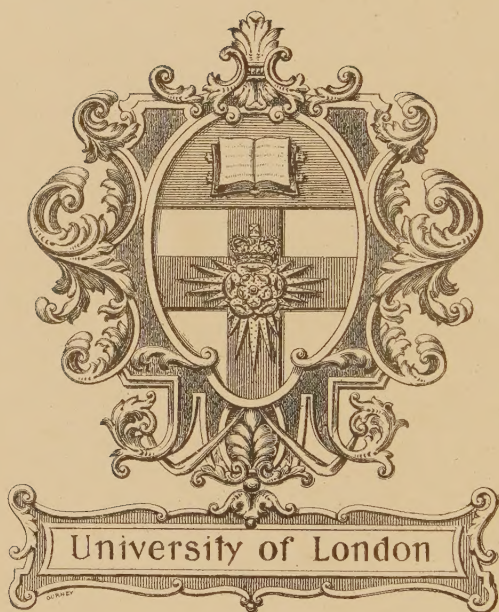


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ALL ENGLAND
LAW REPORTS
ANNOTATED

OF CASES DECIDED IN

THE HOUSE OF LORDS

THE PRIVY COUNCIL

ALL DIVISIONS OF THE SUPREME COURT

AND

COURTS OF SPECIAL JURISDICTION

1943

VOLUME 2

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Published by the Proprietors of

THE LAW JOURNAL, 37-39 ESSEX STREET, LONDON, W.C.2

ALL ENGLAND LAW REPORTS ANNOTATED

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CORRIGENDA.

- P. 54. GLASGOW CORPN. v. MUIR. Solicitors *Hy. S. L. Polak & Co.*, were agents for *Herbert Macpherson*, Edinburgh, for the respondent.
- P. 73. INGRAM v. UNITED AUTOMOBILE SERVICES, LTD. At l. D.5 read "LORD WRIGHT in his speech at p. 121 ([1943] 1 All E.R., at p. 35)
- P. 101. ROYAL CHORAL SOCY. v. I.R.C. The second reference to Case referred to No. 9 should be Tax Leaflet No. 1138.
- P. 479. GARCIA v. HARLAND & WOLFF, LTD. At l. H.2 replace the word "employer" by "occupier" and read "it shall be the duty of the occupier"
- P. 665. R. v. LECKEY. In Case referred to No. 5 the date should be [1933].
- P. 705. RE CANADIAN EAGLE OIL CO., LTD. At the end of l. G.3 read "no deduction" for "no reduction."

THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

TURLEY *v.* MACKAY.

[CHANCERY DIVISION (Uthwatt, J.), **May 4, 1943.**]

Land Charges—Vacation of entry in register—Contract registered as estate contract—Whether an estate contract—Land Charges Act, 1925 (c. 22), ss. 8 (3), 10 (1) class C (iv).

On Sept. 6, 1935, an agreement was entered into between the defendant, Maud Mackay, carrying on business as Jones & Croxford, called the agents, and the plaintiff, Walter Edward Turley, called the principal. The contract recited that the principal was desirous of entering into estate development, and cl. 2 ran as follows: "Upon the acquisition of a site by the principal . . . the principal shall proceed to manage develop realise or dispose of the site under the supervision and direction of the agents in such manner as the agents in their discretion shall think fit . . ." In 1942 the plaintiff entered into a contract for the sale of certain leasehold properties which the defendant contended, under the contract of 1935, he had no right to do without her consent, and the defendant's solicitors registered the agreement of Sept. 6, 1935, as an estate contract pursuant to the Land Charges Act, 1925, s. 10 (1) class C (iv), and, by reason thereof, the plaintiff was unable to complete the contract in respect of the leasehold properties. He applied for an order under sect. 8 (3) of the Act that the said registered land charge be vacated as not being an estate contract within the meaning of the Act:—

Held: a contract under which one person is bound to a second person to dispose of a legal estate to such third person as the second person shall direct is an estate contract within the meaning of the Act.

[EDITORIAL NOTE.] An agreement for the sale of land or the grant of a lease is usually fully carried out in a reasonable time and it is not the general practice to register an estate contract in such cases, though registration is clearly possible. Where completion is not expected to take place for some considerable time, the purchaser is usually well advised to register the contract in the Land Charges Register. In the present case the question was whether an entry in the Register would be proper where the party making the entry was not the purchaser but a third person who had a right to direct to whom the land or any part thereof should be sold or leased. It is held that a contract giving such a right is an estate contract and registrable as such.

AS TO ESTATE CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 19, p. 358, para. 752.]

APPLICATION by originating summons for an order under the Land Charges Act, 1925, s. 8 (3), vacating the registration of a land charge.

On Sept. 6, 1935, an agreement was entered into between the defendant, Maud Mackay, carrying on business as Jones & Croxford, called the agents, and the plaintiff, Walter Edward Turley, called the principal. The contract recited that the principal was desirous of entering into estate development, and cl. 2 ran as follows: "Upon the acquisition of a site by the principal . . . the principal shall proceed to manage develop realise or dispose of the site under the supervision and direction of the agents in such manner as the agents in their discretion shall think fit . . ." In 1942 the plaintiff entered into a contract for the sale of certain leasehold properties which the defendant contended, under the contract of 1935, he had no right to do without her consent, and the defendant's solicitors registered the agreement of Sept. 6, 1935, as an

estate contract pursuant to the Land Charges Act, 1925, s. 10 (1), class C (iv), and, by reason thereof, the plaintiff was unable to complete the contract in respect of the leasehold properties. He applied for an order under sect 8 (3) of the Act that the said registered land charge be vacated as not being an estate contract within the meaning of the Act.

I. J. Lindner for the plaintiff.

C. D. Myles for the defendant.

UTHWATT, J.: The question I have to decide in this case is whether a contract made on Sept. 6, 1935, between Maud Mackay and Walter Edward Turley is an estate contract within the meaning of the Land Charges Act, 1925, s. 10 (1). The question which I have to decide, and the only one which I propose to decide, is whether, as a matter of law, this particular agreement is an estate contract.

The agreement was made between Maud Mackay carrying on business as Jones & Croxford, called the agents, and Walter Edward Turley, called the principal. After reciting that the principal was desirous of entering into estate development and the nature of the operations necessary for that purpose, it was agreed that the agents and the principal should operate on the following lines: The agents were to offer to the principal from time to time as occasion arose such sites as the agents thought capable of being developed with advantage, or to advise the principal upon sites to be obtained by the principal and to give him their advice as to the best means of developing them. Then one comes to cl. 2, which really represents the substance of the matter so far as it bears upon the point that now arises for decision. That clause provides:

Upon the acquisition of a site by the principal whether or not the same shall have been introduced by the agents (the principal finding all sums required subject to deduction as hereinafter mentioned) the principal shall proceed to manage develop realise or dispose of the site under the supervision and direction of the agents in such manner as the agents in their discretion shall think fit and whether by way of placing out of contracts for building upon the site and obtaining advances progressively or otherwise and subsequent sale of the buildings erected or by way of piecemeal sale or granting of building leases and the creation of ground rents or by combination of those methods or any other method alternative thereto...

and then it goes on to detail the matter more particularly. The rest of the agreement is concerned with the way in which the profits and losses made under the agreement are to be dealt with. In substance it amounts to this. With regard to each site, if there are any profits—and they are to be ascertained in accordance with the method set out in the agreement—half of them go to the principal and half to the agent; and if there are losses, they are to fall upon the principal.

Upon the construction of the agreement, it appears to me quite clear that the principal is bound to comply with such directions as his agents may give him as to the method of disposition of the property. They may require the property to be sold or to be leased, and the principal is bound to give effect to those directions. Of course—I apprehend it is not necessary to discuss the matter—it is incumbent upon the agent to carry out the ordinary obligations of an agent to his principal; it is the duty of the agent to exercise good faith in giving directions. It appears to me that, as a matter of law, on the construction of the agreement the one person in whose favour the agent may not direct a sale to be made or a lease to be granted is himself. Subject to this it is for him to determine whether and how any site is to be disposed of, and, upon notice of that determination being given to the principal, the principal is bound to carry it out. The short point that I have to decide is whether this agreement, under which the principal is bound to dispose of certain land by way of sale or lease, is an estate contract where, as I have said, the agent cannot as a matter of law give any such direction for disposition in his own favour. The question is whether a contract under which one person is bound to a second person to create a legal estate in such third person as the second person may direct is an estate contract. In my opinion, the point of the Land Charges Act, 1925, s. 10, so far as it gives a right to register a land charge, is to secure that obligations affecting land may be registered by persons who have a commercial interest in seeing that such obligations shall be carried out. In this case, undoubtedly the agents have such a commercial interest. Upon the construction of the section, I cannot see that it is limited to cases where the obligation is to convey or create a legal

estate in favour of the person with whom the obligation is made. As far as the section is concerned, it appears to me to be perfectly general in its terms. Having regard to the language of the section and the limited ground on which it is sought to displace the entry from the register, the application must be refused.

Application dismissed with costs.

Solicitors: *Saunders, Sobell & Greenbury*, agents for *Whitehouse & Son*, Birmingham (for the applicant); *Peacock & Goddard*, agents for *Rigbey, Brown & Mills*, Birmingham (for the respondent).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

SAMUELS v. DAVIS.

[COURT OF APPEAL (Scott and du Parcq, L.J.J.), April 12, 1943.]

Contract—Implied term—Dentist making dentures—Whether any implied condition of fitness for purpose intended.

The plaintiff, a dentist, entered into a contract to make a set of dentures for the defendant's wife. A dispute arose as to whether the dentures fitted satisfactorily and the plaintiff brought an action to recover his fee for professional services. The defendant maintained that, whether the contract was one of sale of goods or for work done and materials supplied, there had been a breach of an implied condition that the dentures should be reasonably fit for the purpose intended; and counterclaimed for the cost of medical services rendered necessary by the alleged breach. The county court judge found that there was an implied condition that the dentures should be reasonably fit for the purpose intended, and, as a fact, that there had been a breach thereof, and gave judgment for the defendant on claim and counterclaim. The plaintiff appealed against the judgment on the claim:—

HELD: whether the contract was for sale of goods or for work done and materials supplied, there was an implied condition that the dentures should be reasonably fit for the purpose intended. The judge had found as a fact that the dentures were not reasonably fit and had given a correct decision in law on the facts found.

[EDITORIAL NOTE. It was here sought to show that a contract to provide a set of dentures was a contract for work and materials and not a sale of goods. The Court of Appeal, however, left the matter undecided since they were of opinion that, into whichever class of contract this particular one fell, the contract was one subject to an implied term that the dentures must be reasonably fit for the patient's use. Whether such a term is implied into a contract is not a question of the legal classification of the contract, but such a term is implied into every contract where one man engages with another to supply for valuable consideration a particular article to be applied to a certain use or purpose.]

AS TO IMPLIED TERMS IN CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 322, 323, para. 451; and FOR CASES, see DIGEST, Vol. 12, pp. 624, 625, Nos. 5140-5149.]

Cases referred to:

* (1) *Lee v. Griffin* (1861), 1 B. & S. 272; 12 Digest 148, 1017; 30 L.J.Q.B. 252; 4 L.T. 546.

* (2) *Myers (G. H.) & Co. v. The Brent Cross Service Co.*, [1934] 1 K.B. 46; Digest Supp.; 103 L.J.K.B. 123; 150 L.T. 96.

(3) *Francis v. Cockrell* (1870), L.R. 5 Q.B. 501; 34 Digest 166, 1296; 10 B. & S. 950; 39 L.J.Q.B. 291; 23 L.T. 466.

APPEAL by the plaintiff from a judgment of His Honour JUDGE THESIGER, given at Exeter County Court, on Jan. 14, 1943. The facts are fully set out in the judgment of SCOTT, L.J.

Cecil Havers, K.C., and *A. A. Pereira* for the appellant.

F. S. Laskey for the respondent.

SCOTT, L.J.: This appeal is an important case in some aspects, but we are quite clear as to what the position is in this court in view of the findings by the judge in the court below. The case was brought by a dentist against the husband of a patient for whom he had been instructed to prepare a set of dentures. He had told her that his fee for professional services would be 12 guineas. There is no question in the circumstances of the case as to the liability under that contract, for which the husband was willing to be responsible. The defendant contended that the contract was a sale of goods and that there had been a breach

of the condition implied in that contract by the Sale of Goods Act, 1893, s. 14, that the dentures should be reasonably fit for the purpose intended. In the alternative the defendant contended that, if there was a contract for work done and materials supplied for a particular purpose, a similar condition must be implied in that contract.

The evidence showed that the plaintiff was a dental surgeon, a registered dentist, who had studied at Guy's Hospital, and had had considerable experience. I assume that he was in every way well qualified to carry on the profession of a surgeon dentist. In addition, two other dentists gave evidence in court, one being called in as a medical assessor, and examined only by the court. Upon the evidence the county court judge found that there was a breach of the implied condition, whether the contract was for the sale of goods, as the judge thought, or for services rendered. The defendant's wife had, according to the evidence, a normal mouth, and the county court judge held that the dentures supplied by the plaintiff were not reasonably fit for the purpose, that is to say, were not dentures which she could wear and use with comfort. The lady was quite evidently a difficult patient. She found it very hard to tolerate the presence of the dentures in her mouth, and made difficulties. However, no issue was raised on the pleadings or in the court below as to whether the difficulties of character or behaviour of the patient had really any effect upon the position; and it would be wrong for us to treat the evidence as addressed to the question whether the lady, by her conduct, had made it impossible for the plaintiff to complete his work successfully, and this was not an issue before the court.

In my view, it is a matter of legal indifference whether the contract was a contract of sale of goods or a contract of service to do work and supply materials with a view to achieving a certain result. In either case it seems to me that such a contract must necessarily, by reason of the relationship between the parties and the purpose for which the contract is entered into, import a term that, given reasonable co-operation by the patient, the dentist will achieve reasonable success in his work; or, in other words, that there shall be success to the extent of producing dentures which fit well, and which can be used by the patient for the purpose of eating and talking in the ordinary way (if I may add the latter point, which has not arisen in the case). I quite appreciate that in doing work of that kind a dentist must rely very much on the active assistance, co-operation and patience of the patient. A good patient helps a good dentist enormously in the success of his work; but, as I have said before, in this case there was no issue on that point, therefore what I say upon it is not directly relevant to the issue, but I do think that, if a patient makes it impossible as a practical proposition for the dentist to complete his work successfully, the fault must rest with the patient, and the dentist will be entitled to recover the agreed remuneration for the work which he has done or would have continued willing to do but for the failure of co-operation on the part of the patient. Counsel on behalf of the plaintiff was anxious to establish a proposition that the contract here was not, as the judge thought, a contract of sale of goods importing the condition imposed by the Sale of Goods Act, 1893, s. 14, but a contract for work and materials. For the reasons I have already given, I cannot see that that legal distinction has any importance in a contract of the particular type involved here; and, as it is not necessary for the purpose of deciding the appeal to express any final view on the subject of where to draw the line between a contract of sale and a contract for work and materials, I think it is wiser to avoid saying anything on that general topic.

Counsel for the plaintiff quite properly took us through a series of cases, beginning with *Lee v. Griffin* (1), decided in 1861. I will give him credit for citing that case not because the facts were similar—it was a contract for dentures—but because it raised some legal principles which are relevant in the present case. It has been subsequently considered a good deal, but I do not think it is necessary to deal in detail with it. There the court discussed the difference between a contract for the sale of goods and one for work and materials, and BLACKBURN, J., expressed the view that in all cases, in order to ascertain whether the cause of action is for goods sold and delivered or for work and labour done and materials provided, we must look at the particular contract entered into between the parties. I may leave that topic at that. The series of cases cited

by counsel for the plaintiff ended with *Myers & Co. v. Brent Cross Service Co.* (2), which was a case tried by a Divisional Court consisting of DU PARCQ, and SWIFT, JJ., on appeal from the county court (which then lay to the Divisional Court). DU PARCQ, J., gave an illuminating judgment in which he considered the previous cases, and all I need say is that I agree with what he said in that judgment and shall welcome a contribution upon it from him in giving judgment in the present case. This appeal must be dismissed because the judge found as a fact that the dentures were not reasonably fit for the purpose. He gave judgment for the defendant on the claim with costs, and also for the defendant on a small counterclaim for medical expenses incurred by the defendant's wife by reason of the dentures not fitting. The judgement against the plaintiff upon both claim and counterclaim was based on the facts, and, since there was no relevant error of law in that judgment, the appeal must be dismissed with costs. I think no order is necessary on the counterclaim here.

DU PARCQ, L.J.: I agree. Counsel for the plaintiff has put this case concisely and clearly and as forcibly as it could be put. I have no doubt that it is impossible for this court to interfere with the judge's decision. Indeed, assuming that he came to a right conclusion upon the facts, as I am very willing to assume, though my opinion about them would in any case be of no importance, I think he could not, in law, have given any other judgment. He referred, naturally, a great deal to the question whether this was a sale of goods or a contract to do work and labour. I agree with my Lord in thinking that in this case it makes no difference at all which it was. For my own part, I think that it was a contract for the sale of goods. *Lee v. Griffin* (1), which is a very old authority, was dealing with a section of the Statute of Frauds which is now re-enacted in sect. 4 of the Sale of Goods Act. That section deals with the necessity for written evidence of a contract for the sale of goods, and, if I may give a word of advice to the dental profession, I would suggest to them that in all their dealings they assume that a contract under which they are going to supply a set of teeth or a denture, is, for the purposes of that section, a sale of goods. I think they may run risks if they assume that it is a contract for work and labour and that no writing is necessary. That is by the way because we are concerned with an entirely different problem here, and, of course, in *Lee v. Griffin* (1) the court was not directing its attention in the least to the question whether there were any different incidents in the case of a contract for the sale of a denture and in the case of a contract for the work and labour expended on the making of a denture. I have no doubt myself that, if the question had arisen whether it made any difference to describe the contract as one of sale or as one of work and labour, the answer would have been, for the present purpose: None whatever.

In the case of *Francis v. Cockrell* (3), which was cited in *Myer & Co. v. Brent Cross Service Co.* (2), KELLY, C.B., said, at p. 503:

I do not hesitate to say that I am clearly of opinion, as a general proposition of law, that when one man engages with another to supply him with a particular article or thing, to be applied to a certain use and purpose, in consideration of a pecuniary payment, he enters into an implied contract that the article or thing shall be reasonably fit for the purpose for which it is to be used and to which it is to be applied.

There KELLY, C.B., was dealing with a case, as I pointed out in my judgment in *Myers' case* (2), which was not one of a sale of goods at all, and his words were of general application to all contracts under which goods were supplied. It may be that there are exceptions to that general proposition as it is laid down by KELLY, C.B., and I think perhaps he had it in his mind that there might be, because he said, at p. 503:

That I hold to be a general proposition of law applicable to all contracts of this nature and character.

I cannot doubt that, if someone goes to any professional man, however eminent and however distinguished his profession may be, and whatever skill its practice may demand, and says: "Will you make me something which will fit a particular part of my body?" as everybody does say impliedly who asks for a denture to be made, and the professional gentleman says: "Yes," without qualification, he is warranting that when he has made the article it will fit the particular part of the body. I think one is getting into a region of fancy if one assumes any other contract is made by implication. Of course, there are many cases where no professional man would make such a contract

and then he would undoubtedly make an express contract limiting his liability. I say that as a lawyer, but I think any layman would say the same thing if you put the matter to him. Everybody knows, I think, that in most cases a dental surgeon is able to make a denture which will fit the patient's mouth reasonably well—I do not say perfectly. the law does not demand perfection—but reasonably well. One knows, also, that there may be cases, I know not whether they be many or few, where it is quite impossible to do that at all, and there are cases no doubt, also, where it is doubtful whether, with that reasonable degree of skill which the professional man is expected to command, he will succeed in a very difficult task. In such cases I do not doubt that the dental surgeon would always tell the patient of the difficulty and say to him, "I will do my best and I can do no more. I may be able to fit your mouth with a denture, but I may fail, and if you are prepared that I shall do the work on those terms, I will do it"; but in the ordinary case, where a dental surgeon is instructed for reward to make a denture, I have not the faintest doubt that whether you call that a contract of sale of goods or a contract for work and labour done, he is contracting to make a denture which will fit the patient's mouth—in fact, it is hardly necessary to add those latter words, because a denture means something which will fit someone's mouth, because dentures are not things which one can buy ready-made; it means a denture which will fit the mouth of the particular patient for whom it is made.

I think it really does not help to consider the case of an artist painting a picture or a sculptor making a bust or to refer to cases of surgical operations in the ordinary sense. It is perfectly clear that a dentist is in the same position as any other surgeon from the point of view of the law. If a dentist takes out a tooth, or a surgeon removes an appendix, then he is bound to take reasonable care to show such skill as may be expected from a qualified surgeon. Obviously one can apply no other criterion there. The case is entirely different where a chattel is ultimately to be delivered.

I only wish to add a very few words on the question which has been raised about the recalcitrant behaviour which is alleged against the defendant's wife. There is no doubt that, if a patient refuses to co-operate with the surgeon and makes his task impossible, the surgeon is entitled to say, "I will not go on. I cannot do the work satisfactorily, I will treat the contract as repudiated and I will do no more for you, and you are bound, if I care to sue you for them, to pay me damages." In other words, a patient may repudiate the contract by his behaviour, and the surgeon can accept that repudiation. Nothing of the kind occurred here. There was a patient whose mouth was said to be quite an ordinary mouth, so that it was not by any means impossible to fit her; and the plaintiff very fairly and candidly expressed his view of the transaction. He said that he finally told the lady that there was nothing wrong with the denture which he had made and that that was all he could do; so that he could not, even if she had done anything which would amount to a repudiation, accept that repudiation. On the contrary, he said: I have been able to do the work, I have done it, and you have no legitimate complaint about it. The judge, having heard all the evidence, came to the conclusion as a fact that the dentist was wrong about that. He found that the denture did not fit satisfactorily, although he thought that with only one denture inserted at a time it might possibly fit satisfactorily. That would be cold comfort to the person who wanted to wear and eat with it. He also found that there was a defect in the bite, I need not go into the details of it, which had always existed, that is to say, had always existed from the time when the plaintiff completed his work. In those circumstances, it is clear that the dentures were not fit for the purpose for which they were made, and, if I am right in the view I take of the contract, whatever it be called, then the judge clearly arrived at a correct conclusion. He decided in favour of the plaintiff on the counterclaim, which was in any event a trivial matter, and I agree with my Lord that there is no ground for disturbing any part of his judgment and that this appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Le Brasseur & Oakley* (for the appellant); *Lawrence Jones & Co.*, agents for *Hill & Cox*, *Budleigh Salterton* (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

Re CABORNE, HODGE AND ANOTHER v. SMITH AND OTHERS.[CHANCERY DIVISION (Simonds, J.), **May 19, 1943.**]

Wills—Condition—Condition encouraging violation of the sanctity of marriage—Public policy—Absolute gift cut down during lifetime of donee's wife with gift over if wife survives donee—Donee separated from wife by agreement before death of testatrix—Whether condition or limitation.

By her will Mary Caborne devised and bequeathed the residue of her real and personal estate to her son, W. R. Caborne, absolutely. This gift was followed by a proviso that, if the son's wife should still be living and married to him, the absolute gift should be modified, but so that, if at any time during the life of the son his wife should die or the marriage should be otherwise terminated, the absolute gift . . . should take effect as and from such event, but, if the son should die during the lifetime of the wife, the specific gifts and the residuary estate should be held upon certain trusts in the nature of a gift over. After the making of the will but before the death of the testatrix, the son was, by agreement, separated from his wife. The son died several years after the testatrix. The plaintiffs, his personal representatives, maintained that the proviso encouraged a violation of the sanctity of marriage and being contrary to public policy was void, so that the estate of W. R. Caborne was absolutely entitled to the residuary estate of the testatrix. The defendants, the persons entitled under the gift over, contended (i) that, as the legislature had provided the means for divorce, it would not be against public policy for husband or wife to pursue it, (ii) that it was not against public policy to make provision for future divorce where the parties were in fact separated:—

HELD: the proviso was a condition which tended to encourage the violation of the sanctity of marriage, and, being contrary to public policy, was void.

[EDITORIAL NOTE.] The law is clear that any conditions tending to the separation of spouses is void as against public policy. It will be noted that in the present case the spouses were separated by agreement before the condition came into operation. It is held, however, that the presence of this condition must necessarily be regarded as a bar to any reconciliation of the spouses and, therefore, against public policy. In the opinions given in the House of Lords in *Fender v. St. John-Mildmay* (9), there are passages which may suggest that there has been some relaxation of this rule, but it has to be remembered that, in that case, the House was considering only the position of parties after a decree *nisi* of divorce had been granted.

AS TO CONDITIONS CONTRARY TO PUBLIC POLICY, see HALSBURY, Halsbury Edn., Vol. 34, pp. 105-107, para. 141; and FOR CASES, see DIGEST, Vol. 44, pp. 453-454, Nos. 2754-2762.]

Cases referred to:

- * (1) *Hope v. Hope* (1857), 8 De G.M. & G. 731; 11 Digest 403, 739; 26 L.J.Ch. 417; 29 L.T.O.S. 4.
- (2) *Cocksedge v. Cocksedge* (1884), 14 Sim. 244; 27 Digest 223, 1538; 13 L.J.Ch. 384; 3 L.T.O.S. 374.
- (3) *Tennant v. Braie* (1608), Toth. 78; 44 Digest 453, 2754.
- * (4) *Re Thompson, Lloyds Bank, Ltd. v. George*, [1939] 1 All E.R. 681; Digest Supp.
- (5) *Re Moore, Trafford v. Maconochie* (1888), 39 Ch.D. 116; 44 Digest 438, 2646; 57 L.J.Ch. 936; 59 L.T. 681.
- (6) *Re Freedman* (1941), unreported.
- (7) *Walker v. Bullock*, [1935] N.Z.L.R. 828.
- (8) *Mason v. Mason*, [1921] N.Z.L.R. 955.
- * (9) *Fender v. St. John-Mildmay*, [1938] A.C. 1; [1937] 3 All E.R. 402; Digest Supp.; 106 L.J.K.B. 641; 157 L.T. 340.

SUMMONS for a declaration that a proviso attached to a gift in a will tended to produce a separation of husband and wife and was, therefore, void on grounds of public policy. The facts are fully set out in the judgment.

R. F. Roxburgh, K.C., and *I. J. Lindner (Pascoe Hayward with them)* for the plaintiffs.

B. S. Tatham for the first defendants.

J. A. Reid for the second defendant.

W. F. Waite for the third defendant.

Victor Coen for the fourth defendant.

SIMONDS, J.: The testatrix, Mary Lilian Caborne, made her last will on Apr. 13, 1935, and died on Sept. 9, 1937. She had a son, Warren Roger Caborne,

who, at the date of her will, was married to Julia Maria Gertrude Caborne. Of this marriage there was one child, Anne Mary Micheline Caborne, who was living at the date of the will. W. R. Caborne survived his mother, the testatrix, and died on Apr. 3, 1941. The plaintiffs in these proceedings are his legal personal representatives, and they challenge the validity of a proviso in the will of the testatrix which purports to cut down the absolute gift therein made to their testator.

By her will the testatrix, after making numerous specific bequests, gave, devised and bequeathed the residue of her real and personal property to her son, W. R. Caborne, absolutely. This absolute gift was followed by the proviso which I will state *verbatim*. It is in these terms :

Provided that if his present wife shall still be alive and married to him the absolute gift to him next hereinbefore contained shall be modified in such manner that he shall have an interest for his life only or for such part thereof as his present wife Gertrude Maria Julia Caborne shall remain his wife in the articles set out in the schedule hereto but so that if at any time during the life of my said son his said wife shall die or his said marriage be otherwise terminated the absolute gift hereinbefore contained shall take effect as and from such event but if my said son shall die leaving his said wife alive I bequeath each article to the respective legatee whose name appears opposite and as to the remainder of my said residuary estate I give devise and bequeath on the death of my said son if he shall predecease his said wife being then still married to her unto my trustees upon trust to apply the income arising therefrom towards the maintenance education or advancement of my son's said wife's daughter Anne Micheline Mary Caborne for the period of one year after his decease and at the expiration of such year to sell call in and convert the same into money and to divide the net proceeds of such sale calling in and conversion between the following institutions in the following shares.

Then she names a number of charities which are parties to these proceedings. The schedule to the will contains, in the first column, a number of specific articles, and in the second column the names of the legatees.

One further fact should be stated. In or about the month of September, 1935, that is, after the will but before the death of the testatrix, W. R. Caborne was, by agreement, separated from his wife, and they remained so separated until his death. No other matrimonial proceedings were taken. It is in these circumstances that the plaintiffs claim that the proviso is void and that the estate of W. R. Caborne is absolutely entitled to the residuary estate of the testatrix.

The proviso as a whole is complicated and tortuous, but, so far as the residue other than the scheduled articles, is concerned, the part of it that is relevant to the event that happened, namely, the son predeceasing his wife being then still married to her, is simple enough. Its plain meaning and effect was conceded by counsel to be in the nature of a condition subsequent cutting down the absolute gift to the son if he predeceased his wife and their marriage had not, in the meantime, been dissolved. The contention on the one hand is that such a condition is against public policy, and therefore void. I received, on the other hand, the usual warning against the court attempting to define the policy of the law. However, I do not think I set up any new head of public policy or urge that "unruly horse" from its measured gait, if I reassert the sanctity of the marriage bond and with it the importance of maintaining the integrity of family life, and, therefore, denounce and declare void a provision which is designed or tends to encourage an invasion of that sanctity.

It is sufficient if I take one or two out of many pronouncements on this subject. I take the case of *Hope v. Hope* (1), the passage I cite being from the judgment of TURNER, L.J., at p. 744 :

There is nothing which the courts of this country have watched with more anxious jealousy, and I will venture to say, with more reasonable jealousy, than contracts which have for their object the disturbance of the marital relations. The peace of families—the welfare of children, depends to an extent almost immeasurable upon the undisturbed continuance of those relations ; and so strong is the policy of our law upon this subject, that not only is marriage indissoluble except by the legislature, but divorces *a mensa et thoro* are granted only in cases of cruelty or adultery. But what is this article of the agreement ? That the wife shall not oppose the husband's suit for a divorce, but, on the contrary, shall facilitate the obtaining it. I can conceive nothing more contrary to the policy of our law than this provision of the agreement. I need read no more. Against this conclusion two arguments have been urged. First, that since the legislature has thought fit to provide the remedy of divorce

it cannot be against the policy of the law that a husband or wife should pursue it, and secondly, that whether that general proposition be sound or unsound it is not against the policy of the law, where the spouses are in fact separated, to make provision for future divorce. The first argument is, in my judgment, fallacious. The law provides the remedy of divorce for an injured spouse who can prove one or other of the statutory grounds for divorce. A divorce *a vinculo*, which could formerly be granted only by a special Act of Parliament, may now be granted by the High Court under the jurisdiction conferred by general Acts.

A It is a remedy granted in default of a better cure. Whether the matter be looked at from its religious or civil aspect, the positive duty of reconciliation and the danger of a provision which tends to encourage a departure from that difficult path are equally obvious. How often must any judge in this Division, exercising the familiar jurisdiction over infants, have felt a profound conviction that the welfare of his wards, and the interest of society as a whole, could best

B be served by a reconciliation of the parents, and perhaps deplored the readiness with which one or the other, or too often both of them, embraced the opportunity of statutory relief. An inducement to that step by the promise of material advantage must, in my judgment, be utterly invalid. It was urged that the proviso here should be narrowly construed as an encouragement to the husband to avail himself of some existing matrimonial offence on the part of his wife.

C I doubt whether I should be justified in so construing it. I think that it is of wider import and can fairly be read as a direct encouragement either himself to commit those acts which would enable his wife to proceed against him, or to take advantage of his wife's offences: see *Cocksedge v. Cocksedge* (2). However, whether the narrower or wider construction be adopted, I am, for the reasons above stated, clearly of opinion that the condition is void.

The second contention is founded on the fact that at the death of the testatrix, when the will became operative, the son and his wife were in fact separated by agreement. It is said that in such a case provision can validly be made either by the spouses or by a third party for a future divorce. I dissent from this proposition. It has long been established, though not without formidable opposition, that where husband and wife are in fact separated or have determined on an immediate separation, provision may validly be made for that state of affairs; but it is not, in my judgment, a legitimate inference from this

E that provision can therefore be made for divorce. About separation there is nothing final, it may, and not seldom does, lead to reunion; but to make provision for divorce is, as much for parties who are separated as for those who are living together, an invitation to matrimonial offence, or at the least its result may be to bar reconciliation and make irremediable a breach for which time and goodwill might have found a cure. As TURNER, L.J., said in *Hope v. Hope* (1), at p. 746:

F There are consequences which attach to a sentence of divorce which do not belong to a separation by agreement merely.

No valid argument can, in my judgment, be founded on the fact that in this case the spouses were already separated when the will became operative.

Cases in which provision for divorce, as distinct from provision for separation, has been discussed, are few. *Tennant v. Braie* (3) is reported in these few words:

G A devise made to the daughter to pay her a sum of money if she will be divorced from her husband, the gift may be good though the condition is void.

This is early and clear authority for the invalidity of such a condition. It may well be that the only matter of doubt arose on the form of the devise, that is, whether it was a limitation or condition. The diligence of counsel did not discover any case in which a similar provision was considered until *Hope v. Hope* (1), which I have already cited. Again, there is a long gap before I come to *Re Thompson* (4), a decision of BENNETT, J., in 1939. In that case the will contained a clause to the effect that the testator's daughter, if still married to her husband, should be entitled to no more than an annuity of £300, and further provided that she should be entitled to the income of the whole estate:

... if at any time after the testator's decease, she should be the widow of her present husband or married to someone other than her present husband or divorced from but not subsequently married to her present husband.

This provision was held not to be contrary to public policy by BENNETT, J. It does not appear that any authority was cited to him except *Re Moore* (5), and

in coming to a conclusion in favour of the validity of the provision, he found, on evidence *dehors* the will which he held to be admissible, that the testator disliked his son-in-law intensely, and, upon this, held that the purpose of the provision was not to induce a future separation between husband and wife, but was to make sure that the income from the estate in excess of £300 should not get into the hands of a man whom the testator regarded as a spendthrift. He therefore felt at liberty to determine that there was nothing contrary to public policy in the disposition under review. With great deference to the judge, I feel some doubt whether the decision observes the rule that, in these matters, the law looks not to the possibility of public mischief occurring in the particular instance, but to the general tendency of the disposition; but, however that may be, I must regard the case as one depending on its own particular facts for which there is no parallel in the case now before me. In an unreported case, *Re Freedman* (6), FARWELL, J., as appears from the order made by him on Dec. 2, 1942, had to consider the validity of a bequest of a weekly sum to a woman during the period of her widowhood or legal separation or divorce from her husband, and held that such a bequest was wholly void. He appears to have treated the case as too plain for argument or, at any rate, for a reasoned judgment. I have not been told whether in that case the spouses were in fact separated. I was also referred to a decision of the Supreme Court of New Zealand, *Walker v. Bullock* (7), in which it was held by NORTHCROFT, J., that a testamentary provision made by a mother for her daughter upon the contingency of the latter either divorcing her husband or being divorced by him was not against public policy and void. The judge, after citing some observations of SALMOND, J., in *Mason v. Mason* (8), said:

It is true that these words had special application to a question of jurisdiction in divorce in relation to public policy. If it be not against public policy to grant a decree of divorce in certain circumstances to an errant husband, then I do not consider I should hold against a provision made by a mother for her daughter upon the contingency of the latter either divorcing her husband or being divorced by him. A prudent parent may well make such financial provision for a daughter in respect of whom a divorce is neither desired nor expected.

With deference to the learned judge, I cannot subscribe to this view. Husband and wife may agree to separate. That agreement is valid at law, yet a provision in anticipation of such an agreement is invalid. So a husband or wife may lawfully petition for divorce yet a provision for the contingency of future divorce may be, and, as I hold, is, invalid. Finally, I must refer to *Fender v. Mildmay* (9), since counsel on both sides relied on certain passages in the speeches in that case. Only one point was decided there, namely, that a promise of marriage made by a husband or wife after decree *nisi* and before decree absolute, does not offend against public policy and that the breach of it may found an action for damages. No doubt was cast, nor could it be in view of previous decisions of the House, upon the broad principle of public policy to which I referred at the opening of this judgment, and it would, in my opinion, be wrong to find in isolated passages, particularly in the speech of LORD WRIGHT, any support for the suggestion that the duty of reconciliation is less urgent, or any provision tending to lead husband or wife from that path less vicious, than it has so often been proclaimed to be.

I conclude then that the condition attaching to the absolute gift in favour of W. R. Caborne is invalid, and so declare. It was argued on behalf of the specific legatees of the scheduled articles that a different result might be reached in their case upon the ground that, upon the true construction of the will, there was not a gift over on condition, but a series of limitations. This contention is not, in my judgment, well founded. I must read the clause as a whole, and so read, it appears to me to be clearly an absolute gift to W. R. Caborne of residue including the articles in question, followed by a proviso which is in the nature of a condition. I must, therefore, declare that in regard to these articles the gift over is invalid and that they belong to W. R. Caborne absolutely.

Declaration accordingly. Costs of all parties to be borne by deceased's estate.

Solicitors: J. N. Nabarro & Sons (for the plaintiffs); Crossman, Block & Co., agents for Reed, Wayman & Hyner, Downham Market (for the first defendants); Gresham, Davies & Dallas (for the second defendants); Wilde, Sapte & Co. (for the third defendants); M. A. Jacobs & Sons (for the fourth defendants).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

**Re BASDEN'S SETTLEMENT TRUSTS, BASDEN AND
ANOTHER v. BASDEN AND OTHERS.**

[CHANCERY DIVISION (Simonds, J.), **April 15, 1943.**]

Trusts—Variation of trusts by the court—Infants' interests—Scheme for avoidance of income tax failing—Parent having always shown due regard for infants' benefit—Trustee Act, 1925 (c. 19), s. 57 (1).

A The plaintiff by means of a small investment company and a settlement provided for the maintenance and education of his children in such a way that the income so applied was not taxed as his income. After the coming into operation of the Finance Act, 1939, s. 14, the Special Commissioners apportioned the whole income of the company to the settlor with the result that sur-tax became payable in respect of the sums applied to such maintenance and education, and it was alleged that the funds of the company would soon become exhausted to the detriment of the infants' interests. B The articles of the company, however, were such that the plaintiff and his wife could at any time take the necessary steps to have it wound up. Certain variations of the trusts of the settlement were proposed, but as the infants' rights under the new trusts might be greater or less than those under the old trusts, the trustees could not assent to the variations. The court was asked in the exercise of its jurisdiction under the Trustee Act, 1925, s. 57, or under its inherent jurisdiction, to sanction the variations:—

C **HELD:** this was not a case in which the discretionary power of the court under either its statutory or its inherent jurisdiction ought to be exercised. If the plaintiff so desired he could secure the winding up of the company and there was no reason to apprehend that the children's interests would suffer by what might be done by the plaintiff after the winding up of the company. D

[**EDITORIAL NOTE.** The avoidance of tax was until recently not regarded with disfavour by the courts. Without suggesting that there was any merit in such arrangements, it was always said that a man may, so far as he can legally do so, so arrange his affairs that he becomes liable to a minimum of tax. Quite recently the courts have taken the view that such arrangements are to be regarded with disfavour and, while the law must be strictly applied, at least no encouragement must be given to those who do not wish to take their fair burden of taxation. In exercising a purely discretionary power of the court, it may well be that such considerations might well be sufficient to justify a refusal by the court to interfere, but, in the present case, the interests of the infants were not thought to be likely to be prejudiced by anything the settlor might do, and the order asked for is refused upon the ground that no protection of the infants' interest was necessary. E

AS TO VARIATION OF TRUSTS BY THE COURT, see HALSBURY, Hailsham Edn., Vol. 33, pp. 296-299, paras. 519-521; and FOR CASES, see DIGEST, Vol. 43, pp. 839-841, Nos. 2857-2867.] F

SUMMONS for leave to vary the terms of the trusts of a settlement. The facts are fully set out in the judgment.

Hon. C. R. R. Romer, K.C., and Wilfrid M. Hunt for the plaintiffs.

W. F. Waite for the defendants.

SIMONDS, J.: This is an application in the matter of the trusts of a deed of settlement made on Dec. 28, 1930, and a supplemental deed of June 29, 1939. G

The parties are Edward Duncan Basden and Marie Bonnell Basden, his wife, as plaintiffs, who are the trustees of the settlement, the first plaintiff being also the settlor, and the defendants are the five children of the marriage, all of whom are minors. The jurisdiction of the court is invoked in order that the trustees may assent to a variation of the terms of the trusts of the settlement and supplemental deed to which they cannot assent without the sanction of H the court.

The relevant facts I can conveniently take from the memorandum which is exhibited in the proceedings. First I must refer to a small company which was formed in October, 1930, bearing the name "Education Endowment Trust, Ltd.," formed by the settlor as part of the scheme which he then intended to carry out. The company was incorporated, as I have said, in October, 1930, and the settlement was executed on Dec. 28 of the same year. The objects of the company, as stated in its memorandum, were to carry on the business of an investment company and other ancillary objects. Its original capital was

£200 divided into 195 ordinary shares of £1 each and 100 deferred shares of 1s. each. Only 100 out of the 195 ordinary shares were issued, and they were all issued to the trustees of the settlement. The 100 deferred shares of 1s. each were issued to the settlor.

At a later date, in the year 1939, the capital structure of the company was altered by special resolution. The 100 ordinary shares, all of which were held by the trustees, were converted into 75 second preference shares of £1 each and 25 ordinary shares of £1 each, those ordinary shares being divided up into five groups each having the appropriate letter A, B, C, D and E, and at the same time the 100 deferred shares of 1s. each held by the settlor were converted into 100 first preference shares. The dividend rights attaching to the several shares can be summarised as follows. The profits of the company, which in due course were intended to be distributed, were to be applied in the following manner: first, in paying a fixed cumulative dividend of 5 per cent. on the first preference shares; secondly, in paying a fixed cumulative dividend of 100 per cent. on the second preference shares; and, thirdly, subject to any rights which might be attached upon the issue of the then unissued ordinary shares and until the death of the survivor of the settlor or his wife or, if the survivor should be the wife, until her remarriage, in paying such dividends to the holders of the A, B, C, D and E ordinary shares or to the holders of any one or more of such classes of such ordinary shares to the exclusion of the holders of the remaining classes of ordinary shares, as the board of the company should think fit. There is nothing illegal about that, but, of course, it is a very unusual and curious disposition. Subject to that, after the death of the survivor of the settlor or his wife or, if such survivor should be the wife, after her remarriage, the balance of the profits was to be distributable to the holders of the A, B, C, D and E ordinary shares. Then in a winding up the surplus assets were to be applied, first, in repaying the capital paid up on the first preference shares; secondly, in repaying the capital paid up on the second preference shares; and, thirdly, the balance was to be distributed equally between the holders of the several classes of ordinary shares. As to voting rights, the holders of the first preference shares had two votes per share. That meant that the settlor, as the holder of the 100 first preference shares, commanded 200 votes. The holders of the A, B, C, D and E ordinary shares were to have three votes per share and the holders of the ordinary shares were to have three votes for every two ordinary shares held by them. The holders of the second preference shares were not entitled to receive notice of, or to attend and vote at, general meetings of the company. Then there was a provision that, upon the death of the survivor of the settlor or his wife or, again, if the survivor should be his wife, upon her remarriage, the voting rights attached to the first preference shares should cease. There followed a provision with regard to the unissued ordinary shares which I need not mention, and there were stringent restrictions upon the transfer of the shares. As to the settlement, as I have already said, the 100 ordinary shares were divided into five equal parts, and the trustees were to stand possessed of one of such parts for each of the five children, but each child also had appropriated to him or to her 15 of the preference shares. The income of each child's share whilst that child was under the age of 21 years was to be applied at the discretion of the trustees for his or her maintenance, education or benefit, and any part of the income not so applied was to be accumulated. After the child attained the age of 21 years the income of that child's share was to be paid to him or her for his or her life. After the death of a child—this is important—the share appropriated to that child was to be held in trust for the settlor absolutely; so that no child got anything more than a life interest. The control of the company has at all material times been appropriately vested in the settlor. The directors are his wife and an employee in his service, who no doubt acted under his directions.

That was a scheme against which, in law, nothing could be said, and for a long time it achieved its object, in that the income of the company was treated as the income of the company and there was no legislation under which it was to be treated as the income of the settlor. The company and the settlement were originally constituted to provide a lawful means by which income which would not be taxed in the settlor's hands could be made available to meet the cost of the maintenance and education of the five children of the settlor. This

object was achieved by the company paying reasonable dividends on its ordinary shares to the trustees of the settlement and the trustees handing the moneys received by them to the settlor as the parent and guardian of his five children, to be applied by him in maintaining and educating his children. By reason of the provisions of recent Finance Acts the said means of achieving the desired object have been effectively nullified. The company still pays in dividends a substantial part of its income to the trustees of the settlement, and they pay the same to the settlor and he in his turn maintains and educates his five children; but, unfortunately, the Special Commissioners of Income Tax make a direction, under the Finance Act, 1939, s. 14, that the income of the company is to be treated as the income of its members and, pursuant to that direction, apportion the whole of the income to the settlor. The result of this procedure is that the company is called upon to pay sur-tax on its income for each year at the same rate as would be applicable if that income were added to the income of the settlor for that year, that is, since sur-tax is charged at an increasing rate, at the same rate as if that income were treated as the highest part of the settlor's income. Illustrations are given in the memorandum, from which it appears that, a certain amount being paid by way of dividend, in the result more than the balance of the profits is required to pay sur-tax and the capital of the company is in effect depleted. The only other fact that I have to add is this: that, by judicious investment and other means, the company has acquired assets of a very large value.

It is in these circumstances that the jurisdiction of the court is invoked in order that what is described as a modification of the settlement should be effected, the jurisdiction of the court being invoked both under the Trustee Act, 1925, s. 57, and under its inherent and general jurisdiction. The proposals involve: first, a winding up of the company and the transfer of its assets *in specie* to the trustees as the holders of the second preference shares and of the only issued ordinary shares of the five several classes, the settlor foregoing his right to a trifling sum in respect of his first preference shares; secondly, a substantial modification of the settlement by virtue of which the settlor would settle his reversionary interest in the settled funds which would then be held upon the following trusts: each child would, on attaining 21, take a protected life interest in a sum of £3,000, with a power of appointment for life in favour of his or her surviving wife or husband, and, subject thereto, such sum would be held on the usual trusts in favour of his or her issue, with cross remainders between the children; subject to the appropriation of these several sums of £3,000, the trust fund is to be held until the death of the survivor of the settlor and his wife, but, subject to any appointment made by the settlor or his wife under the power thereafter created, as the trustees in their absolute discretion think fit to or for the benefit of any one or more of the following persons: such of the five children of the settlor and his wife as survive the April 6 succeeding the date on which they attain the age of 21 years, the husbands or wives, widowers or widows of the five children, and any children or remoter issue. Any surplus income for any fiscal year not paid or applied by the trustees within the limits therein mentioned is to be held by the trustees as a separate fund entitled: "The surplus income fund," the trusts of which are declared. After the death of the survivor of the settlor and his wife, the trust fund is to be divided into five equal parts and one of each such parts is to be appropriated to each of the five children's shares and to be held upon the same trusts as those declared in respect of the original capital of that child's share. That refers to the £3,000 which I have mentioned. It is provided that, during his life, the settlor and, after his death, his widow, may by any deed or deeds revocable or irrevocable appoint the whole or any part of the trust fund to or for the benefit of any one or more of the following persons: the children, their respective husbands and wives, widowers or widows, and their issue. I do not think that I need refer to any more of the provisions.

The necessity for invoking the jurisdiction of the court appears to be that it would undoubtedly not be competent for the trustees to assent to any variation of the trusts of the settlement which would prejudice the rights of the beneficiaries. Under the present trusts, a child, on attaining 21, is entitled to the income of a share of the fund, whether represented by shares in the company or by other assets. Under the proposed new trusts, a child will be entitled only to a pro-

tected life interest in a sum of £3,000 and to certain other benefits which may be greater or less than those taken from him. Quite rightly, therefore, the trustees say that they cannot assent to such a variation. Ought then the court to assent to such a scheme?

Under the Trustee Act, 1925, s. 57, where, in the administration of any property vested in trustees, any sale, lease or other disposition, or any purchase or other transaction is, in the opinion of the court, expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees the necessary power for the purpose. The general jurisdiction of the court, which is also invoked, assuming it for this purpose to exist apart from the statute, could not be stated in wider terms. In either aspect, the jurisdiction is a discretionary one, and I am clearly of opinion that, in this case, I ought not to exercise it.

It was urged upon me that the interest of the infants (to whose interests the court is ever tender) required that I should sanction the proposals. It was, in the first place, said that it was imperative for the infants' sake that the company should be wound up, for otherwise not only might they be deprived of their intermediate source of income, but even the capital would be substantially depleted if the settlor lived long enough; and it was said that only if the scheme was sanctioned would the company be wound up and such detriment to the children's interests averted. It appears to me that this was really a fantastic suggestion. I did not and do not accept it as a probability that the settlor, who has been diligent and ingenious in reducing his share of the common burden of taxation, will not, if and when he thinks fit, take the necessary steps to wind up the company and put an end to a state of affairs in which so large a part of the trust income is taken by the revenue authorities, nor is it credible that, when he, as settlor and the holder of 100 first preference shares determines to wind up the company, he, with his wife as co-trustee holding the issued ordinary shares, will vote against a winding up. I should, therefore, in any event, disregard as an element in the case the suggested detriment to the children arising out of the continued existence of the company; but I required the settlor to go into the witness box and I heard from him, as I expected, that he had not fully determined what course he would take if his present scheme did not go through, but that, in any case, he was anxious only to do what was best for his children. The suggestion, then, that the trustees should be authorised to assent to a variation of the trust because thus and thus alone could the infants' interests be safeguarded, falls to the ground and, in my judgment, ought never to have been made.

This alone is sufficient ground for refusing this application, but, even if I were satisfied, as I am not, that the alternative presented to the court was a real one and that there was a real apprehension of the infants' potential income from the settlement being exhausted by taxation by reason of the continued existence of the company, it would still be a serious question how far the court should, in the exercise of a statutory or inherent jurisdiction, sanction a bargain of this kind. The settlor thought fit to arrange his affairs in such a way as would, he hoped, reduce his share of taxation and increase the share of others. Temporarily he succeeded, but his success was short-lived. He is left, so far as taxation is concerned, in substantially the same position as if he had made no such arrangement. So, too, the infants are in no worse position than they would have been. I have grave doubts whether in such a case it is the duty of the court, under the guise of protecting the interests of infants, to come to his rescue and assent to a variation of the settlement as part of a general scheme for reducing the *quantum* of his taxation. I do not decide the question for, as I say, it does not appear to me really to arise. If the settlor thinks fit, he can himself, with the assistance of his wife and co-trustee, wind up the company, and I have no reason whatever to apprehend that the children's interests will be less well served thereafter than they would be if I gave my sanction to the proposal.

The application is refused, and I make no order as to costs.

Declaration accordingly.

Solicitors: *Ashurst, Morris, Crisp & Co.*

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

Re A DEBTOR (No. 27 OF 1943). THE DEBTOR *v.* THE PETITIONING CREDITORS AND THE OFFICIAL RECEIVER.
[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.),
April 20, 1943.]

Bankruptcy—Receiving order—Creditors' petition—Admission of debt at hearing—Affidavit of proof filed after hearing on same day—Bankruptcy Act, 1914 (c. 59), s. 5 (2)—Bankruptcy Rules, 1915, r. 171.

An application for a receiving order was made by the petitioning creditors without producing the usual affidavit stating on oath that the debt was owing. The debtor had served no notice of intention to dispute the debt. At the hearing the debtor admitted the debt and the receiving order was made subject to an affidavit being filed on the same day. The affidavit was duly filed. It was contended for the debtor that the requirements of the Bankruptcy Act, 1914, s. 5 (2) and Bankruptcy Rules, 1915, r. 171 had not been complied with:—

HELD : since the debtor had not served a notice of intention to dispute, his admission of the debt was sufficient proof to satisfy the requirements of the above section and rule.

[EDITORIAL NOTE. Proceedings in bankruptcy are not mere proceedings *inter partes* but are proceedings in which the court has a public duty to perform, and it is, therefore, necessary that the details of procedure should be more strictly observed than in ordinary civil procedure. The court has necessarily to be on its guard against admissions made by arrangement between the parties and hence strict proof is often necessary in bankruptcy. Thus an admission of the debt of the petitioning creditors is insufficient without an affidavit by them that the debt is due and owing ; but, if in a case where there are no special circumstances (such as, for example the debt being due in moneylending transactions), the affidavit is not forthcoming at the hearing there is no objection to the petitioners being given the opportunity of filing the affidavit on the same day. In the ordinary course, however, the affidavit should be filed before the hearing of the application.]

AS TO RECEIVING ORDER ON CREDITOR'S PETITION, see HALSBURY, Hailsham Edn., Vol. 2, p. 80, para. 97 ; and FOR CASES, see DIGEST, Vol. 4, pp. 138, 139, Nos. 1276-1286.]

Case referred to :

** (1) Re A Debtor, Ex p. Debtor (No. 591 of 1934), [1935] Ch. 353 ; Digest Supp. ; 104 L.J.Ch. 228 ; 152 L.T. 368.*

APPEAL from a receiving order made by Mr. Registrar KEAN on Mar. 20, 1942. The facts are fully stated in the judgment of LORD GREENE, M.R.

G. F. Kingham for the appellant.

S. Seuffert for the respondents, the petitioning creditors.

LORD GREENE, M.R. : In this case the petitioning creditors had not, at the time of the hearing of an application for a receiving order, produced the usual affidavit that the debt was owing. The fact that it was owing was admitted by the debtor at the hearing. The registrar, without adjourning the hearing in order that an affidavit might be produced, made an order on the undertaking by the petitioning creditors' solicitor to file an affidavit of the debt the same day. That affidavit was filed the same day, and the matter would appear, *prima facie*, to be perfectly regular. The point is taken that that procedure is technically wrong. The argument is based upon a decision of this court in *Re A Debtor* (1). Referring to that case, it purports to be stated in a note to the Bankruptcy Rules, 1915, r. 171, in WILLIAMS ON BANKRUPTCY, 15th Edn., p. 589, that "admission or consent is insufficient." The section upon which the argument is based is the Bankruptcy Act, 1914, s. 5 (2), which provides as follows :

At the hearing the court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and if satisfied with the proof, may make a receiving order in pursuance of the petition. Reading that by itself one would have thought that a mere admission by the debtor that the debt was an existing debt as alleged was sufficient proof, because admissions are one method of proof. That that was the view of those who framed the Bankruptcy Rules appears to follow from r. 171 which deals with this matter. It says :

On the appearance of the debtor to show cause against the petition, the petitioning creditor's debt, and the act of bankruptcy, or such of those matters as the debtor shall have given notice that he intends to dispute, shall be proved . . .

That implies that the proof required need not be carried any further, save in cases where the debtor has given notice that he intends to dispute.

Reading the section and the rule together I am of opinion that, if the debtor admits the debt and has not served notice of intention to dispute it, the fact of admission can be accepted as the proof which the section requires.

The practice seems to be to require an affidavit of proof and I do not wish to suggest that that practice is not a desirable one. It has been modified by allowing the affidavit to be filed on the solicitor's undertaking to file it. It is said that that practice cannot be followed owing to the language used by LORD HANWORTH, M.R., with the approval of ROMER and MAUGHAM, L.JJ., in the case to which I have just referred. In that case LORD HANWORTH, M.R., referred to the section and to the rule and, immediately after quoting the rule, he said, at p. 357 :

Now, I have specifically called attention to these rules, because on July 13 there was filed a notice to dispute . . .

That being the case, the obligation to prove the debt remained. The condition that proof of the debt is required when the debtor has given notice to dispute the debt became operative, and accordingly it became necessary to prove the debt. This was a case of a moneylender's debt and, when inquiring into the adequacy of a moneylender's debt to support a petition, the court is bound to require something quite different from what is required in the ordinary case. Having called attention to the fact that there was a notice to dispute, LORD HANWORTH, M.R., said, at p. 357 :

I also call attention to the fact that an admission is not sufficient in bankruptcy proceedings; the court is acting not merely *inter partes* but in the public interest, and that being so the court has a public function and duty to perform and is bound to perform it.

The case before LORD HANWORTH, M.R., was one in which notice of intention to dispute had been filed, and his observations were not intended to apply to a case where there is no intention to dispute. I am not speaking upon the propriety of calling for an affidavit in all cases whether there is a dispute or not. The practice is no doubt a salutary one. In the present case it seems to me, however, that the section and the rule have been adequately complied with and the result is that the point fails.

MACKINNON, L.J. : I agree.

GODDARD, L.J. : I agree.

Appeal dismissed.

Solicitors : *Spiro & Co.* (for the appellant); *Leslie J. Griffin* (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

MURPHY RADIO, LTD. v. WELWYN GARDEN CITY RATING AUTHORITY AND ANOTHER.

[KING'S BENCH DIVISION (Charles and Stable, JJ.), April 5, 1943.]

Rates and Rating—Valuation list—Amendment of current valuation list by rating authority—Rating and Valuation Act, 1925 (c. 90), s. 37—Rating and Valuation (Postponement of Valuations) Act, 1940 (c. 12).

The appellants were the lessees and occupiers of premises which had been assessed in 1936 at a net annual value of £340. In consequence of a report made in 1939 by the county valuer that the rents being paid by the appellants were greatly in excess of the assessment figure, the respondent rating authority made a proposal to amend the valuation list with respect to that property. It was contended for the appellants that the effect of the Rating and Valuation (Postponement of Valuation) Acts, 1938 and 1940, was to preclude the authority from amending the valuation list during the currency of those Acts :—

HELD : the Rating and Valuation (Postponement of Valuations) Acts, 1938 and 1940, dealt merely with the extensions of the period of validity

of the valuation list and did not affect the powers given to a rating authority by s. 37 of the Rating and Valuation Act, 1925, to make amendments thereto. In this case the amendment of the existing valuation list was well within the powers of the respondent and was not open to objection.

[**EDITORIAL NOTE.** It is here pointed out that the Rating and Valuation (Postponement of Valuations) Acts are Acts postponing the quinquennial valuations and do not affect the rights of interested parties to propose an amendment of the valuation under sect. 37 of the 1925 Act. It is theoretically possible that a rating authority might propose so many amendments that, though each was in itself a separate amendment, taken together they amounted to a new quinquennial valuation. That, however, was not the course adopted here and, until that is shown to have been done, the Acts of 1938 and 1940 have no application to proposals for amendment under sect. 37 of the 1925 Act.

As to AMENDMENT OF VALUATION LISTS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 484-488, para 913; and FOR CASES, see DIGEST, Supp., Rates and Rating, Nos. 1158d-1161a. FOR THE RATING AND VALUATION (POSTPONEMENT OF VALUATIONS) ACT, 1940, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 33, pp. 361, 362.]

Case referred to:

*(1) *R. v. Horsham and Worthing Assessment Committee, Ex p. Burgess*, [1937] 2 K.B. 408; 157 L.T. 41; *sub nom. R. v. Worthing Borough Council and Horsham and Worthing Assessment Committee, Ex p. Burgess*, [1937] 2 All E.R. 681; Digest Supp.; 106 L.J.K.B. 810.

CASE STATED under the Rating and Valuation Act, 1925, by the Assessment Appeals Committee of the Quarter Sessions of the County of Hertford.

A. S. Comyns Carr, K.C., and *W. A. L. Raeburn* for the appellants.

Harold B. Williams for the respondents.

CHARLES, J.: I had better refer to the case stated, for it puts shortly and clearly exactly what the point at issue is.

The aforementioned premises 88-90, Bridge Road, East, were, at all material times since they were first occupied and assessed in 1936 at a net annual value of £340, let to the appellants at a rental of £620. In or about the year 1939, the county valuer reported to the respondent authority that the rents that were being paid by factory owners including the appellants in the Welwyn Garden City were greatly in excess of the respective net annual values as assessed.

Upon that report the respondent authority gave notice of a proposal to amend the valuation list then in force by substituting £480 for the assessment of £340, on the ground that the existing assessment was incorrect. The respondent committee having considered the proposal and the objection of the appellants, confirmed the same, and so it came before the appeals committee.

It is interesting to observe what was argued there.

On the part of the appellants it was contended before us that the scope of the Rating and Valuation Act, 1925, s. 37, was limited by the effect of the Rating and Valuation (Postponement of Valuations) Acts, 1938 and 1940, so as to preclude the present authority, during the currency of the last mentioned Acts, from making proposals for amending the said valuation list which amounted in fact to a new valuation of the relevant hereditaments.

That is the only statement on the part of the appellants which is set forth in the case. Then:

On the part of the respondents it was contended before us that the effect of the Rating and Valuation (Postponement of Valuations) Acts, 1938 and 1940, was merely to extend the period of currency of the existing valuation lists without in any way altering the powers of any person aggrieved by the incorrectness or unfairness of any matter in the valuation list to make a proposal for the amendment of the list.

Quarter Sessions dismissed the appeal on the ground that the passing of the Rating and Valuation (Postponement of Valuations) Acts, 1938 and 1940, did not affect this matter and that the powers which were given to the rating authority under the 1925 Act remained unimpaired, and, if they had acted upon them correctly, they were well within their powers in doing so.

I will deal with the Rating and Valuation (Postponement of Valuations) Acts, 1938 and 1940 first. I say at once (and I think counsel for the appellants agrees) that those Acts really do not affect this matter. They are Acts which deal with the postponement of the quinquennial period. What was done here was not an attempt to make a new valuation list. All that was done here was by way of amendment to the existing valuation list.

I have come to the conclusion that the terms of these Rating and Valuation (Postponement of Valuations) Acts, 1938 and 1940, are so clear that really the matter does not admit of argument, and I do not think counsel for the appellants pursued that argument with any great fervour. They deal with the postponement of the quinquennial period and no more.

The question here is, then, whether the rating authority have acted legally and in a way that they should act in raising this assessment from £340 to £480. It is quite clear by the Rating and Valuation Act, 1925, s. 37 (1), that :

Any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force, or by the inclusion therein or omission therefrom of any matter, or by the valuation as a single hereditament of a building or a portion of a building occupied in parts, or otherwise with respect to the list, may make in manner provided by this section a proposal for the amendment of a list . . .

The report that their surveyor, Wilkes, gave to them made it quite clear that the assessments that had been set upon this building and some other buildings which were factories, were incorrect. Indeed, they were figures which, on an examination of the position, it was impossible to support. Therefore, the rating authority under sect. 37 of the 1925 Act, acting well within their powers, took the steps that they did and made a proposal to amend the list in the manner to which I have already referred.

The Quarter Sessions Assessment Appeals Committee had their attention called to *R. v. Horsham and Worthing Assessment Committee, Ex p. Burgess* (1). It is said by counsel for the appellants that there was very little in that case which could or should affect the case at present before this court. But there are a great many observations in that case by LORD HEWART, L.C.J., and SINGLETON, J., which relate in the main to matters of fact in that case, but which, I think, are very illuminating when read in connection with the case now before the court. In that case the rating authority was satisfied that a very large number of assessments of shops, houses and flats in the borough were incorrect and ought to be increased. So they made many thousands of proposals—it was a great deal more general than in the present case—for the amendment of the valuation list. The headnote says :

It was sought to quash the assessment committee's decision on one such objection on the grounds (a) that no such proposal for the amendment of a valuation list could lawfully be made under the Rating and Valuation Act, 1925, s. 37 ; (b) that sect. 37 of that Act did not empower the rating authority to make a general revaluation of their district to take effect during the currency of a quinquennial valuation list . . .

It is quite clear (and was so held in that case as in this case) that there was no attempt to make a general revaluation such as would amount to the making of a new valuation list. What is clear is that they considered these particular cases and found that the assessments were incorrect. They applied themselves to their duty under the 1925 Act, and they came to certain conclusions, the conclusions being that these shops and flats were under-assessed. LORD HEWART, L.C.J., said, at p. 415 ([1937] 2 All E.R., at p. 683) :

It is manifest, therefore, at the outset that what was being considered by the borough of Worthing was not a suggestion for the making of a new valuation list because of some general consideration, such as a general rise in the annual value of the properties. It is the same in this case. As SINGLETON, J., said, at p. 423 ([1937] 2 All E.R., at p. 689) :

Certain duties are put upon the county valuation committee by the statute, and if it had become necessary for them to lodge proposals in order to promote uniformity they would clearly have been within their rights. That applies whether it was one proposal or many thousands of proposals, so long as they were taking such steps as they thought fit for promoting uniformity in the principles and practice of valuation. He goes on, at p. 424 ([1937] 2 All E.R., at p. 690) :

The argument that what took place was the making of a new valuation within the quinquennial period fails on the facts. No new list was made, but a very large number of amendments were made to the current list. If something was done which was in fact the making of a new list, it might well be said to be contrary to the spirit of the Act, and in particular to sect. 19, but that did not take place.

We have the written judgment before us of His Honour JUDGE STURGES and others who sat as the Assessment Appeals Committee at the Hertfordshire Quarter Sessions. I have no doubt that what was done was done under sect.

37 of the 1925 Act and was properly done and is not open to objection. The appeal, therefore, must be dismissed with costs.

STABLE, J. : I agree. Sect. 37 of the 1925 Act provides the machinery for amending the list during the life of the current list. Whether the duration of that life is 5 years or less or more is immaterial. The Rating and Valuation (Postponement of Valuations) Acts, 1938 and 1940, have extended the duration of the life of the lists without in any way affecting the powers to make amendments thereto, or the machinery for making amendments thereto, during that life.

As regards the second point, if the appellants had been able to say that what was done here was to alter the valuation because of what has been described as some general economical or social change, the result might—I do not say that it would—have been different. Whether what was done here comes within that category or not, in my judgment, is essentially a question of fact. There are no facts found in this case to support the contention that what really happened was that a fresh valuation was being made piecemeal and that what was done was a colourable attempt to make a fresh valuation and not to deal with errors or omissions that were apparent on the face of the valuation when it was made.

I agree that the appeal fails and should be dismissed.

Appeal dismissed with costs.

Solicitors : *Richardson, Sadler & Co.* (for the appellants) ; *Walter Wright* (for the respondents).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

APPEAL OF MACKLEY.

[KING'S BENCH DIVISION (Singleton, J.), **February 25, 1943.**]

Work and Labour—National health insurance—Employment—Lavatory attendant working 2 shifts a week—Whether employed in relief of lavatory attendants—National Health Insurance Act, 1936 (c. 32), Sched. I, Pt. II—National Health Insurance (Subsidiary Employments) Order, 1932 (S.R. & O., 1932, No. 501).

The appellant was employed by the Ilford Borough Council as a lavatory attendant. The period each day during which the lavatory was open was divided into 2 shifts and 2 women were appointed to work there 6 days a week, each of them having 1 day a week off. From Aug., 1934, to June, 1939, the appellant was appointed to do 2 shifts per week, one on each of the days when one of the other attendants had her day off. The council employed persons classed as relief latrine attendants who were not given check numbers, but the appellant was classed in the wages sheets as a latrine attendant and was given a check number, and the requisite contributions under the National Health Insurance Acts and the Widows', Orphans' and Old Age Contributory Pensions Acts were paid in respect of her employment. On a claim by the appellant that her employment was employment within the meaning of the National Health Insurance Act, 1936, the Minister of Health, having found as a fact that it did not involve as much as 28 hours weekly, also decided that the appellant was a person employed to act in relief of lavatory attendants and that her employment was excepted from the scope of compulsory insurance by virtue of the National Health Insurance (Subsidiary Employments) Order, 1932 :—

HELD : the appellant was appointed as a permanent employee to work regularly at fixed times as a latrine attendant. Her employment did not come within the class excepted from the scope of compulsory insurance by virtue of the order and it was, therefore, employment within the meaning of the Act.

[EDITORIAL NOTE.] The difficulty here was that the employee had been engaged in relief work but had been treated by the employers as a regular or permanent employee. The matter is one of some difficulty, but it has been held that the nature of the employment must be decided by the terms of the appointment and the subsequent conduct of the employers thereafter.

AS TO EMPLOYMENTS EXCEPTED FROM COMPULSORY INSURANCE, see HALSBURY, *Halsham Edn.*, Vol. 34, pp. 617-620, para. 770 ; and FOR CASES, see DIGEST, Vol. 44, pp. 1309, 1310, Nos. 143-149.]

D. A. Scott Cairns for the appellant.

Ralph Etherton (for *Valentine Holmes*) for the respondent.

APPEAL by the applicant from a decision of the Minister of Health holding that her employment was not employment within the Act.

SINGLETON, J. : The appellant claims that her employment with the Ilford Borough Council from Aug., 1934, was employment within the meaning of the National Health Insurance Act, 1936.

The Minister caused due inquiry to be made, and the findings are set out in the case, and, as is shown by para. 9 of the case, the Minister on the report made to him and on his examination of the circumstances came to the conclusion :

(1) that the employment of the appellant by the respondents was at all material times as a person employed to act in relief of lavatory attendants and (2) that except from June 6, 1940, her employment as such ordinarily involved less than 28 hours' service weekly ; and he, accordingly, decided that the employment of the applicant by the respondents between Aug., 1934, and June 5, 1940, was excepted from the scope of compulsory insurance by virtue of the National Health Insurance (Subsidiary Employments) Order, 1932, and was not employment within the meaning of the Act or of the Acts repealed by the Act ; and that the employment of the appellant as aforesaid since June 6, 1940, had not been excepted from the scope of compulsory insurance by virtue of the order aforesaid and accordingly since June 6, 1940, had been employment within the meaning of the Act.

I am not concerned in any way with the results of the findings, but I am told that the appellant is approaching the age of 65 and that her pension rights are affected considerably by the question whether or not the decision of the Minister was right. First of all, it is important to see what the appellant's actual employment was, and I find in para. 5 of the case a statement of the facts which were admitted or proved in evidence :

(a) the applicant was at all material times employed by the respondents at Goodmayes Park lavatory or elsewhere as a lavatory attendant under a contract of service at a rate of remuneration which did not exceed the statutory limit for non-manual workers. (b) the respondents decided when they provided the Goodmayes Park lavatory that it should be open from 7 a.m. to 11 p.m. each day of the week, the daily periods being divided for the purpose of the provision of lavatory attendance into two shifts, the first from 7 a.m. to 3 p.m. and the second from 3 p.m. to 11 p.m., and they further decided to appoint two women to work at that lavatory as lavatory attendants for six shifts each per week, each woman to have 1 day per week off, and to appoint 1 attendant to do two shifts per week, one to be performed on each of the days when one of the other two women had her day off. (c) the appellant was appointed by the respondents in Aug., 1934, to work regularly the two shifts per week above referred to at the Goodmayes Park lavatory which were from 7 a.m. to 3 p.m. each Tuesday and from 3 p.m. to 11 p.m. each Wednesday. (d) the applicant so continued until Dec., 1939, save for a period of 3½ months when, on the instructions of the respondents, instead of working at the Goodmayes Park lavatory for the two shifts per week she regularly worked two shifts per week at the Goodmayes Lane lavatory on each of the days when one of the other two attendants there had her day off. (e) in Dec., 1939, the applicant was appointed to work regularly, in addition to the two shifts per week at Goodmayes Park lavatory as aforesaid, one shift per week (also of 8 hours) on Thursdays at the Goodmayes Lane lavatory (that being the day when an attendant at that lavatory had her day off), and so continued at all material times thereafter.

Sub-para. (f) shows that she worked at other times when called upon to do so to replace attendants absent by reason of sickness or holidays, but she was not bound to do so. Sub-para. (g) refers to the hours which the applicant worked and which are set out in the appendix to the case. Sub-para. (h) is important :

The applicant was at all material times classed in the wages sheets of the respondents as a latrine attendant and not as a relief latrine attendant. She was appointed by the respondents as a permanent employee and as such was from the first given a check number. The respondents employ in addition persons classed as relief latrine attendants who render only casual service as required. Such employees are not given check numbers. (i) Contributions under the National Health Insurance Acts and Widows', Orphans' and Old Age Contributory Pensions Acts, for the time being in force were paid in respect of the appellant's employment by the respondents.

The statutory provisions which are material are set out in paras. 6, 7 and 8 of the case. Sect. 2 (1) of the 1936 Act, which replaced the 1924 Act, provides as follows :

The persons employed within the meaning of this Act are all persons of either sex,

whether British subjects or not, who are engaged in any of the employments specified in Sched. I, Pt. I, to this Act, not being employments specified in Pt. II of that Schedule.

One of the employments specified in Sched. I, Pt. I, to the 1936 Act in (d) is employment in the United Kingdom under any local or other public authority except in so far as such employment is excluded by a special order.

Sched. I, Pt. II, para. (m) to the Act provides many exceptions:

A Employment of any class which may be specified in a special order as being of such a nature that it is ordinarily adopted as subsidiary employment only and not as the principal means of livelihood.

In 1932 there came the National Health Insurance (Subsidiary Employments) Order, 1932, which has effect in this case, and which is preserved by sect. 228 of the 1936 Act. The order made by the Minister specifies in para. 1:

B The employments of the several classes set forth in Sched. I hereto are specified as being of such a nature that they are ordinarily adopted as subsidiary employments only and not as the principal means of livelihood.

Then Sched. I commences with these words:

Classes of employment specified as being of a subsidiary nature only and, therefore, excluded from being employment within the meaning of the Act.

One of those under heading III, "Employment under Local Authorities, etc.", is:

C Employment, ordinarily involving less than 28 hours' service weekly, by any local or other public authority, as a person employed to act in relief of gymnasium or lavatory attendants or of attendants at a park, playground, or other public open space.

The view taken by the Minister is that the appellant falls within that exception. He has decided the 28 hours' service question, and that is a question of fact, and nothing arises upon it for my decision. He has decided that, prior to June 6, 1940, the appellant's employment did not ordinarily involve as much as 28 hours' service weekly, but that, since June 6, 1940, it has done so.

D The real question on which this case comes before me is whether or not the employment of the appellant is that of a person employed to act in relief of lavatory attendants. The Minister's conclusion is that the employment of the appellant by the respondents was at all material times as a person employed to act in relief of lavatory attendants. Counsel for the respondent has admitted, and I think quite properly admitted, that, in a matter of this kind the onus is upon the Minister to show both things; first, that the employment is employment ordinarily involving less than 28 hours' service weekly; and, secondly, that the service or the employment is as a person employed to act in relief of lavatory attendants, and, unless both those are shown, the appellant does not fall within the section, but is a person within the definition of the Act which I have already read.

F It is no easy question to determine whether or not the appellant was employed in relief of lavatory attendants. I confess that I realise that different people might come to different decisions upon it. I have to make up my own mind as to what is the true inference to draw from the facts as stated.

G Counsel for the respondent read me a definition from a well-known dictionary of "relief" as meaning "release from a post or duty by a substitute or substitutes who may act either permanently or temporarily." Counsel for the appellant, on the other hand, argued that that definition had nothing whatever to do with this, and he submitted to me that there was nothing on the facts as stated which enabled one to say that this appellant was employed in relief of a lavatory attendant or of lavatory attendants; and he submitted further that no such inference ought to be drawn from the facts as stated.

I am bound to say that I attach great importance to para. 5 (h) of the case:

H The applicant was at all material times classed in the wages sheets of the respondents as a latrine attendant and not as a relief latrine attendant. She was appointed by the respondents as a permanent employee and as such was from the first given a check number. The respondents employ in addition persons classed as relief latrine attendants who render only casual service as required. Such employees are not given check numbers.

I think that means that, within the borough council of Ilford there are two classes of latrine attendants; (a) latrine attendants, and (b) relief latrine attendants. That is how I read it; and, that being so, I find it difficult to say, on this case as stated, that the appellant was employed as a relief latrine attendant or in relief of latrine attendants.

She was employed regularly—I bear in mind the submission of counsel for the respondent that that does not matter—and from the time when the Goodmayes Park lavatory was opened she was a regular employee; her times were fixed. There were two other attendants; both those attendants worked much longer hours and more days. They worked 6 days per week for 7 hours; she worked 2 days per week for 7 hours on her ordinary and regular engagement. I cannot help thinking that her engagement as a regular employment was done advisedly; it was thought undesirable that the other women should work 7 days per week; indeed, I think there may well have been some regulation or some statutory requirement that they should not work 7 days per week. I have not been told much about that, but at least it was thought desirable that they should not work 7 days per week, and so for 2 days during the week the appellant was appointed to work regularly. In one sense her doing so made it unnecessary for them to work 7 days per week, and, I suppose, she might be said to be relieving them, but she was not appointed to relieve them. I put to counsel for the respondent the case, if one could imagine it, of one woman working 4 days per week and another 3 days per week on work of this kind; could it be said that the one working 3 days per week was in relief of the one working 4 days per week? It would depend, I suppose, or might depend, on the appointment. One might be appointed as an attendant, and the other as relief lavatory attendant. In this case there was no such appointment. The case finds in fact that the appellant was appointed by the respondents as a permanent employee, and as such was from the first given a check number, and from the first she was given regular times. Those times were not in relief of other lavatory attendants; at least, she was not appointed in relief; and when it is stated in the case that the council also have relief lavatory attendants, I do not think I ought to draw the inference that her employment was in relief of lavatory attendants. I think she was a latrine attendant, just as the other two employees whom I have mentioned were, and from that point of view in the same position, except that she worked less hours and less days a week.

That being so, I hold that the appellant is entitled to succeed in this appeal.

Appeal allowed.

Solicitors: *Emanuel, Round & Nathan* (for the appellant); *Solicitor of Ministry of Health* (for the respondent).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

Re M. KUSHLER, LTD.

[COURT OF APPEAL (Lord Greene, M.R., Luxmoore and Goddard, L.JJ.).

May 20, 1943.]

Companies—Winding up—Fraudulent preference—Bank overdraft guaranteed by director—Overdraft paid off within 12 days of creditors' meeting—No direct evidence of intent to prefer—Whether court precluded from drawing inference of intent to prefer—Bankruptcy Act, 1914 (c. 59), s. 44—Companies Act, 1929 (c. 23), s. 265.

The appellant was the liquidator of the company and the respondents were the company's bankers. The appellant sought a declaration of fraudulent preference in respect of all payments made to the respondents between Feb. 23, 1941, and May 23, 1941, which was the date of the resolution for the voluntary winding up of the company. The company had an overdraft at the bank which overdraft was guaranteed by a director of the company and secured by the deposit of certain policies belonging to him. Between May 10, 1941, and May 23, 1941, only 2 trade creditors were paid, although a third had been pressing since Apr. 2 for the payment of an overdue account, but during the same period payments were made to the respondents of an amount sufficient to replace the overdraft of £609 3s. 9d. by a balance of £55 3s. 3d., this being the first time that the account had been in credit. On May 12, the director was informed, on taking professional advice, that the company was insolvent and must be wound up, but the respondents were not included among the recipients of notices convening a meeting of creditors which were sent out on May 14. At the creditors' meeting, the director concealed the fact that he was the

guarantor of the banking account and gave the names of persons as guarantors who were not parties to the guarantee. It was contended for the respondents that the court was precluded from inferring a dominant intention of the debtor to prefer in a case where there was no direct evidence of his state of mind and there was some other possible explanation of his conduct :—

HELD : (i) in the circumstances the proper inference to be drawn was that the payments to the bank after May 10, 1941, were made with a view of giving the bank a preference over the other creditors and so discharging the guarantee.

(ii) there is no rule of law which precludes the court from drawing an inference of an intention to prefer a creditor in a case where some other possible explanation is open.

[EDITORIAL NOTE. In this case it was sought to rely upon certain words of LORD TOMLIN in *Peat v. Gresham Trust, Ltd.* (1), that, where there is no direct evidence of an intention to prefer and there is room for more than one explanation, it is not enough to say that the intent to prefer must be inferred. From these words it was argued that, if there are two reasonable inferences from the evidence, one of which is favourable to the debtor, then the onus of proving a fraudulent preference has not been discharged. That would place a heavier burden on a trustee or a liquidator seeking to prove a fraudulent preference than is placed upon a person in an ordinary case who has to prove an intent. The Court of Appeal are clear that that is not what LORD TOMLIN meant and that the law is the same in the case of a fraudulent preference as in any other case where an intent has to be proved. If the court is left in any reasonable doubt the onus has not been discharged, but, while the court will be slow to draw an inference which involves a taint something approaching dishonesty, it will be guided by the probabilities and, given solid ground for drawing an inference of fraudulent preference, it will draw it although there may be some possible innocent inference from the facts proved.

AS TO FRAUDULENT PREFERENCE IN A WINDING UP, see HALSBURY, Hailsham Edn., Vol. 5, pp. 704, 705, paras. 1176, 1177; and FOR CASES, see DIGEST, Vol. 10, pp. 975-978, Nos. 6732-6746.]

Cases referred to :

*(1) *Peat (Sir William Henry) v. Gresham Trust, Ltd.*, [1934] A.C. 252; Digest Supp.; 151 L.T. 63.

*(2) *Re Lyons, Ex parte Barclays Bank, Ltd. v. The Trustee* (1934), 152 L.T. 201; Digest Supp.

APPEAL by the liquidator from an order of BENNETT, J., dated Feb. 17, 1943. The facts are fully set out in the judgment of LORD GREENE, M.R.

V. R. Aronson for the appellant.

A. J. Belsham for the respondent.

Aronson : The question is as to what is the state of a man's mind at the time he makes the payments. There can be no direct evidence on that point unless it is given by the man himself. In the present case he was not called.

Peat v. Gresham Trust, Ltd. (1) is not an authority for saying that in no circumstances could there be a fraudulent preference unless every other explanation was excluded. It only decides that the onus is on the liquidator to satisfy the court that the debtor's dominant intention was to give a preference. In the present case, I submit that no one can reasonably doubt what Kushler's intention was. This is the plainest possible case of a fraudulent preference. After Kushler had formed the intention to wind up the company, any payments he made would be fraudulent preferences. His intention was manifested by his actions on May 12, 1941.

Belsham : The judge has not misdirected himself either on the law or on the facts. The observations of LORD TOMLIN in *Peat v. Gresham Trust, Ltd.* (1), justify one in saying that, if two reasonable inferences can be drawn from a set of circumstances and one inference is favourable, the applicant has not discharged the burden of proof cast upon him. Also, *Re Lyons* (2) supports the principle upon which BENNETT, J., acted. In the present case it is not an unreasonable inference that Kushler had been warned not to pay creditors, and that he complied with the advice. There is more than one reasonable inference which may be drawn from the facts. Therefore, the case has not been established.

Aronson, in reply : The words used by ROMER, L.J., in *Re Lyons* (2), were used in respect to the facts of that case which differs very much from the present case.

LORD GREENE, M.R. : In this appeal the liquidator is appealing from an

order of BENNETT, J., dismissing a summons issued by the liquidator, which sought a declaration that certain payments made into the company's banking account were fraudulent preferences. The respondents are the company's bankers. The company (M. Kushler, Ltd.) was as good an example as one could wish to find of what is popularly called a "one-man company"; out of 1897 issued shares 1796 were held by Kushler himself, the remaining 101 were held by his wife; he and his wife were the directors, and he seems to have taken the active part in the management of the company.

The company had obtained from its bankers facilities in the shape of a permitted overdraft up to, but not exceeding, £800, and the case presents one familiar element in that this overdraft was guaranteed by Kushler and secured by the deposit of certain policies belonging to him. The company, admittedly, was insolvent for at least three months before the date of the winding-up resolution, which was May 23, 1941; the notices calling the meeting of shareholders to pass a resolution for voluntary winding up were sent out on May 14, and on the same day notices were sent out convening a meeting of creditors.

The summons asked for a declaration of fraudulent preference in respect of all payments made into the bank which went to extinguish the overdraft, between Feb. 23, 1941, and May 23, 1941—that is to say, in respect of the whole of the three months' period.

In addition to negating the whole of the claim, BENNETT, J., referred to that particular aspect of it which is concerned with the length of the period and the payments during that three months' period into the bank. He took the view that, whatever might be the case with regard to a later date, there was no evidence at all from which it could be inferred that there was an intent to prefer during the whole of that three months' period. I am in entire agreement with that view. It seems to me that the original claim to go back to that early date is one which the evidence fails to support. The crucial question, to my mind, is whether payments made at a very much later date were made with the dominant intention to prefer which the law requires before the section can be satisfied. The section, of course, uses the phrase: "With a view of giving such creditor . . . a preference," and that means that the intention to prefer must be the dominant intention which actuates the payment.

The period to which I wish to direct attention is one beginning on or about May 10, 1941. At that date the overdraft stood at £609 3s. 9d., and down to that date the banking account appears to show that payments in and out were proceeding in a more or less normal way; trade debts were being met, and there is nothing on the face of the transactions as they appear on this account to suggest that there was some intent to prefer the bank before that date. Between May 10 and the date of the winding-up resolution, the payments do not include any trade payments except two, one of £36 18s. 2d. in favour of K. Harris (which we were told was a cash transaction), and a small item to a company or firm called Campden Box Company of £1 2s. 3d. On the other hand, there were payments into the bank between May 10 and the date of the winding-up resolution of an amount sufficient not only to liquidate the whole overdraft of £609 3s. 9d., but to substitute for it an ultimate credit balance of £55 3s. 3d.

The putting of this account into credit was something quite unusual. In the accounts as we have them the earliest date takes us back to Aug. 1, 1940, and during the whole of that period, right down to the date of these days in May of 1941, the overdraft was always being operated upon, and was running in figures of £700, £800, and as much as £900 or £1,000 sometimes, down to £600, and sometimes down to £500, and once down to £275, which I think is the lowest figure which appears in the account; but never once had this account, during the whole of the period of which we have particulars, been in credit. I am disposed to think, and, in fact, I do think, that the circumstances, so far as I have related them, would not, by themselves, be sufficient to justify the court in drawing the necessary inference. The failure to pay trade debts during those concluding days or weeks may have been due to the circumstance that no bills had come in.

However, these are far from being the only facts. A trade creditor, namely, Debenhams, had been pressing for payment of their account, which was overdue, ever since Apr. 2. They had written on Apr. 2 and 15, in reference to their February account of £88 1s. 6d., and no notice was taken of those two

letters until, on Apr. 22, Kushler called at Debenhams and saw their deputy credit manager. He then took up an attitude which was quite unnecessary, having regard to the state of the overdraft, because he could have paid this account. He asked for the account to stand over. He said what a lot of difficulty he had in getting in his own accounts, and was very persistent. Debenhams declined to do that, although they were prepared to give him some indulgence if he was prepared to pay one half of their account by the end of April. They pressed him again on May 1, and again on May 9. Being under that pressure from a creditor whom there was plenty of money to pay, in the sense that the overdraft was sufficient for the purpose, on May 12 the company had in its hands two cheques which belonged to it, amounting together to over £570. Those cheques were paid into the account on May 12, and as a result of that payment the overdraft was reduced to £71 7s. 10d. In those circumstances one asks oneself how did it come about that Debenhams' account was never paid; and the behaviour of Kushler with regard to that account itself throws some light on the fact that no other trade accounts were paid during this period.

According to a letter written by the liquidator—I do not know where he got the information from—on or before May 12, the directors of the company, which, I suppose, means Kushler, took professional advice, and they were informed that the company was insolvent and must be wound up. If that statement by the liquidator is correct, on the very day when Kushler is told that his company is insolvent and must be wound up, having been under pressure from Debenhams for over a month, he chooses to use the two cheques which I have mentioned to pay off, in part, the company's indebtedness to one of its creditors, namely, the bank, and subsequent cheques are paid in, with the result, as I have said, that by the time the resolution for winding up was passed the account was in credit, and accordingly the bank had ceased to be a creditor.

There are two more matters of evidence which appear to me to have great significance. On the day when the notices of the meeting were sent out, namely, May 14, the bank was a creditor for £71 7s. 10d., that being the amount of the overdraft on that date, and the bank, therefore, ought to have been summoned to the creditors' meeting which was going to be held on May 23. For a reason of which no explanation at all was given, no notice was sent to the bank, and it seems to me that the inference—and the only inference—that a reasonable mind can draw from that omission is that Kushler's intention at that time was to see that, by the time the meeting was held on May 23, the bank should no longer be a creditor of the company; in other words, his intention was to see that the whole of the overdraft was paid off before the company went into liquidation. That, in fact, is what happened, because, as I have said, by the time the meeting took place the bank, so far from being a creditor, was a debtor.

The other circumstance is this. At the creditors' meeting Kushler, when asked a question with regard to the banking account, stated that the guarantors of the banking account were two gentlemen named Cohen and Waldstein, and he did not say that he was himself a guarantor. Now Cohen and Waldstein had never had anything to do with this guarantee. The statement made by Kushler to the creditors at that meeting was entirely untrue; he not only gave the names of persons as guarantors who were not guarantors at all, but suppressed the fact that he himself was a guarantor, and, indeed, the sole guarantor. One may ask why he made a statement of that kind, and it is quite fairly said that, if he made that statement with a view to concealing the fact that he had been arranging a fraudulent preference, he must have been extremely stupid and short-sighted to think that it would not, in a very short time, be found to be untrue. One of the remarkable things about people who start going wrong is the childish attempts at deceit which they sometimes make. I myself cannot draw from this untrue statement any inference save that it was intended to conceal the fact that he was a guarantor, and I can see no object in attempting to conceal that fact unless it be that he was wishing to throw the creditors off the scent as to what he had been doing in respect of the banking account.

In those circumstances, that being the evidence, what inference should the court draw? The weight of evidence of conduct in these cases may vary very much according to the particular type of case with which the court is concerned. In the case of a creditor who is an entire stranger to the debtor (or the person who is acting for the debtor) circumstances may be insufficient to

justify an inference of an intent to prefer, when there can be no benefit at all to the debtor who is making the payment. That is one type of case. At the other end of the scale comes the type of case which is extremely familiar nowadays, where the person (such as a director) who makes the payment on behalf of the debtor is himself going to obtain by means of it a direct and immediate personal benefit. These cases of guarantees of overdrafts and securities deposited to cover overdrafts are very common indeed, and where, for example, you have directors who have given guarantees, the circumstance of that strong element of private advantage may justify the court in attaching to the other facts much greater weight than would have been attached to precisely similar facts in a case where that element did not exist.

Taking all the circumstances in this case together, in my opinion, the proper inference to be drawn is that the payments since May 10 were made with a view of giving to the bank a preference over the other creditors, and so discharging the guarantee. However, it is said (and BENNETT, J., seems to have adopted this view of the law), that no such inference can, as a matter of law, be drawn. He took the view, apparently, that, in cases where there is no direct evidence of the state of mind of the debtor (by which I understand no evidence by the debtor himself or evidence of admissions by him), if there is any other possible explanation, it is not right to draw an inference of an intent to prefer. That, it is said (and BENNETT, J., seems so to have thought) was a proposition of law to be extracted from what was said in the House of Lords in the case of *Peat v. Gresham Trust, Ltd.* (1).

Before examining that case, I just pause to indicate what the effect of that doctrine would be in its application to the language of the statute. It would mean that the statute had been authoritatively construed as laying it down as a matter of law that where there is no direct evidence no court is entitled to find that a debtor, in making a payment, had a view of giving the creditor a preference, where, on the evidence before it, there is any other possible explanation of his conduct.

I must confess, looking at the matter quite apart from authority, that the language of the statute does not seem to me to warrant any such interpretation. The statute is directing the court to ascertain the state of mind of the payer in relation to a particular transaction; a state of mind is as much a fact as a state of digestion; the method of ascertaining it is the ordinary familiar method of evidence and inference, and I can see nothing in the language of the section which justifies the view that this particular problem which the legislature sets the court is one which is to be dealt with on any principles different from those which are commonly employed in drawing inferences of fact. There is always this to be remembered, of course, that the particular inference which falls to be drawn in this case is an inference of something which has about it, at the very least, a taint of dishonesty, and, in extreme cases, very much more than a mere taint of dishonesty. That being so, the court, on ordinary principles, is not in the habit of drawing inferences which involve dishonesty or something approaching dishonesty, unless there are solid grounds for drawing them.

It is said, however, that authority compels us to attribute a special meaning to the section. The passages relied upon are to be found in the speech of LORD TOMLIN in the case to which I have referred, a speech in which the other members of the House concurred. It is very important, in understanding the language there used, to appreciate the nature of the case to which it was directed, and the nature of the arguments with which it was dealing. It was a case where the act of preference was said to have been the withdrawal of instructions to counsel to oppose an application by a creditor company to register out of time a charge which had been given to it by the debtor company. The withdrawal of the instructions to oppose that application to register was said to be the suffering of a judicial proceeding. Assuming, as LORD TOMLIN was assuming in the passage which I am about to read, that it was the suffering of a judicial proceeding, and dealing only with the question of intent, the matter stood in this way: There was no evidence of intent in that case, direct or circumstantial, subject to this, that it was said to be sufficient evidence that the withdrawal of the opposition in fact took place and that the preferential treatment of the creditor in fact resulted. The argument, as appears on p. 254, was as follows:

There is no evidence one way or the other as to the reasons for the withdrawal of

opposition by the debtor company, therefore the ordinary rule is applicable—namely, that a man must be taken to intend the result of his acts, and the withdrawal resulted in the order being obtained.

That was the argument of counsel who was appearing for the liquidator. It is with that argument that the passage under consideration in the speech of LORD TOMLIN was dealing. -He said this, at p. 262 :

A It is contended on the appellant's behalf that once given the withdrawal and the consequences of the withdrawal, then in the absence of any other explanation the intent to prefer must be inferred, because a man is presumed to intend the natural consequences of his act. My Lords, I do not accept this contention. In my opinion in these cases the onus is on those who claim to avoid the transaction to establish what the debtor really intended, and that the real intention was to prefer.

That paragraph, if I may venture to say so, puts very much more concisely what a moment ago I said appeared to me to be what the section was contemplating. He continued, at p. 262 :

B The onus is not discharged when the court upon a review of all the circumstances is satisfied that the dominant intent to prefer was present.

There again, that appears to me to be a statement of what one would expect to be the principle, that, upon a review of all the circumstances, the court must be satisfied as to the dominant intent. That is, of course, indisputable. He went on to add this, at p. 262 :

C . . . where there is not direct evidence and there is room for more than one explanation it is not enough to say there being no direct evidence the intent to prefer must be inferred.

D The words, "there being no direct evidence," appear to me to be a repetition of what he has said above, "where there is not direct evidence," and to mean no more than this : It is not enough to say, in a case where there is no direct intent, that the intention to prefer must be inferred. That was what counsel for the liquidator had argued ; he had said : "True it is there is no direct evidence in this case, but you must infer from the facts of the withdrawal and the consequential preferential treatment of the creditor that the intention existed." LORD TOMLIN is refuting the argument that in such a case an inference can be drawn ; but it does not seem to me that he could have meant that in every case where there is no direct evidence you are bound to say that the onus is not discharged on the ground that there may have been another explanation. Of course, there may have been other explanations. One can scarcely imagine a case of circumstantial evidence where it would not be possible to say that there might be another explanation of the facts. I cannot bring myself to believe that LORD TOMLIN (who was only dealing with the particular facts of one case, and a particular argument) was intending to say that wherever there is some other possible explanation then the inference must not be drawn. It would be entirely contrary to what he had said in the earlier sentence which I read a moment ago.

F He went on, a little lower down on p. 262 :

G In the present case it is plain in my judgment that Mr. Wheeler's action may have been due to reasons unconnected with any intention to prefer. He may for example have come to the conclusion that his position *vis-a-vis* the two companies was such that he could not fairly take an active part in what was done. It is improper to speculate what the reasons for his actions were, and in my opinion upon the material available the inference that the intent was to prefer cannot in law properly be drawn.

H Those observations have relation to that particular case where there was no evidence beyond what I may call the evidence of cause and effect ; there was no evidence at all of any intention beyond the circumstance that a certain effect followed naturally from a certain act. It seems to me that when LORD TOMLIN said : "It is improper to speculate what the reasons for his actions were," his observations are directed towards the facts of that case and the material that was present there.

Our attention was also called to a decision of this court in *Re Lyons* (2). That was a case where the guarantor for the debtor's overdraft was his own father, and an attempt was made to show that as from a certain date the payments which the debtor made into the bank were made with intent to prefer his father by securing the release or diminution of the debt for which the father stood surety. There was something very artificial about the case, for this reason, that the date as from which the fraudulent payments into the bank were said to have begun was fixed at the date when the overdraft had been reduced to

£2,000, which was the limit of the father's liability under his guarantee. The only evidence from which it was sought to build up the case of fraudulent preference was that since that date there was a progressive diminution of the overdraft, and that was the only circumstantial evidence which was before the court. Very naturally, in that case the Court of Appeal (although CLAUSON, J., as he then was, had taken a different view), said that was not enough; there might be many explanations of the reason why the flow of payments into the account since that date exceeded the flow of payments out, and there was not sufficient evidence there on which any sound judicial inference could be drawn. I think that it is in particular reference to the facts of that case that one or two expressions particularly, in the judgment of ROMER, L.J., as he then was, are to be read. I do not read those observations as laying down any such extreme proposition as the one which I discussed a moment ago. It seems to me that, although it is quite clear that ROMER, L.J., had LORD TOMLIN's words in his mind, what he was doing was applying the principles which LORD TOMLIN had laid down to the facts of the case of *Lyons* (2), because they exactly fitted. I read what he says as applying what LORD TOMLIN said to the facts of that case, and not as affirming some proposition of law which would preclude the court from ever drawing an inference as to the intention of the payer in a case where some other possible explanation was open.

The result is, in my opinion, that the appeal should be allowed, but the declaration should be confined to the payments into the account which were made after May 10.

LUXMOORE, L.J.: I agree.

GODDARD, L.J.: I agree. I can only add one word, because I happened to be a party to the decision in *Re Lyons* (2). The law with regard to the onus of proof in this case is very well summarised, and I think quite accurately summarised, in WILLIAMS ON BANKRUPTCY, 15th Edn., p. 341, and, indeed, in this case I do not think there is any difference in law between the inferences that you may draw and the evidence from which you may draw inferences in cases relating to fraudulent preferences and in those relating to other matters, nor do I think the cases establish any such difference.

In the case of *Re Lyons* (2), when it is understood (and the most complete statement of the facts in that case is to be found in the judgment of CLAUSON, J.) it will be found that the facts were very, very different from what they are in this case. I think it is fair to say that the cases do establish that the mere fact that a preference is shown is not sufficient to enable the court to draw the inference that that preference was fraudulent, because, before they can draw the inference that the preference was a fraudulent preference, they must be satisfied that the dominant motive of the debtor was to prefer the particular creditor or surety or guarantor for that creditor; but it would be wholly impossible, and it would be dangerous, if one attempted to lay down any particular circumstance or set of circumstances from which the court was always not justified in drawing that inference, save and except that the mere fact that a preference is shown is not sufficient. On the rest the matter stands as it does in any matter relating to a state of mind where any criminal or civil court, if the person upon whom the onus lies, proves no more than a state of facts which is equally consistent with guilt or innocence (using the expression "guilt" for convenience, because, in bankruptcy, there is no question of crime or criminal intent). In such a case, the court is not entitled to draw the one unfavourable inference and find the payment was a guilty rather than an innocent preference, and, if any court is left in doubt as to the inference, then the trustee has not proved his case. When one talks about giving a person the benefit of the doubt, the expression means only that the case is not proved beyond reasonable doubt, and, therefore, the case is not proved and fails, and I do not think the cases intend to lay down any different principle from that which applies in other cases where evidence is necessarily circumstantial and necessarily dependent upon the inference which a reasonably minded man might draw. I think, for the reasons given by LORD GREENE, M.R., that the inference here is overwhelming, and that this appeal should be allowed.

Appeal allowed with costs.

Solicitors: F. W. Perkins (for the appellant); Stafford Clark & Co. (for the respondents). [Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

Re WAKEFIELD, GORDON v. WAKEFIELD.

[COURT OF APPEAL (Lord Greene, M.R., Luxmoore and Goddard, L.JJ.),
May 18, 1943.]

*Executors—Bequest cum onere—Gift of real estate contracted to be purchased—
Cheque appropriated to purchase money—Vendor's lien—Liability of devisee—
“Contrary or other intention” —Administration of Estates Act, 1925 (c. 23),
s. 35.*

A The testator, by cl. 8 of his will made on Apr. 21, 1939, devised his real estate (if any) to his nephew W.W.W. absolutely. At that time the testator owned no disposable real estate, but on July 12, 1941, he contracted to purchase a freehold property for £5,475, and he paid a deposit of 10 per cent. on the purchase price. On July 14, 1941, he instructed his stockbrokers to sell certain stock which he owned. On July 31, 1941, he called on the stockbrokers and asked for payment of the proceeds of the sale of the stock to be made by two cheques payable to himself, one for £4,927 10s. and the other for the balance of the sale moneys, namely, £1,743 19s. 6d. On the same day, he wrote to his solicitors a letter in which he enclosed the cheque for £4,927 10s. and, after referring to the property, said: “Cheque enclosed for balance of purchase money. Please own receipt. There will be some small adjustments to be made but that can be done on completion.” On Aug. 3, 1941, the testator died before the completion of the contract for sale. The appellant, the devisee, claimed that the amount of the cheque should be applied to the payment of the balance of the purchase price of the property and that he was entitled to the property free from the vendor's lien:—

D HELD: the letter of July 31, 1941, contained no “contrary or other intention” within the meaning of the Administration of Estates Act, 1925, s. 35, and, therefore, the appellant took the property devised subject to the vendor's lien for the unpaid purchase money.

[EDITORIAL NOTE. A devisee takes property subject to the charges upon it unless the testator has expressed a contrary intention. In order that a contrary intention may be shown, it is not enough that the testator has clearly ear-marked certain money for that payment in his life. That shows no intention how he intended the charge to be borne after his death as between the specific devisee and his residuary estate. The facts which are relied upon as showing a contrary intention must specifically refer to the manner in which the charge has to be borne after his death and as between the parties entitled under his will.

E AS TO CONTRARY INTENTION IN RESPECT OF BEQUESTS *cum onere*, see HALSBURY, Hailsham Edn., Vol. 14, pp. 382, 383, para. 711; and FOR CASES, see DIGEST, Vol. 23, pp. 489-493, Nos. 5574-5603.]

F Cases referred to:

* (1) *Re Nicholson, Nicholson v. Boulton* (1923) W.N. 251; 44 Digest 303, 1346.

(2) *Re Fleck, Colston v. Roberts* (1888), 37 Ch.D. 677; 23 Digest 491, 5592; 57 L.J.Ch. 943; 58 L.T. 624.

(3) *Re Campbell, Campbell v. Campbell*, [1893] 2 Ch. 206; 23 Digest 493, 5603; 62 L.J.Ch. 594; 68 L.T. 851.

G APPEAL by the defendant, the specific devisee, from an order of FARWELL, J., dated Nov. 27, 1942.

The testator made his will on Apr. 21, 1939. It contained a number of pecuniary bequests which the executors duly paid. They were given free of duty and this had also been paid. Cl. 8 of the will of the testator was in these terms:

H I devise my real estate (if any) to my nephew William Wavell Wakefield absolutely. At the time he made his will, the testator had no free real estate, but he was tenant for life of a property which was vested in him under the Settled Land Act, 1925. The testator also gave an annuity to his housekeeper and that has been purchased. By cl. 10 of the will the testator bequeathed his residuary personal estate. On July 12, 1941, the testator entered into a contract for the purchase of a freehold property, consisting of a farm and an adjacent field. The purchase price was £5,475 and £547 10s. was paid by the testator to the vendor's agent as a deposit. The date fixed for completion was Aug. 12, 1941. On July 14, 1941, the testator instructed his stockbroker to sell £7,000 Local Loans 3 per cent. stock. The stockbroker sold them the same day for

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£6,671 9s. 6d. On July 31, 1941, the testator again called on his stockbroker and, at his request, the stockbroker drew and handed to the testator two cheques both of which were made payable to him. One cheque was for £4,927 10s. and the other for £1,743 19s. 6d., making together £6,671 9s. 6d., which was the amount realised by the sale of the stock. On July 31, 1941, the testator wrote to his solicitors a letter and enclosed the cheque for £4,927 10s. and said, in a footnote, after referring to the property, "Cheque enclosed for balance of purchase money. Please own receipt. There will be some small adjustments to be made but that can be done on completion." The cheque, which had been indorsed by the testator, was paid by the solicitors into their clients' account. On Aug. 3, 1941, the testator died before the completion of the sale.

M. Gravenor Hewins for the appellant.

Wilfrid M. Hunt for a respondent representing residuary legatees.

H. E. Salt for the respondent trustee.

Hewins : A contrary intention is to be found either in the letter of July 31, 1941, sent by the testator to his solicitors or in the letter and the cheque enclosed therewith taken together. The cheque was the result of the sale of part of the testator's personal property. The footnote to the letter said that the cheque was to be applied to the purchase of the property in question. The letter, though written in and revocable during the testator's lifetime, was, however, written after the date the testator had entered into a contract to purchase the property and at a time when the vendor's lien was in existence. If the letter is read in the light of the circumstances, it signifies that the testator intended that the purchase money should come from a particular source. The direction was revoked by the testator's death but, in my submission, the intention that the purchase money should be provided from this particular source was not affected. In *Re Nicholson, Nicholson v. Boulton* (1), there was no intention expressed as to where the money should come from. *Re Fleck, Colston v. Roberts* (2) and *Re Campbell, Campbell v. Campbell* (3) show that it is sufficient to find in some written form an expression or a signification that a particular charge which may affect certain property shall not be borne by that property or that it shall be satisfied out of some other property. It is not necessary for an expression of intention to go further and express the consequences of that intention being given effect to. It is not necessary that the document, which contains the expression of intention should have any binding force. All that one needs is a clear expression of intention.

Counsel for the respondents were not called upon.

LORD GREENE, M.R. : The appellant is a nephew of the testator and he feels, and in the circumstances not unnaturally, that he has suffered a misfortune. In that, most people will sympathise with him. In my opinion, the law is too clear to enable us to give him any relief. The testator, having at the time he made his will no disposable real estate of his own, devised his real estate, if any, to the appellant absolutely. Some two years after the date of his will he contracted to purchase a freehold estate for £5,475 and paid a deposit of 10 per cent. upon the purchase money. The date of completion was to be Aug. 12, 1941, and the purchaser set about to provide the purchase money. He instructed his stockbrokers to sell some Local Loans 3 per cent. stock which he held. On his instructions the stockbrokers made out a cheque in his favour for the balance of the purchase price of the property. This was done some 12 days before the date fixed for completion. On the same day, July 31, 1941, he sent a letter to his solicitors in which, after referring to the property, he said :

Cheque enclosed for balance of purchase money. Please own receipt. There will be some small adjustments to be made but that can be done on completion.

On Aug. 3, 1941, the testator died. He had, at his death, no real estate except the equitable estate in the property which he had just purchased. The purchase money was to come out of the proceeds of the broker's cheque which had been indorsed and handed to the solicitors. The question is whether the appellant is entitled to have the costs of completion thrown upon the personal estate or whether his equitable interest is liable to that charge. The relevant section is the Administration of Estates Act, 1925, s. 35, which replaces the Real Estates Charges Acts, and provides as follows :

(1) Where a person dies possessed of, or entitled to, or, under a general power of appointment (including the statutory power to dispose of entailed interests) by his will disposes of, an interest in property, which at the time of his death is charged with the

payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase money) and the deceased has not by will, deed or other document signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof.

(2) Such contrary or other intention shall not be deemed to be signified (a) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate; or (b) by a charge of debts upon any such estate; unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.

In the present case it is not suggested that there is any such contrary or other intention to be found in the will. It is argued, however, that such contrary or other intention is to be found in the letter to the solicitors enclosing the cheque to which I have referred or, if that be not right, in the combination of the cheque and the letter. I am unable to follow that. The whole question, in my opinion, is whether the letter enclosed with the cheque can be said to indicate a contrary or other intention within the meaning of sect. 35. The first thing to notice about that letter is that there is no reference in it as to what is to happen after the death of the testator. It is a mandate given to the solicitors which is not merely revocable in the testator's lifetime, but which necessarily comes to an end on his death. It is not a direction which is to operate after his death, but it is merely a direction of the character which I have described. The proceeds of that cheque, which the solicitors paid into their clients' account, became part of the testator's estate on his death and passed to his executors. There was no trust attached to the cheque and no enforceable mandate because the mandate to the solicitors had come to an end. It follows, therefore, that the intention disclosed by the testator in that letter could have no effect upon anything which was to happen after his death. It had reference to what was to take place in his lifetime and had no reference to what would happen after his death. That, in my opinion, is sufficient to dispose of this appeal because, if that is right, no such contrary or other intention as the section requires is to be found. That view was taken by FARWELL, J., and, in my opinion, he was perfectly correct. He found support for it in *Re Nicholson, Nicholson v. Boulton* (1). That was a case in which the testatrix, subsequently to the date of her will, had mortgaged her freehold property and had served notice upon the mortgagee that she intended to pay off the mortgage, but she died before that could be done. It was contended that the letter giving notice of intention to pay off the mortgage should be treated as being an indication of a contrary or other intention. It was said by RUSSELL, J., at p. 251:

Now it is said that the letter written by the lady's solicitor to the mortgagee, giving notice of an intention on the part of the lady herself to pay off the mortgage in 6 months' time, is an "other document" within the meaning of the section by which she has shown a contrary or other intention within the meaning of the Act. In my opinion that view is quite unsound. The letter shows no intention of any sort or kind that, as between the specific legatee and the residuary legatee, the debt should be borne by the latter. It merely shows an intention by the testatrix to pay off the mortgage herself in her own lifetime, and, above all, the letter shows no intention at all in relation to a mortgage which would be in existence at the date of the death of the testatrix.

Those observations appear to me to apply with equal force to the present case. The only difference is that in the present case a cheque was sent to the solicitors for the purpose of paying the purchase money. That seems to me to make no difference. It merely shows an intention on the part of the testator to pay the unpaid balance of the purchase money in his lifetime and it had no reference as to what the position would be after his death as regards the administration and distribution of his estate. In my opinion, the judgment of FARWELL, J., was right and this appeal must be dismissed with costs.

LUXMOORE, L.J.: I agree.

GODDARD, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Seaton, Taylor & Co.*, agents for *Arnold, Greenwood & Son*, Kendal (for the appellant); *Kingsford, Dorman & Co.*, agents for *Milne, Moser & Co.*, Kendal (for both the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

FARMER v. LONDON COUNTY COUNCIL.

[COURT OF APPEAL (Scott, MacKinnon and du Parcq, L.JJ.). May 4, 1943.]

Lunatics—Mental hospital—Nurse—Emergency during war—Nurse required to stand by for duty if necessary—Overtime—“Subject to standing orders regulations and rules.”

The appellant was a male nurse at a mental hospital. The terms of his employment were (*inter alia*) that the maximum number of hours that he should be required to work in any one fortnight should be 96 and that hours worked in excess of that number should be paid for as overtime. There was also included a term that he should be subject to the standing orders, regulations and rules from time to time in force, one of which, in the case of the appellant, was that he was permitted to be non-resident but might be, in rotation with other nurses, required to sleep in for stated periods to be fixed by the sub-committee. After the commencement of the war, the respondent council passed a resolution requiring a minimum number of the nursing staff, male and female, to be available on the premises at all times in case of an emergency, and for this purpose the non-resident staff were from time to time required to “stand by” from 9 p.m. till midnight. A payment of 1s. per night was made to each member of the nursing staff so required to “stand by,” and, if there was an emergency, the time the staff were on duty during such emergency was included in their hours of duty and paid for. The appellant contended that time spent standing by should also be included in his hours of duty and, in so far as it caused those hours to exceed 96 hours in a fortnight, it was overtime, and should be paid for at overtime rates:—

HELD: the appellant was not entitled to overtime pay in respect of the periods during which he was standing by and such duty was included in the contract of service by reason of the words “subject to the standing orders, regulations and rules.”

[EDITORIAL NOTE. During the war many additional precautions have to be taken and for this purpose many employees are required to remain on the premises in case their services are wanted. More often than not their services are not required and they are merely standing by. The question here was whether such hours were to be included in the hours of duty or whether for this purpose they were to be disregarded. The question was of importance to the employee because the additional hours would have had to be paid for at overtime rates. The Court of Appeal have decided that, since the contract of employment was expressed to be subject to the standing orders of the council, this standing-by must be treated as due to a variation of those standing orders and not to be extra hours of duty. It appeared that, in this case, employees standing by were paid 1s. per night for standing-by and, if it had been necessary, the council would have relied on a variation of the contract whereby in consideration of the payment of 1s. the employee agreed to stand by. It does not seem, however, that it was necessary for the council to rely at all upon this aspect of the matter.]

AS TO OFFICERS AND SERVANTS OF MENTAL HOSPITALS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 392, 393, para. 675; and FOR CASES, see DIGEST, Vol. 33, pp. 248, 249, Nos. 1683-1688.]

APPEAL by the employee from a decision of His Honour JUDGE WELLS given at the Southwark County Court on Jan. 26, 1943. The facts are fully stated in the judgment of SCOTT, L.J.

N. L. C. Macaskie, K.C., and R. Moelwyn Hughes for the appellant.

Valentine Holmes for the respondents.

SCOTT, L.J.: The appellant joined the hospital service of the London County Council in June, 1926, and then signed an application form which was accepted by the council. He became at first a nurse probationer and then a full nurse. The contract between the parties is contained partly in that application form and partly in regulations and orders which were incorporated into the contract pursuant to the terms to which he agreed in his application form.

The application form provided that the applicant, if appointed, should join the established nursing staff as a probationer nurse and that after six months' service a calendar month's notice or the payment of a calendar month's wages in lieu should be necessary to terminate the engagement. Then there was a provision about the scale of wages which does not matter for present purposes, and towards the end of the form there was a provision, under the heading of

"Hours of Duty," that the maximum ordinary hours of duty should be 96 in a fortnight. Then, under the head of "General," it was provided that the appointment should be held during the pleasure of the council, which must be subject to the term about notice that I have read; that it should be a whole time employment; and that the appellant should be subject to the standing orders, regulations and rules in force from time to time.

In 1922 a report of the General Purposes Sub-Committee had been made to the council, and that report had been adopted by the Statutory Lunacy and Mental Deficiency Committee of the council, and, therefore, came within the description of regulations or orders to which I have referred. Under the heading of "Male Nursing Staff; Question of Non-residence," it was provided that the non-resident male nursing staff should be divided into two classes. Class A comprised:

Those male nurses permitted by the Sub-Committee of the Institution to be altogether non-resident.

Class B comprised:

Male nurses permitted by the Sub-Committee to be non-resident who may be required, in rotation, to sleep in the institution for stated periods to be fixed by the Sub-Committee having regard to the maintenance in the Institution at night of a sufficient number of staff available for emergency duty.

Those terms were in force at the time when the appellant signed his application form and became a part of his contract. In addition there were two regulations which were pleaded by him in his particulars of claim:

618. The working hours of duty of the indoor staff (except certain members of the professional, administrative and clerical staff) in the mental health services, who, in the course of their duties, have the care or charge of patients shall be such as may be specified from time to time, provided that the maximum hours shall not be more than 96 in any one fortnight.

619. Payment shall be made at the rate of time-and-a-quarter for the first 2 hours and time-and-a-half thereafter for all overtime worked in excess of 96 hours in any one fortnight.

It is to be observed that those regulations referred to "the working hours of duty" in the one, and "overtime worked in excess of 96 hours" in the other.

Under that contract it is clear that the appropriate committee acting for the county council were entitled to make such alterations in the details of the working contract by standing orders, regulations and rules as from time to time they thought fit, and by accepting that position in his application form the appellant agreed in advance that they should have that power.

When the war broke out, it was obvious that the probability of emergencies arising was much increased, and on Sept. 10, 1940, a resolution was passed by the Mental Hospitals Committee to this effect:

That it be an instruction to each head of an institution in the mental health services to fix the minimum number of nursing staff, male and female, who must be available on the premises at all times, and, if necessary, to maintain those minima after day duty hours by requiring resident staff, including those non-resident staff who are performing sleeping-in duty, to stand by in rotation in the institution between the time of the termination of the day shift and the normal hour of return of resident staff to the institution at night.

Those provisions require a little explanation in relation to the practice at the hospital. The staff worked in three shifts, the first shift working from 7 in the morning until 2 o'clock in the afternoon, the second shift from 1 o'clock (and thus overlapping the first shift) till, I think, 9 o'clock in the evening, and the night shift from 9 o'clock in the evening until 7 o'clock the next morning. Of the nurses a certain proportion had to sleep in always, to be permanently in residence. Of those who were resident outside, a rota was established under which, in rotation, a proportion of them would come to sleep in the institution at night, and in regard to them, those who had worked the afternoon shift would normally cease work at 9 o'clock and have from 9 till midnight free; but this resolution provided that of those members of the staff who were required to sleep in, a proportion, to be fixed by the head of the institution, should during the hours from 9 to 12, in effect be available for emergencies, the expression being that they were "to stand by in rotation."

It is in regard to this duty to stand by in rotation that the claim was raised in the present case. The appellant was in that class of nurses, and the claim that he made was that he should be paid overtime for the three hours from 9 till midnight in any event, whether he was called upon for emergency, whether or not he was called upon to do what was, under the contract, work for the purpose of the contract.

That aspect of the matter was in fact dealt with by a further resolution of the council itself on Sept. 24, 1940, that is to say, a fortnight after the passing of the one that I have read, to this effect :

That for the duration of the war and subject to review, payment of 1s. a night be made to members of the nursing staff in the mental health services when they are required to "stand by" in their institution between the time when day duty ends and the hour at which resident staff who are out of the institution on evening leave must return [which was midnight].

That 1s. was in fact paid to the appellant among others, in respect of every evening that he was called upon in rotation to stand by.

The claim made was that for the hours in which he so "stood by," he should be paid overtime rates, and the essence of his claim was that the giving up of the three hours of what I will call "off-duty" or relaxation, during which he could return to his home, coupled with the obligation when at the hospital during those hours to be "available" for work, constituted work within the meaning of the overtime clause. The county court judge held that it did not, and that consequently the claim for overtime failed; and the main question in the case is whether stand-by time, in those circumstances, ought to be treated as working hours within the meaning of the contract to which I have referred. In my opinion, he was right in holding that it was not working time. Counsel, both below and before us, submitted on behalf of the London County Council that on the proper construction of the two regulations which I have read and which were relied on by the appellant as a part of the contract, there were no facts in evidence which would have entitled the judge, or which entitle us, to hold that the overtime pay clause attached. I agree, for the reasons that I have indicated in my references to the terms of the contract. There was, in my view, liberty reserved to the committee of the council, to make minor alterations in regard to the methods of carrying out duty; and that liberty was applicable to the order for a proportion of the non-resident people to sleep in, and also to the order that those who were called upon to come in during the three hours from 9 to 12 in rotation, should do it as part of their ordinary duty, and not be entitled to extra remuneration for overtime for doing so. It was open to them to spend their time from 9 to 12, if they chose, by sleeping upon their beds, provided they were available for emergency work so as to satisfy the requirement of standing-by to perform it in case of an emergency of any kind. In my view, there was no right to any extra payment for that. If there was any alteration of the original terms involved, it was covered by the power given to the committee by the provision which I quoted before, contained in the application form itself, that the applicant should be subject to the standing orders, regulations and rules in force from time to time.

Counsel for the respondents raised below and mentioned before us an alternative point if we were against him on his main submission, namely, that the arrangement about the 1s. should be deemed to have been accepted by the plaintiff as a variation of the contract; but that question does not arise now, and I only mention it in order to show that counsel kept that point open. For these reasons the appeal must be dismissed with costs.

MACKINNON, L.J. : I agree. The appellant in fact agreed to serve the council as a male nurse in Class B. In that capacity, in the terms of the document, he may be required to sleep in the institution so as to be available for emergency duty. There is no suggestion that when so sleeping he was doing his 96 hours ordinary duty or overtime in excess of that period; but it is agreed that, if he was called up from his sleep upon an emergency, the time spent until the emergency ceased and he could go back to bed again and sleep, was treated as within those hours of working duty. In fact, when the appellant so agreed with the council the directors of the hospital had ordained that people required to sleep at the hospital at night must come in at midnight. In September, 1940,

this was altered by a resolution, and the people who were to sleep at the hospital, were required to be in by 9. They in fact varied the exact nature or period of the duty which the appellant undertook to fulfil when he joined, or perhaps the duty which he had reason to think he was then undertaking; but when he so joined he agreed to be subject to the standing orders, regulations and rules in force from time to time. There has been a new regulation or rule changing the midnight hour to 9 p.m.; but when he has to come in as a night sleeper there at 9 p.m. instead of at midnight, his status in regard to remuneration is, I think, unchanged. That status is that he is waiting, or, as they call it, standing by, in case he is wanted to work in an emergency. If an emergency arises at any time after 9 p.m., the time until the emergency finishes will count, or did count, in his 96 hours of ordinary work for the purposes of his payment of overtime; but, if no such emergency arises between 9 p.m. and midnight, no time before midnight has to be treated as part of the 96 hours any more than any time spent in bed after midnight had to be confessedly so treated. For these reasons the appeal fails.

DU PARCQ, L.J.: This is a question of construction, and I agree, for the reasons which have already been fully stated, that this appeal should be dismissed, and there is nothing that I can usefully add.

Appeal dismissed with costs.

Solicitors: *Pattinson & Brewer*, agents for *Booth & Booth*, Manchester (for the appellant); *J. R. Howard Roberts* (for the respondents).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

HOLLINGTON v. F. HEWTHORN & COMPANY, LIMITED.

[COURT OF APPEAL (Lord Greene, M.R., Goddard and du Parcq, L.J.J.),
May 7, 11, 12, 28, 1943.]

Evidence—Admissibility—Motor car accident—Previous conviction—Written statement by deceased driver soon after accident—"Proceedings anticipated"—Evidence Act, 1938 (c. 28), s. 1 (3), (5).

The plaintiff's car was involved in a collision with a car owned by the defendants. The plaintiff's car was being driven by his son who had since died, though not as a result of the accident. The plaintiff brought an action for damage to his car and, as administrator, for personal injury sustained by his son. The defendants counterclaimed for negligence. At the close of the plaintiff's case, counsel for the defendants submitted that there was no case to answer and elected to call no evidence. Judgment was given for the plaintiff on both claim and counterclaim. The defendants appealed, and the plaintiff not only sought to uphold the judgment but contended that certain evidence tendered by him at the trial was wrongly rejected and, if the court should hold that there was no evidence to support the judgment, that there should be a new trial. The evidence which had been rejected at the trial was: (a) a certificate that the defendants' driver had been convicted of driving without due care and attention on the same day on which the accident occurred and in the same parish, and which, counsel contended, was admissible as *prima facie* evidence of negligence, and (b) a signed statement as to the cause of the collision made by the plaintiff's deceased driver to a police constable soon after the accident, and which, it was maintained, was admissible under the Evidence Act, 1938, s. 1 (3):—

HELD: (i) the damage to the cars was equally consistent with either car being at fault and the finding of negligence against the appellant could not be supported by the evidence.

(ii) a certificate of a conviction cannot be tendered in evidence in civil proceedings and, in the present case, the certificate was rightly rejected. On a subsequent civil trial the court should come to a decision on the facts before it without regard to the proceedings before another tribunal.

(iii) the statement made by the deceased driver to the police constable was made at a time when the deceased must have anticipated the likelihood of at least civil proceedings and, consequently, the statement was not admissible.

[EDITORIAL NOTE.] The judgment considers at full length the admissibility in evidence in civil proceedings of a conviction obtained in criminal proceedings. It was admitted that the conviction could not be tendered as conclusive evidence of the facts, but it was contended that it should be admitted as *prima facie* evidence. It was said that the objection to the admissibility of such evidence based on the maxim of *res inter alios acta* was answered by the fact that the conviction, if it was only *prima facie* evidence, could be explained, but the Court of Appeal are clear that the civil court must base its findings on the facts placed before it without any regard to the proceedings before another tribunal. Upon this point the Court of Appeal has critically examined three cases: *In the estate of Crippen* (13), *Partington v. Partington and Atkinson* (15), and *O'Toole v. O'Toole* (16), and holds that these cases go beyond and are contrary to the authorities and ought not to be followed in future. The point raised on the Evidence Act, 1938, turns entirely upon whether the statement was made with the likelihood of proceedings being taken in mind. It is held that the deceased must have anticipated that there would be such proceedings and the evidence is, therefore, inadmissible. It is not correct to say that *Robinson v. Stern* (1) decided that a statement made to a police officer inquiring into a road accident is never admissible. The court must read the statement and draw from it such inference as is reasonable on the question whether the maker of the statement must have anticipated that proceedings were likely to be taken in respect of the accident.

AS TO SIMILAR FACTS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 567-571, paras. 639-641; and FOR CASES, see DIGEST, Vol. 22, pp. 71-75, Nos. 421-438.]

AS TO NECESSITY FOR DECLARATION TO BE *ante litem motam*, see HALSBURY, Hailsham Edn., Vol. 13, pp. 592, 593, para. 659; and FOR CASES, see DIGEST, Vol. 22, pp. 121-123, Nos. 965-982.]

Cases referred to:

- * (1) *Robinson v. Stern*, [1939] 2 K.B. 260; [1939] 2 All E.R. 683; Digest Supp.; 108 L.J.K.B. 665; 161 L.T. 3.
- (2) *Isherwood v. Oldknow* (1815), 3 M. & S. 382; 31 Digest 422, 5681.
- (3) *Kingston's (Duchess) Case* (1776), 2 Smith L.C. 13th Edn., 644; 20 State Tr. 355, 573; 22 Digest 419, 4299.
- (4) *Green v. New River Co.* (1792), 4 Term Rep. 589; 22 Digest 311, 3028.
- (5) *R. v. Warden of the Fleet* (1698), 12 Mod. Rep. 337; 22 Digest 281, 2673; Holt, K.B. 133.
- (6) *Gibson v. McCarty* (1736), Lee temp. Hard. 311; 22 Digest 280, 2664.
- (7) *Hillyard v. Grantham* (circa 1727), cited 2 Ves. Sen., p. 246; 21 Digest 237, 668; 28 E.R. 159.
- (8) *Brownsword v. Edwards* (1751), 2 Ves. Sen. 243; 22 Digest 399, 4063.
- (9) *Blakemore v. Glamorganshire Canal Co.* (1835), 2 Cr. M. & R. 133; 21 Digest 189, 370; 4 L.J.Ex. 146.
- (10) *Castrique v. Imrie* (1870), 4 H.L. 414; 21 Digest 197, 422; 39 L.J.C.P. 350; 23 L.T. 48.
- (11) *Wilkinson v. Gordon* (1824), 2 Add. 152; 21 Digest 195, 409.
- (12) *March v. March* (1858), 28 L.J.P. & M. 30; 27 Digest 438, 4494.
- * (13) *In the estate of Crippen*, [1911] P. 108; 22 Digest 280, 2669 80 L.J.P. 47; 104 L.T. 224.
- (14) *Leyman v. Latimer* (1878), 3 Ex.D. 352; 22 Digest 280, 2667; 47 L.J.K.B. 470; 37 L.T. 819.
- * (15) *Partington v. Partington and Atkinson*, [1925] P. 34; 27 Digest 367, 3537; 94 L.J.P. 49; 132 L.T. 495.
- * (16) *O'Toole v. O'Toole* (1926), 42 T.L.R. 245; Digest Supp.; 134 L.T. 542.
- (17) *Jones v. Great Western Ry. Co.* (1930), 47 T.L.R. 39; Digest Supp.; 144 L.T. 194.
- (18) *Mash v. Darley*, [1914] 1 K.B. 1; 22 Digest 281, 2670; 83 L.J.K.B. 78; 109 L.T. 873; *affd.* on other grounds, [1914] 3 K.B. 1226.
- (19) *R. v. General Medical Council, Ex p. Spackman*, [1942] 2 K.B. 261; [1942] 2 All E.R. 150; Digest Supp.
- (20) *Richardson v. Williams* (1699), 12 Mod. Rep. 319; 22 Digest 310, 3022; 88 E.R. 1349.
- (21) *Smith v. Rummens* (1807), 1 Camp. 9.
- (22) *Hathaway v. Barrow* (1807), 1 Camp. 151; 17 Digest 114, 241.
- (23) *Barnett v. Cohen*, [1921] 2 K.B. 461; 13 Digest 260, 409; 90 L.J.K.B. 1307; 125 L.T. 733.
- (24) *Smith v. Selwyn*, [1914] 3 K.B. 98; 1 Digest 63, 516; 83 L.J.K.B. 1339; 111 L.T. 195.
- (25) *Admiralty Comrs. v. Amerika (Owners)*, [1917] A.C. 38; 1 Digest 35, 266; 86 L.J.P. 58; 116 L.T. 34; *affg.* S.C. *sub nom. The Amerika*, [1914] P. 167.
- (26) *Davis v. Nest* (1833), 6 C. & P. 167; 22 Digest 282, 2686; 2 Nev. & M.M.C. 161.
- (27) *Eaton v. Swansea Waterworks Co.* (1851), 17 Q.B. 267; 22 Digest 282, 2687; 20 L.J.Q.B. 482; 17 L.T.O.S. 154.

- (28) *Petrie v. Nuttall* (1856), 11 Exch. 569; 21 Digest 194, 403; 25 L.J.Ex. 200; 26 L.T.O.S. 204.
 (29) *R. v. Horton* (1871), 4 Price 150; 15 Digest 743, 8022; 11 Cox C.C. 670.
 (30) *Plomien Fuel Economiser Co., Ltd., v. National Marketing Co.*, [1941] Ch. 248; [1941] 1 All E.R. 311; Digest Supp.
 (31) *Collins v. London General Omnibus Co.* (1893), 63 L.J.Q.B. 428; 18 Digest 141, 905; 68 L.T. 831.
 (32) *Re Davy*, [1935] P. 1 Digest Supp.; 103 L.J. P. 115; 151 L.T. 562.

APPEAL by the defendants from a judgment of HILBERY, J., dated Oct. 22, 1942. The facts are fully set out in the judgment of the court read by GODDARD, L.J.

J. D. Casswell, K.C., and *E. Holroyd Pearce* for the appellants.

A. T. Denning, K.C., and *Harold S. Simmons* for the respondent.

Casswell, K.C.: It is impossible on the evidence to say which car was to blame, and there was no sufficient case for the defendant to answer. There was nothing proved that threw any burden upon the defendants except a mere surmise. [Counsel referred to *Jones v. Great Western Ry. Co.* (17) and CHARLES-WORTH ON NEGLIGENCE, p. 22.]

Denning, K.C.: If on all the evidence a legitimate inference can be drawn that the defendants' driver was negligent, no other question arises. If, however, it is held that there was insufficient evidence of negligence, two other points arise, (i) the admissibility of the conviction, (ii) the admissibility of the statement to the police constable. The conviction of driving without due care is admissible in evidence not as conclusive evidence but as *prima facie* evidence of negligence: *Wilkinson v. Gordon* (11), *In the estate of Crippen* (13), *Mash v. Darley* (18), *O'Toole v. O'Toole* (16), *R. v. General Medical Council* (19). Where a felony is also a civil wrong no action can be brought against the wrongdoer until he has been prosecuted. The maxim *res inter alios acta* should not apply where it would not injure another. The conviction would injure another if it was conclusive evidence but not if it were merely *prima facie* evidence, since it might then be explained. The statement made to the police constable was admissible under the Evidence Act, 1938, s. 1 (3). The section does not say "might reasonably be anticipated" but "anticipated." It cannot be ruled that because a statement has been made to the police it is inadmissible. Even if a caution has been given, it is not thereby ruled out. "Anticipated" does not mean "may be anticipated by any particular person." One must have regard to the circumstances of each case. *Robinson v. Stern* (1) is distinguishable. The person referred to in sect. 1 (3) of the Act means a person interested in proceedings. If this means criminal proceedings the respondent is not a person interested. The rule ought to be regarded stringently when the person who has made the statement is dead. [Counsel referred to *Gibson v. McCarty* (6), *Richardson v. Williams* (20), *R. v. Warden of the Fleet* (5), *Blakemore v. Glamorgan-shire Canal Co.* (9), *Partington v. Partington and Atkinson* (15), *Kingston's (Duchess) case* (3), *Smith v. Rummens* (21), *Hathaway v. Barrow* (22), *Barnett v. Cohen* (23), *Smith v. Selwyn* (24), *Admiralty (Lords Comrs.) v. Amerika (Owners)* (25), *Davis v. Nest* (26), *Eaton v. Swansea Waterworks Co.* (27), and *Petrie v. Nuttall* (28).]

Casswell, K.C.: The issue here is quite different from that which was before the magistrates. In *Mash v. Darley* (18), it was held on appeal that evidence of a prior conviction was wrongly admitted and that the conviction was not corroboration as required by the Bastardy Acts. All that the court had to decide in *In the estate of Crippen* (13) was whether there were special circumstances to justify the court in refusing administration to a person who had been appointed a personal representative of a man convicted of murder. It would be a dangerous thing to lay down that a previous conviction was always admissible as *prima facie* evidence. With regard to the statement made by the deceased driver, anything which is of the nature of a document which may be used afterwards in proceedings is the very sort of document which was meant to be excluded by sect. 1 (3) of the 1938 Act. There is no doubt that the respondent's driver must have had in mind the possibility of proceedings. [Counsel referred to *Richardson v. Williams* (20), *R. v. Horton* (29), *O'Toole v. O'Toole* (16), *Partington v. Partington and Atkinson* (15), *Robinson v. Stern* (1), *Plomien Fuel Economiser Co., Ltd. v. National Marketing Co.* (30) and *Collins v. London General Omnibus Co.* (31).]

Denning, K.C. : The current of authority is that a conviction should be admitted in evidence although not as conclusive evidence. With regard to the statement, if the parties are alive and can give evidence, a statement is unnecessary. The crucial test is whether a statement is admissible in evidence in such cases as the present one. With regard to the word "anticipated" in the Evidence Act, 1938, s. 1 (3), the degree of likelihood has to be considered. It would limit the effect of the Act very much if the court were to rule out statements in such cases as the present. [Counsel referred to *Re Davy* (32).]

GODDARD, L.J. [delivering the judgment of the court] : The action out of which this appeal arises related to a collision between a motor car owned by the plaintiff, which was being driven by his son, who was also originally a plaintiff, and another car owned by the defendant company and driven by the defendants' driver Poll. The plaintiff's son had died since action brought, though not as a result of the accident, and the action was continued by the plaintiff, as his administrator, to recover damages for the personal injury sustained by his son and also for the damage to his car. There was a counterclaim by the defendants alleging negligence on the part of the plaintiff's son ; but at the trial it was abandoned. HILBERY, J., gave judgment for the plaintiff : and it is against that judgment that the defendant appeals. The plaintiff not only seeks to uphold the judgment for the reasons given by the judge ; but contends that evidence tendered by him was wrongly excluded ; and so asks that, if this court should find that there was no evidence to support the judgment, there should be a new trial, at which evidence tendered by him and rejected could be given. Apparently no one except the drivers of the two cars saw the accident ; the driver of the plaintiff's car was dead ; and the only witness called by the plaintiff was a police constable, who spoke to the position of the cars when he arrived on the scene after the accident, and the plaintiff himself, who arrived there soon after the police constable. The latter found each car was on its proper side of the white line ; and there was no suggestion that either car had been moved between the time of the accident and his arrival. The defendants' car had its rear off-side wheel 2ft. from the white line, and the front near-side wheel 15ins. from the side of the road, which was 21ft. 4ins. wide. The plaintiff's car was pointing diagonally towards the off-side ; the rear near-side wheel was 5ins. from the near-side kerb, and the off-side wheel was 34ins. from the kerb, the front off-side wheel being 19ins. from the white line. There were no marks on the road ; but some oil had dripped on to the road from the plaintiff's car as it stood there. The front of the plaintiff's car was extensively damaged on both sides, that is, right across the front ; while the damage to the defendant's car was down its off-side and also on the off-side of the front. Both cars were practically level with each other. That was all the evidence that was given ; because, at the close of the plaintiff's case, counsel for the defendants submitted that there was no case to answer and elected to call no evidence. The judge, quite rightly, in our opinion, would not allow him, after his election to call no evidence on the claim, to call evidence confined to the counterclaim. Counsel therefore abandoned it ; and judgment was entered for the plaintiff upon it. That judgment only establishes that the plaintiff's driver was not negligent ; it cannot be used to show that the defendant was. On the claim the judge held that the plaintiff had established a case. From the position of the cars, as found by the police constable, and from the damage they had suffered, he drew the inference that the defendant had been on his wrong side, and had made a desperate effort to swerve back to his near side, and so went across the front of the plaintiff's car, thereby sustaining the damage that was found on his, the defendant's, car. We are unable to agree that this inference was justified. In our opinion, the damage to the cars was equally consistent with either car being at fault. There was no evidence that the defendant was ever on the wrong side of the white line ; or that he swerved : and it is possible that the judge was unconsciously influenced by what had been stated by counsel at the trial, in opening for the plaintiff, as to the nature of the evidence which he proposed to tender, but which was rejected. On the evidence which was before him, we do not think that a finding of negligence against the defendant can be supported.

The evidence which was rejected by the judge and which counsel, who now appears for the plaintiffs, contends ought to have been received was, first, a

certificate that the defendants' driver Poll had been convicted of driving without due care and attention on the day and in the parish in question; and, secondly, the signed statement made by the deceased driver to the police constable soon after the accident, which, it is said, is made evidence by the Evidence Act, 1938. As to the first, HILBERY, J., rejected it on the ground that it was *res inter alios acta*; and as to the second, he held that he was precluded from admitting it by the judgment of this court in *Robinson v. Stern* (1).

A Dealing first with the conviction, counsel for the plaintiff contends that, as he has to prove negligence as part of his case, he is entitled to put in the conviction, not as conclusive, but as *prima facie*, evidence that the defendant was driving negligently. He admits that he must prove by oral evidence, if it is not admitted, that the defendant is the person who was convicted; and also, as we understand his argument, that he would in some manner have to identify the negligence for which the defendant was convicted with that which caused the accident. The conviction will then still not be an estoppel; and it will be open to the defendant to show, if he can, that he ought not to have been convicted; or that the negligence of which he was convicted did not cause the accident: but counsel for the plaintiff says that the fact of his conviction is *prima facie* evidence that the defendant was guilty of negligence. Many years ago LORD ELLENBOROUGH, when considering the maxim *communis error facit jus* said that it was more true to say that *communis opinio* is evidence of what the law is: *Isherwood v. Oldknow* (2); and the first observation we would make on this part of the case is that it has been the invariable practice of the judges for many years, certainly for so long as any member of the court has been in the profession, to reject this class of evidence, so that nowadays counsel have ceased to tender it in accident cases. It is, of course, no reflection on counsel in this case that they contended for its admission; because here there is the unfortunate fact that the material witness is dead, and they had to consider whether there was evidence which, according to the rules of law, was admissible, whatever the prevailing practice might be. However, where it is clear that over a long period there has been a unanimous opinion, not only of most modern text-book writers, but among judges of first instance, that some particular class of evidence is inadmissible the court should be slow to differ from it unless it can be clearly shown that the *communis opinio*, which we are satisfied has hitherto prevailed, is based on wrong premises. Before dealing with the authorities, let us consider the question in the light of the principles of modern law relating to evidence and see whether they support the admissibility of the conviction on such an issue as arises in this case. We say of modern law because in former days, it is fair to say, the law paid more attention to the competency of witnesses than to the relevance of testimony. We are apt to forget that it was not only the parties who were incompetent, but also any person who was or could be interested in the question at issue; so that parties would sometimes go to court with releases already executed under seal, ready to be tendered to a witness to free him from any possible obligation that might prove an objection to his giving evidence. It was not till the Evidence Act, 1843, that interested witnesses, other than the parties, their husbands and wives, were rendered competent; and by the Evidence Act 1851, the parties, and by the Evidence (Amendment) Act 1853, their husbands and wives were at last enabled to give evidence. The law being what it was before these statutes were passed, it is not surprising to find SIR FITZJAMES STEPHENS saying, in his *DIGEST OF THE LAW OF EVIDENCE*, that the law of competency was formerly the most, or nearly the most, important and extensive branch of the law of evidence; and that rules of incompetency are nearly the only rules of evidence treated of in the older authorities. However, nowadays, it is relevance and not competency that is the main consideration; and, generally speaking, all evidence that is relevant to an issue is admissible, while all that is irrelevant is excluded. Is it then relevant to an issue whether the defendant by negligent driving collided with and thereby injured the plaintiff to prove that he had been convicted of driving without due care and attention on the occasion when the plaintiff was injured? As stated above, counsel for the plaintiff admits that he would have to identify the negligent driving which formed the subject of the charge with that which caused the injury to the plaintiff, for the record of the conviction itself would show no more than that the defendant was convicted for so driving on a certain day

and in a certain parish or place. In truth, the conviction is only proof that another court considered that the defendant was guilty of careless driving. Even were it proved that it was the accident that led to the prosecution, the conviction proves no more than what has just been stated. The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court: it cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision. Moreover, the issue in the criminal proceedings is not identical with that raised in the claim for damages. Assume that evidence is called to prove that the defendant did collide with the plaintiff, that has only an evidential value on the issue as to whether the defendant, by driving carelessly, caused damage to the plaintiff. In order to link up or identify the careless driving with the accident, it would be necessary in most cases, probably in all, to call substantially the same evidence before the court trying the claim for personal injuries, and so proof of the conviction by itself would amount to no more than proof that the criminal court came to the conclusion that the defendant was guilty. It is admitted that the conviction is in no sense an estoppel, but only evidence to which the court or a jury can attach such weight as they think proper. Nevertheless, it is obvious that once the defendant challenges the propriety of the conviction, the court, on the subsequent trial, would have to retry the criminal case, to find out what weight ought to be attached to the result. It frequently happens that a bystander has a complete and full view of an accident; it is beyond question that while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide; but in truth it is because his opinion is not relevant. Any fact that he can prove is relevant; but his opinion is not. The well-recognised exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant. Another rule of general application is that only the best evidence is admissible. Where the only witness to a fact is dead, a party is often placed in great difficulty; but, with certain well-settled exceptions, the death of a witness does not on that account render admissible evidence that would be objectionable if he were still alive. These exceptions are: (1) dying declarations, in the case only of murder or manslaughter; (2) declarations in the course of business or professional duty; (3) declarations against interest; (4) declarations by testators as to contents of their wills in certain cases; (5) declarations as to public and general rights, but not as to particular facts from which a right or custom can be proved; and (6) certain declarations as to pedigree. To these must be added certain statutory provisions as to putting in depositions taken under the Indictable Offences Act, 1848; and also statements now made evidence under the Evidence Act, 1938. But none of these matters relates to the subject that we have now to consider: and the fact that the plaintiff's son has since died affords no ground for allowing a conviction, which would not have been evidence had he been alive, to be now put in.

The trial judge rejected the conviction on the ground that it was *res inter alios acta*, which is the reason generally given for not admitting that class of evidence. No doubt it is difficult for a layman to understand why it is that if A prosecutes B, say, for doing him grievous bodily harm, and subsequently brings an action against him for damages for assault, this doctrine should apply so that he cannot use the conviction as proof that B did assault him. The "*alios*" can only be the Crown; who, in the case of what is commonly called a private prosecution, is no more than the nominal prosecutor. It is for this reason that we have stressed the question of relevancy; and, indeed, it is relevancy that lies at the root of the objection to the admissibility of the evidence. Other reasons can, of course, be given for the rule; and in other cases would have great force. A judgment obtained by A against B ought not to be evidence against C; for, in the words of SIR WILLIAM DE GREY, C.J., in the *Duchess of Kingston's* case (3), at pp. 644, 645:

... it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment that he might think erroneous: therefore... the judgment of the court upon facts found, although evi-

dence against the parties and all claiming under them, are not, in general, to be used to the prejudice of strangers.

This is true not only of convictions, but also of judgments in civil actions; if given between the same parties they are conclusive, but not against anyone who was not a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as some evidence of a fact which must have been found, owing mainly to the impossibility of determining what weight should be given to it without retrying the former case.

A judgment, however, is conclusive as against all persons of the existence of the state of things which it actually affects, when the existence of that state is a fact in issue. Thus, if A sues B, alleging that owing to B's negligence he has been held liable to pay £x to C, the judgment obtained by C is conclusive as to the amount of damages that A has had to pay C. But it is not evidence that B was negligent: see *Green v. New River Co.* (4); and B can show, if he can, that the amount recovered was not the true measure of damage.

We now turn to the authorities. Counsel for the plaintiff first relies on certain passages in GILBERT ON EVIDENCE, which is described by BLACKSTONE as an excellent treatise, which it is impossible to abstract or abridge without losing some beauty and destroying the chain of the whole (COMMENTARIES BK. III, c. 23). The author had long judicial experience as Lord Chief Baron, both in Ireland and in England; and his writings have always been held in high repute.

C This book, however, has, from the point of view of the modern lawyer, the disadvantage already referred to, that it deals so much more with competency than with any other subject. On the point we are now discussing, the learned author laid down that a verdict on an indictment should not be given in evidence if found only on the oath of the party in the cause, for that would enable him to give evidence indirectly on his own behalf. However, he maintained that, if the verdict was found partly on other evidence, it was admissible and ought to sway in the determination of the same fact, whether the verdict be on an indictment or action. It might be diminished in point of authority, he said, by showing that it was in part founded on the oath of the party and the jury were to respect it no further than they presumed it given on the credit of the other witnesses. The learned author cited no authority for this opinion other than stating: "This is the practice *ex relatione* Mr. Phipps 1700" (which was only two years after GILBERT was called to the Bar), and it would seem to confront a jury with an impossible task. The editor of the second edition of BULLER'S NISI PRIUS, evidently took the view that a verdict obtained even in part on a party's evidence could not be admitted (see p. 245, note (a)); and it is fair to say that the learned author gave no clear assistance on the matter one way or the other. The note to which reference has just been made and for which BRIDGEMAN, who edited the second edition, is responsible, says:

F . . . the effect of verdicts in criminal cases on the civil rights of the parties does not appear to be clearly settled.

This was the view of the author of PEAKE ON EVIDENCE, as is shown in his preface to the 2nd. edition published in 1808; and at p. 46 he summed up the cases to which he had referred in the earlier pages by saying that they seemed to show that such evidence was in no case admissible, though he said "this is opposed to the *dictum* of GILBERT." STARKIE, writing in 1833, said:

G As a general rule it seems that a verdict or judgment in a criminal case is not evidence of the fact upon which the judgment was founded in a civil proceeding.

For this he cites *R. v. Warden of the Fleet* (5). It is true that Modern Reports have been said to be of little or no authority; but this case is also reported in almost precisely the same terms in the volume of reports that bears the name of SIR JOHN HOLT, C.J.; and, unlike many of the cases in this series, this is a full report and, as we have just said, was treated as an authority by STARKIE. In the case as reported, it was laid down by the full court in a trial at Bar that a conviction could be no evidence against the warden upon a debt on a bond, nor for the prisoner in false imprisonment against the warden, because it would not be between the same parties; for conviction at the suit of the King for battery cannot be given in evidence in an action for trespass for the same battery. The next case is *Gibson v. McCarty* (6). The admission of a conviction was opposed on the ground that it might have been obtained upon the evidence of

the party. LORD HARDWICKE, C.J., rejected the evidence on this ground, but referred to a case relating to the family of the Hillyards. The case he had in mind is evidently *Hillyard v. Grantham* (7), in which he had been counsel and to which he refers in some detail in *Brownsword v. Edwards* (8). In that case he said that, at trial in the King's Bench on a question of legitimacy, the sentence of a consistory court that the father and mother had lived in fornication was rejected, first, because it was a criminal matter and could not be given in evidence in a civil case; and, secondly, because it was *res inter alios acta* and could not affect the issue. The importance of this is that it would seem that, when ruling on the evidence in *Gibson v. McCarty* (6), LORD HARDWICKE, C.J., had in mind the doctrine that *res inter alios acta* could not be relevant to the issue. *Blakemore v. Glamorganshire Canal Co.* (9) shows that the earlier cases, while based on nice considerations as to competency of witnesses, might all have been decided on the fact that they were *res inter alios acta* and so inadmissible. The judgment in that case was delivered by PARKE, B., and is a clear authority against the admission of this class of evidence. So, too, is the passage in the opinion of BLACKBURN, J., delivered to the House of Lords in *Castrique v. Imrie* (10). He said, without any qualification, that a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, was not only not conclusive, but was not even admissible evidence of the forgery in an action on the bill.

We turn now to the cases on which counsel for the plaintiff relies. In *Wilkinson v. Gordon* (11), SIR JOHN NICHOLL, dealing with whether the record of a conviction could be admitted to prove a bigamy, said, at p. 161 :

I apprehend the true rule to be that a record of conviction is *evidence* of the same fact in a civil cause, only that it is not *conclusive evidence* . . . and for this he cited GILBERT ON EVIDENCE. This was a case in the Prerogative Court, and decisions at Doctors Commons were not binding on the courts at Westminster. The decision was given in 1824, and so was before the judgment of the Court of Exchequer in *Blakemore's* case (9). Moreover, the exact contrary was ruled in 1858 by SIR CRESSWELL CRESSWELL as JUDGE ORDINARY, in *March v. March* (12), where, in giving leave to prove a divorce case based on bigamy by affidavit evidence, he said, at p. 30 :

Remember the bigamy must be proved. Proof of the conviction for bigamy will not suffice.

It may frequently happen that, where bigamy or any other crime has to be proved in a civil proceeding, the prisoner on his trial had pleaded guilty. Proof by a witness present at the trial of the confession is admissible, because an admission can always be given in evidence against the party who made it. In the present case, had the defendant before the magistrates pleaded guilty, or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved, but not the result of the trial. It remains to deal with three more recent cases, all in the Probate, Divorce and Admiralty Division. The first is *In the estate of Crippen* (13). In that case the administration of the estate of an intestate wife was sought, passing over the legal personal representative of her husband, who had been convicted of murdering her. SIR SAMUEL EVANS, P., admitted the conviction as proof that the husband had murdered her. The only point that was actually decided was that the fact that the husband was a convicted felon was a sufficient special circumstance to justify passing over his personal representative; and so far the decision is beyond criticism. However, SIR SAMUEL EVANS, P., went on to consider the cases, some of which have already been cited in this judgment; and came to the conclusion that he could admit the conviction as *prima facie* proof that the husband had murdered his wife. The convenience of the decision is obvious; but we cannot agree that the authorities support it. It is difficult to understand how SIR SAMUEL EVANS, P., regarded the judgment of BRAMWELL, L.J., in *Leyman v. Latimer* (14), which he quoted but apparently disregarded. That was a libel action; and the words complained of were that the plaintiff was a convicted felon, which was strictly true; but later in the libel he was called also a felon editor. To justify the last words, BRAMWELL, L.J., said that the defendants must show that the plaintiff had actually committed felony; and then said, at p. 354 :

It is plain from the numerous authorities cited in TAYLOR ON EVIDENCE . . . that

a conviction for felony is *res inter alios acta*, and of itself is no evidence in a civil proceeding, that the person convicted has committed a felony.

One would have thought this was a sufficiently clear ruling by a very high authority. Nor can we agree with the view that SIR SAMUEL EVANS, P., took of the passage from the opinion of BLACKBURN, J., in *Castrique v. Imrie* (10), already cited. With all respect to the opinion of SIR SAMUEL EVANS, P., we do not think that the authorities justified him in admitting the conviction as proof that the husband had murdered his wife. The next case is *Partington v. Partington and Atkinson* (15). There a husband, who had previously been found to have been guilty as a co-respondent, petitioned for divorce. Counsel for the co-respondent in the husband's suit put in the decree in the former suit, apparently without objection; and the petitioner's counsel appear to have accepted that it was some evidence against him, though not an estoppel. The authorities we have been considering were not cited; and the matter seems to have been treated as a matter of practice. HORRIDGE, J., admitted the decree as some evidence, though not as an estoppel; and allowed the petitioner to give evidence denying the adultery which had been found against him in the previous suit. Then in *O'Toole v. O'Toole* (16), HILL, J., admitted proof of a conviction of the respondent for perjury, in swearing that he had not had connection with a certain woman, as evidence that he had committed adultery with her. The learned judge obviously had considerable doubt on the matter, but thought *Partington's* case (15) justified him in admitting the evidence. In our opinion, these three cases go beyond and are contrary to the authorities and ought not to be followed in future.

There is one further observation we may make on this part of the case: The contention that a conviction or other judgment ought to be admitted as *prima facie* evidence is usually supported on the ground that the facts have been investigated, and the result of the previous investigation is, therefore, at least some evidence of the facts that have been established thereby. To take the present case, it could be said that the conviction shows that the magistrates were satisfied, on the facts before them, that the defendant was guilty of negligent driving. If that be so, it ought to be open to a defendant who had been acquitted to prove it, as showing that the criminal court was not satisfied of his guilt; though the discussion by text-book writers and in the cases all turn on the admissibility of convictions, not of acquittals. If a conviction can be admitted, not as an estoppel, but as *prima facie* evidence, so ought an acquittal: and this only goes to show that the court trying the civil action can get no real guidance from the former proceedings without retrying the criminal case. Without dealing with every case and text-book that was cited in the argument, we are of opinion that, both on principle and authority, the conviction was rightly rejected.

Before parting with this question, we may add that in a note in the *LAW QUARTERLY REVIEW*, Vol. 42, p. 144, it is suggested that these 3 cases in the Probate Division can be supported by the application of the maxim *Omnia praesumuntur rite esse acta*. The author of the note would limit the admissibility as *prima facie* evidence of judgments which are *res inter alios acta* to those cases in which the state has an interest in seeing that the truth of the facts necessary to support the judgments is established, that is to say, convictions and decrees *nisi*: and this, he contends, is required as a matter of common sense. If such an exception is made, it ought to be by legislation and not by judicial decision. In any case, it is a very debatable point whether more weight ought to be given to a conviction or a decree *nisi* than to any other judgment. The King's Proctor does not and cannot investigate every case in which a decree *nisi* is granted. With the enormous increase in divorce cases that has taken place in the last 20 years, it would be impossible to inquire into more than a very small proportion. Nor do we see that there is any more reason why the decision of a criminal court, whether a court of summary jurisdiction, quarter sessions or assizes, should be considered of greater evidential value than one given in a court exercising civil jurisdiction. If a conviction for murder is admissible, so must one be for a motoring or licensing offence; and to say that the state has an interest in these summary convictions so as to attribute particular value to them as evidence, seems to us, with all respect, to be more theoretical than practical. In many, perhaps in most, cases the correctness of the conviction

would not be questioned; but where it is, only by a retrial on the same evidence can its value be assessed. However convenient the other course may be, it is, in our opinion, safer in the interests of justice that on the subsequent trial the court should come to a decision on the facts placed before it, without regard to the result of other proceedings before another tribunal.

The last point that arises is whether the statement made by the deceased to the police constable ought to have been admitted under the provisions of the Evidence Act, 1938. The judge, without looking at the statement, refused to admit it, holding that the question of its admissibility was concluded by the judgment of this court in *Robinson v. Stern* (1). The question turns on sect. 1 (3) of that Act, which renders inadmissible a statement by a person interested at a time when proceedings were pending, or anticipated, involving a dispute as to any fact which the statement might tend to establish. *Robinson v. Stern* (1) did not decide that a statement made to a constable, who is inquiring into the facts of a road accident, can never be admitted. It depends on whether the person making it is interested, as no doubt ordinarily the driver of a car involved in the accident would be; and also on whether proceedings are pending or anticipated. To enable the court to decide on the admissibility of the statement, the court is permitted by sect. 1 (5) to look at it, and then draw any reasonable inference from its form and contents, which is what this court did in the case cited; and from which they drew the inference that the defendant in that case must have anticipated proceedings. We have looked at the statement that was tendered in evidence in this case: and counsel have agreed that the warning required by the Road Traffic Act, 1930, s. 21, was given to the deceased before he made it. In the circumstances of this case, we do not draw any inference from that fact; it was not the same sort of warning, nor were the circumstances under which it was given the same as in *Robinson v. Stern* (1). Here we find from the statement that the defendant at first practically admitted that the accident was his fault; but some time afterwards came and said it was the fault of the deceased. In these circumstances we think that the deceased must have anticipated the likelihood at least of civil proceedings and, consequently, the statement was not admissible.

The result is that the defendant's appeal succeeds; and there is no ground for sending the case back for a new trial. Judgment will be entered for the defendant with costs here and below.

Appeal allowed with costs.

Solicitors: *P. A. Gascoïn* (for the appellants); *Leader, Henderson & Leader* (for the respondent).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

CORPORATION OF GLASGOW *v.* MUIR AND OTHERS.

[HOUSE OF LORDS (Lord Thankerton, Lord Macmillan, Lord Wright, Lord Romer and Lord Clauson), **January 7, 29, April 16, 1943.**]

Negligence—Invitees—Children injured by scalding tea spilt from urn being carried through narrow passage—Whether danger reasonably foreseeable—Standard of care owed by occupier.

Members of a church picnic party in King's Park, Glasgow, obtained permission from the manageress employed by the appellants to have their tea in the tea room owing to the unfavourable weather conditions. It was necessary to carry the tea urn through a narrow passage on one side of which was a counter where several children were buying sweets or ices. The urn was being carried through the passage by the church officer and a boy, the boy holding the front handle and the officer the back one, when for some unexplained reason the latter let go his handle and scalding tea escaped from the urn, injuring 6 children. It was contended for the respondents that the manageress of the tea room should have anticipated that there was a risk of the contents of the urn being spilt and scalding some of the children and that her omission to remove the children from the passage during the transit of the urn constituted a breach of her duty to take reasonable care of the children :—

HELD : the appellants were not liable in negligence to the respondents. A reasonable person would not have anticipated danger to the children, the invitees of the appellants, from the use of the premises permitted by them.

[EDITORIAL NOTE. Cases dealing with the duty of the occupier of premises towards an invitee have usually arisen out of some defect in the repair or condition of the premises. Here the point arises out of the use which the occupier has permitted a third party to make of the premises. The same test has to be applied in each case and the test is whether such foresight as a reasonable man would exercise has been exercised by the occupier. The test is an impersonal one and eliminates the personal equation. The reasonable man is free both from over-confidence and over-apprehension. The standard by which the scope of the duty must be determined is what the hypothetical reasonable man would have foreseen. It is helpful to have a case which is not complicated by questions of whether the injured parties are invitees, licensees or mere trespassers and where the duty can be discussed and stated free from any such complication.

AS TO DUTY OF CARE TO INVITEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 604-606, paras. 853, 854; and FOR CASES, see DIGEST, Vol. 36, pp. 40-43, Nos. 247-266.]

Cases referred to :

* (1) *Hay (or Bourhill) v. Young*, [1943] A.C. 92; [1942] 2 All E.R. 396; Digest Supp.; 111 L.J.P.C. 97; 167 L.T. 261.

(2) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.

(3) *Indermaur v. Dames* (1866), L.R. 1 C.P. 274; 36 Digest 35, 208; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* (1867), L.R. 2 C.P. 311.

(4) *Heaven v. Pender* (1883), 11 Q.B.D. 503; 36 Digest 8, 9; 52 L.J.Q.B. 702; 49 L.T. 357.

(5) *Addie (R.) & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; Digest Supp.; 98 L.J.P.C. 119; 140 L.T. 654.

* (6) *Excelsior Wire Rope Co., Ltd. v. Callan*, [1930] A.C. 404; Digest Supp.; 99 L.J.K.B. 380; 142 L.T. 531.

* (7) *Cox v. Coulson*, [1916] 2 K.B. 177; 36 Digest 40, 242; 85 L.J.K.B. 1081; 114 L.T. 599.

APPEAL by the defenders in an action to recover damages for personal injuries from the decision of the First Division of the Inner House of the Court of Session, Lord President NORMAND dissenting. The facts are fully stated in the opinion of LORD THANKERTON.

D. P. Blades, K.C., and *G. A. Montgomery* (Scottish Bar) for the appellants. *Arthur P. Duffes, K.C.*, and *James Walker* (Scottish Bar) for the respondents.

LORD THANKERTON : My Lords, this action arises out of an unfortunate accident to six young children on June 15, 1940, in the old mansion house in the King's Park, Glasgow, which belongs to the appellants. At that time the mansion house was being used *inter alia* for the service of tea to visitors to the park and also as a shop for the sale of sweets and ices. The mansion house is now in military occupation. The witness, Mrs. Emily Alexander, was manageress of the tea rooms and shop on behalf of the appellants, and the action is based on the alleged negligence of Mrs. Alexander in breach of a duty to take reasonable care of the children.

After a proof before answer, the LORD ORDINARY, LORD ROBERTSON, on June 6, 1941, assolized the appellants, but his interlocutor was recalled by the first division of the Court of Session, the LORD PRESIDENT dissenting, by interlocutor dated Nov. 7, 1941, and, the amount of damages having been agreed, subject to reservation of the defenders' right to bring the present appeal, decree was given for the agreed amounts by interlocutor dated Dec. 2, 1941. At the hearing of the appeal the question of liability was alone argued.

About 200yds. from the mansion house, at the top of a hill, there is a shelter for the convenience of picnic parties and the general public, at the back of which there is a boilerhouse, at which picnic parties can obtain, for a moderate charge, boiling water to make their tea. Weather permitting, the usual practice is for the picnic parties to eat their tea in the field which lies between the shelter and the mansion house.

On the day of the accident, it had come on very wet in the afternoon, and there were at least two picnic parties who desired shelter. One of these, which came from Rutherglen, was a large one, comprising 650 children and 250 adults ;

the other party, which came from Milton Street Free Church, consisted of 30 or 40 persons, including George McDonald, the church officer. The larger party having absorbed the accommodation in the shelter, two members of the church party went down to the mansion house, and got permission from Mrs. Alexander to use the tea room in the mansion house for eating their own tea, at a charge of 12s. 6d. Thereafter the church party brought their tea urn and their eatables to the mansion house.

It is necessary to give some idea of the space available for the carrying of the tea urn from the front door to the tea room, which is shown on the ground plan made and proved by the witness Thomas Lucas. A short flight of steps leads up to the double doors by which entry is obtained to what may be called the entrance hall or passage. On passing through the doors, the passage runs towards the tea rooms on the left hand, while immediately opposite, on the other side of the passage, is the counter at which the sweets and ices are sold, and, to the left, in continuation of the line of the counter, there is a showcase. The counter is about 5ft. long and the showcase is over 3ft. long. Between the doorway—ignoring the space necessary for the inward opening of the doors—and the counter the space is nearly 5ft. wide, but, as you turn left-handed to proceed to the tea room, the space narrows on the left side until, opposite the innermost end of the showcase, there is only 3ft. 3ins. of passageway, at which width the passage continues so far as is material to the present case.

The tea urn of the church party was carried so far down the hill by George McDonald and a boy Murray abreast, the cakes being carried by James Taylor ; before they reached the mansion house, Taylor took Murray's place, McDonald having one handle, and Taylor the other one. At the entrance door, they found it necessary to proceed in single file, Taylor having the front handle and McDonald the back handle. At the time of their entry there were about a dozen children from the other party, who were buying sweets or ices at the counter. There can be no doubt that, just after Taylor and McDonald had turned left-handed, McDonald let go the handle by which he was carrying the urn, and some scalding hot tea escaped from the urn and injured the 6 children already referred to, Eleanor Muir, in particular, having sustained serious injuries.

It is a remarkable fact that no witness is produced who saw the accident happen. Taylor, although he felt McDonald let go his handle and was able to get the urn on to its base on the floor before it completely overturned, could give no competent evidence as to why McDonald let go. The evidence of the witness Jeffrey as to the cause of the accident was equally incompetent. Mrs. Alexander, who was serving the children at the counter, had her back turned when it happened, as she was taking ice cream from the freezer. None of the children saw it happen. Neither McDonald nor Murray was produced as a witness, and no explanation was given of their absence.

My Lords, it is worth noting the averments of the pursuers in condescendence, 3, where they state :

... the urn, which was at least 2ft. in height, when filled with hot tea was a heavy load, and difficult to carry not only because of its weight, but owing to the risk of some of the hot liquid coming in contact with the hand of a person carrying it and so causing him to drop his side of the urn. It is believed and averred that this occurred on the occasion of the accident. The carrying of the said urn with its contents through said shop created a serious danger particularly when being carried as it was through a narrow passage near a crowd of persons including many children. . . . The said accident was the natural and probable result of the defenders' permitting the said urn to be brought on to their premises in the circumstances condescended on, and of their failure to protect the said children therefrom.

The pursuers averred that, for a long time, the defenders had allowed and encouraged picnic parties to bring their urns and food into the tea rooms. It is not now disputed that the present occasion was the first one on which that had occurred. It is also proved, by their own evidence, that the urn in question is about 16ins. high, with an external over-all width of about 18ins., that its capacity is over 9 gallons, that it is of an ordinary type, and that, if carried carefully, it involves no danger. On the evidence, it appears that, at the time of the accident, the urn was, at the most, not more than two-thirds full.

My Lords, on a careful consideration of the opinions in the courts below, it appears to me to be accepted by the parties and by all the judges that there rested on Mrs. Alexander, as representing the appellants, a duty to take reason-

able care for the safety of the children who had come on to the premises to purchase sweets and ices. But there was a serious difference between the three judges who formed the majority in the First Division on the one hand and the LORD PRESIDENT and the LORD ORDINARY on the other hand, as to the standard of care which the circumstances imposed on Mrs. Alexander and I shall state the test by which, in my opinion, the standard of care is to be judged, and this I will do by two quotations from the recent decision of this House in the Scottish case of *Bourhill v. Young* (1). I take from my own opinion, on p. 98, that the duty :

... is to take such reasonable care as will avoid the risk of injury to such persons as he can reasonably foresee might be injured by failure to exercise such reasonable care.

and from the opinion of my noble and learned friend LORD MACMILLAN, on p. 104 :

The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.

In my opinion, it has long been held in Scotland that all that a person can be held bound to foresee are the reasonable and probable consequences of the failure to take care, judged by the standard of the ordinary reasonable man.

I am unable to agree with LORD CARMONT that the appellants could be made liable :

... even if it were proved that the actual damage to the invitee happened through the tea urn being spilt in a way that could not reasonably have been anticipated.

Further, this is essentially a jury question, and, in cases such as the present one, it is the duty of the court to approach the question as if it were a jury, and a

Court of Appeal should be slow to interfere with the conclusions of the LORD ORDINARY. The court must be careful to place itself in the position of the person charged with the duty and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not to give undue weight to the fact that a distressing accident has happened, or that witnesses, in the witness box, are prone to express regret, *ex post facto*, that they did not take some step, which it is now realised would definitely have prevented the accident.

In my opinion, the judges of the majority have made far too much of that which LORD MONCRIEFF regarded as an admission by Mrs. Alexander. It is not an admission in the sense that it can bind the appellants, though it may be of some evidential value as to what the ordinary person would regard as a reasonable standard of care ; for myself, I regard it of little value, in view of what I have said above, in assisting the court to form its conclusion, as a jury, as to the reasonable standard of care. I also am of opinion that LORD MONCRIEFF is not justified in regarding the event as demonstrating the risk, and that, in particular, because there is no evidence as to why McDonald let go his handle, but I will deal with this aspect of the case later, in other words, what event it was that caused the accident.

The ground of the majority judges, as I understand it, is that Mrs. Alexander, while authorising the transport of the tea urn through the entrance passage, where the sweets and ices were being sold to a large number of children, omitted to remove the children altogether from the passage-way, so as to avoid a danger which should have been obvious to her. In my opinion, this is to turn Mrs. Alexander into something like an insurer against any risk of danger from the tea urn. On the evidence, it is established, as I have already stated, that, if carefully carried, there was no element of danger to be reasonably anticipated from the operation of carrying the urn. Differing from LORD CARMONT, I am

clearly of opinion that the standard of care owed by the two persons in charge of the urn to the children was at least as high as that owed by Mrs. Alexander ; they were even more cognisant than Mrs. Alexander of the position in the passageway when they entered it with the urn ; Mrs. Alexander knew nothing that they did not know, and the point taken by LORD CARMONT that they had no authority to make the children stand aside appears to me to be immaterial, as, on failure of the children to stand aside, they had only to ask Mrs. Alexander to attend to it, and to put down the urn until sufficient space was cleared. On the evidence of the pursuers' witness Taylor, they did ask the children

to stand aside and the children had cleared sufficient space to enable him to get comfortably past them. There is no evidence that it was any want of care on the part of McDonald that caused the accident or that the children hustled him and caused him to let go. There may have been some cause, such as a physical failure on McDonald's part, which he—and still less Mrs. Alexander—could not possibly have foreseen. I am not prepared to find that the careful carriage of the tea urn past the dozen or so of children in the wider end of the passage involved such an obvious danger as would have been foreseen as a natural and probable consequence of such carriage by an ordinary reasonable person which would lead him to clear the children out of the passage. But, further, let me make it quite clear that, even on the contrary view, I would hold that the pursuers must fail here, as they have not proved what the event was that caused the accident. If the truth were that the accident was caused by some unexpected physical failure on McDonald's part, it is not enough for the pursuers to say that, if the children had been removed, the accident could not have happened. That would be to make Mrs. Alexander, on behalf of the appellants, an insurer.

Though I have expressed the tests of the standard of duty in my own way, I agree substantially with the opinions of the LORD PRESIDENT and LORD ROBERTSON. It follows that the appeal should be allowed, that the interlocutor of the first division should be recalled, and the interlocutor of the LORD ORDINARY dated June 6, 1941, should be restored. The appellants should have the costs of this appeal and their expenses in the Inner House. I move accordingly.

LORD MACMILLAN: My Lords, the degree of care for the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances. There is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved. Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life. It is no doubt true that in every act which an individual performs there is present a potentiality of injury to others. All things are possible and, indeed, it has become proverbial that the unexpected always happens. But while the precept *alterum non laedere* requires us to abstain from intentionally injuring others, it does not impose liability for every injury which our conduct may occasion. In Scotland, at any rate, it has never been a maxim of the law that a man acts at his peril. Legal liability is limited to those consequences of our acts which a reasonable man of ordinary intelligence and experience so acting would have in contemplation. As I essayed to formulate it in *Bourhill v. Young* (1), at p. 104:

The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed. This, in my opinion, expresses the law of Scotland and I apprehend that it is also the law of England.

The standard of foresight of the reasonable man is in one sense an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions; others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence. But there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what in the circumstances of the particular case the reasonable man would have had in contemplation and what accordingly the party sought to be made liable ought to have foreseen. Here there is room for diversity of view, as, indeed, is well illustrated in the present case. What to one judge may seem far-fetched may seem to another both natural and probable.

With these considerations in mind, I turn to the facts of the occurrence on which your Lordships have to adjudicate. Up to a point the facts have been sufficiently ascertained. They have been recounted by my noble and learned friend LORD THANKERTON. The question, as I see it, is whether Mrs. Alexander, when she was asked to allow a tea urn to be brought into the premises under

her charge, ought to have had in mind that it would require to be carried through a narrow passage in which there were a number of children and that there would be a risk of the contents of the urn being spilt and scalding some of the children. If as a reasonable person she ought to have had these considerations in mind, was it her duty to require that she should be informed of the arrival of the urn and, before allowing it to be carried through the narrow passage, to clear all the children out of it, in case they might be splashed with scalding water?

The urn was an ordinary medium-sized cylindrical vessel of about 15ins. diameter and about 16ins. in height, made of light sheet metal with a fitting lid, which was closed. It had a handle at each side. Its capacity was about 9 gallons, but it was only a third or a half full. It was not in itself an inherently dangerous thing and could be carried quite safely and easily by two persons exercising ordinary care. A caterer, called as a witness on behalf of the pursuers, who had large experience of the use of such urns, said that he had never had a mishap with an urn while it was being carried. The urn was in charge of two responsible persons, McDonald, the church officer, and the lad Taylor, who carried it between them. When they entered the passage-way they called out to the children there congregated to keep out of the way and the children drew back to let them pass. Taylor who held the front handle had safely passed the children when, for some unexplained reason, McDonald loosened hold of the other handle, the urn tilted over and some of its contents were spilt, scalding several of the children who were standing by. The urn was not upset but came to the ground on its base.

In my opinion, Mrs. Alexander had no reason to anticipate that such an event would happen as a consequence of granting permission for a tea urn to be carried through the passage-way where the children were congregated, and consequently there was no duty incumbent on her to take precautions against the occurrence of such an event. I think that she was entitled to assume that the urn would be in charge of responsible persons (as it was) who would have regard for the safety of the children in the passage (as they did have regard) and that the urn would be carried with ordinary care, in which case its transit would occasion no danger to bystanders. The pursuers have left quite unexplained the actual cause of the accident. The immediate cause was not the carrying of the urn through the passage, but McDonald's losing grip of his handle. How he came to do so is entirely a matter of speculation. He may have stumbled or he may have suffered a temporary muscular failure. We do not know and the pursuers have not chosen to enlighten us by calling McDonald as a witness. Yet it is argued that Mrs. Alexander ought to have foreseen the possibility, nay, the reasonable probability of an occurrence the nature of which is uncertain. Suppose that McDonald let go his handle through carelessness. Was Mrs. Alexander bound to foresee this as reasonably probable and to take precautions against the possible consequences? I do not think so. The only ground on which the view of the majority of the judges of the first division can be justified is that Mrs. Alexander ought to have foreseen that some accidental injury might happen to the children in the passage if she allowed an urn containing hot tea to be carried through the passage and ought, therefore, to have cleared out the children entirely during its transit, which LORD MONCRIEFF describes as "the only effective step." With all respect I think that this would impose upon Mrs. Alexander a degree of care higher than the law exacts.

There is a passage in Mrs. Alexander's evidence on which reliance is placed by LORD MONCRIEFF and LORD CARMONT as tantamount to an admission on her part of a failure of duty. But the answers which she gave with creditable candour to the leading questions of cross-examining counsel are, in my opinion, quite natural expressions on her part of wisdom after the distressing event. She says that, if she had been told of the arrival of the men with the urn, as she expected she would be, she "certainly would have got them [the children] away from the entrance at the doorway." That is just what McDonald and Taylor evidently did. I do not think that Mrs. Alexander's evidence amounts to an admission of negligence on her part and in any case it is not an admission binding on the defenders.

No special point arises from the circumstance that the injured children were invitees on the defenders' premises. They were entitled to rely on not being

exposed while on the premises to any risk occasioned by the negligence of the defenders or their servants. As, in my opinion, no negligence has been established I agree with what I understand to be the view of all your Lordships that the appeal should be allowed and the judgment of the LORD ORDINARY restored.

LORD WRIGHT [read by LORD CLAUSEN]: My Lords, it is impossible not to feel a desire that the children, by or on behalf of whom these proceedings have been taken, should be compensated for the injuries sustained by them. It is true that the accident could not have occurred but for the action of Mrs. Alexander, the appellants' manageress, in giving permission that the tea urn should be carried through the short but narrow passage in which the children, about a dozen in number, were waiting as customers at the appellants' sweet counter to buy ices or sweets. But in order to establish liability, the court has to be satisfied that the appellants owed a duty to the children, that that duty was broken, and that the children were injured in consequence of the breach. That the appellants owed a duty to the children is not open to question. Your Lordships are not, therefore, on this occasion exercised by the problem which was presented recently in *Bourhill v. Young* (1), which was whether the person injured came within the limits of foreseeable harm from the acts complained of. Here the children were on the appellants' premises in full view of Mrs. Alexander, the appellants' responsible servant, and were plainly liable to be injured if the place in which they were was rendered dangerous to them by Mrs. Alexander's act in consenting to the urn being carried through the place. The question thus is whether Mrs. Alexander knew or ought to have known that what she was permitting involved danger to the children. The same criterion applies in this connection as applied in the kindred problem in *Bourhill's* case (1), that is to say, the criterion of reasonable foreseeability of danger to the children. It is not a question of what Mrs. Alexander actually foresaw, but what the hypothetical reasonable person in Mrs. Alexander's situation would have foreseen: the test is what she ought to have foreseen. I may quote again as in *Bourhill's* case (1) the words of LORD ATKIN in *M'Alister (or Donoghue) v. Stevenson* (2), at p. 580:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

On this occasion the children were the "neighbours." The act or omission to be avoided was creating a new danger in the premises by allowing the church party to transport the urn. If that issue is decided against the appellants, they must be held responsible in the action. The issue can be stated on the general principles of the law of negligence without any reference to the special rules relating to the position of those who come as invitees upon premises. The children were clearly invitees within the rules laid down in *Indermaur v. Dames* (3) because they were customers at the appellants' shop. But that authority does no more than lay down a special sub-head of the general doctrine of negligence. Indeed, in *Heaven v. Pender* (4), BRETT, M.R., would have decided the case simply on the general principles of negligence. At p. 509, he anticipated the language used in *M'Alister (or Donoghue) v. Stevenson* (2), when he enunciates the principle:

... whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

This is a wider rule than that laid down in *Indermaur's* case (3), and places the duty on a wider basis than is there postulated. The duty in *Indermaur's* case (3), is limited to occupiers, or persons in control, of "premises," a wider term which embraces places and structures of all sorts upon which persons may be invited to come, and has reference to the safe condition of these premises from the standpoint of the invitees. Many cases have been decided on "invitation" and many sub-rules and distinctions have been evolved, as, for instance, in *Robert Addie & Sons v. Dumbreck* (5), with which may be contrasted *Excelsior Wire Rope Co. v. Callan* (6), which the House, ignoring problems of the rule of invitation (indeed, there was there no "invitation") decided on the short and simple ground stated by LORD BUCKMASTER, at p. 410:

It was therefore well known to the appellants that, when this machine was going to

start it was extremely likely that children would be there and, with the wire in motion, would be exposed to grave danger.

This decision was based on the same principle as that stated by BRETT, M.R., and LORD ATKIN in the passages I have quoted. The House did not consider whether the appellants there were occupiers, or whether the children were invitees (that is, persons who came on the premises on business of mutual concern to them and the appellants) or bare licensees or trespassers. It was enough that a danger to the children was created by the act of the appellants in that case and that they either knew or ought to have known of the danger. That simple principle is enough to decide the present appeal subject to the question of fact whether there was the creation of an obvious danger. The complications which have centred round the doctrine of invitation are absent in this case. I do not ignore or dispute that the simple principle, like other simple principles, may be subject to many qualifications, which have limited or perhaps sometimes obscured its correct application, or that the principle may have come into real or apparent conflict with prevalent rules in other spheres of law. It may be possible to put the principle of negligence in a nutshell, but difficult to keep it there. But all this may, I think, be disregarded in deciding the present appeal.

Before dealing with the facts, I may observe that, in cases of invitation the duty has most commonly reference to the structural condition of the premises, but it may clearly apply to the use which the occupier (or whoever has control so far as material) of the premises permits a third party to make of the premises. Thus the occupier of a theatre may permit an independent company to give performances, or the person holding a fair may grant concessions to others to conduct side shows or subsidiary entertainments which may in fact involve damage to persons attending the theatre or fair, and in such and similar cases the same test of reasonable foreseeability of danger may operate to impose liability on the person authorising what is done. The immediate cause of damage in such cases is generally the action of third parties, who are neither servants nor agents of the defendant, but are mere licensees or concessionaires, for whose acts as such the defendants are not directly liable. If the occupiers are held liable for what is done, it is because they are in law responsible in proper cases at an earlier stage because of the permission which they gave for the use of their premises. This is the cause of action against them. Thus, in the present case, the appellants are not primarily concerned with the manner in which the members of the church party carried the urn, as they would have been if these members had been servants or agents; the two men were mere licensees in the matter. The appellants were not directly responsible for their acts. If they are to be held responsible, it must be because by the permission which Mrs. Alexander, their manageress, gave to the members of the church party, they created an unusual danger affecting the invitees, in particular the children. The breach of duty (if any) may thus be stated to have been that in granting the permission they did not use reasonable foresight to guard the children from unusual danger arising from the condition or use of the premises. If the tea urn had been upset by the negligence of the appellants' servants, the appellants would have been liable in negligence. Whether or not they would have been liable as inviters in the alternative would depend on other considerations. The cause of action in invitation is different, because it depends primarily not on what actually happened (except in the sense that what actually happened would be essential to complete the cause of action by showing damage) but on whether the invitor (it is convenient to use the word) knew or ought to have known that the invitee was being exposed to unusual danger. Where the unusual danger was due to structural defects the question can be stated to be whether the invitor knew or ought to have known of the defects. In a case like the present the question is whether it can be said of Mrs. Alexander that she either knew or ought to have known that the children would be exposed to unusual danger by reason of the uses to which the premises were put by her permission for the tea urn to be carried into and down the passage. It is not, of course, a question of what she actually thought at the moment, but what the hypothetical reasonable person would have foreseen. That is the standard to determine the scope of her duty.

This involves the question, was the operation of carrying the tea urn some-

thing which a reasonable person in Mrs. Alexander's position should have realised would render the place in which it was performed dangerous to the children in the circumstances. This is the crucial issue of fact, and the acid test of liability. I do not recapitulate the general facts of the case because they have already been fully stated by my noble and learned friend LORD THANKERTON.

On this crucial issue I agree with the LORD PRESIDENT. He said :

I find myself unable to assent to the proposition that anything was authorised by the defenders or their servant which obviously involved a danger which could not be avoided by the care of the men who carried the urn. The respondents [i.e., the defenders] were not bound to take precautions against dangers which were not apparent to persons of ordinary intelligence or prudence.

A distinction has been drawn in some cases between things intrinsically dangerous or dangerous *per se* and other things which are not dangerous in the absence of negligence. The correctness or value of that distinction has been doubted by eminent judges. I think, however, that there is a real and practical distinction between the two categories. Some things are obviously and necessarily dangerous unless the danger is removed by appropriate precautions. These are things dangerous *per se*. Other things are only dangerous if there is negligence. It is only in that contingency that they can cause danger. Thus to introduce not a tea urn but a savage animal such as a lion or a tiger into the passage-way would have been of the former category. Another illustration of the same class may be afforded by the performance in a circus on the flying trapeze. The occupier who permits such a performance owes a duty to the members of the audience to protect them by sufficient netting or otherwise, against the obvious risk of the performer missing his hold. The present case, however, in my opinion, falls under the other category. It was not, in my opinion, *per se* dangerous. I do not think that the safe carriage of the tea urn presented any reasonably foreseeable difficulty. The urn was about 15ins. high and about 15ins. in diameter. It was a cylinder of metal about $\frac{1}{2}$ in. thick, with a lid which was in position. It weighed at most about 100lbs. with the quantity of tea it contained. The handles for carrying it were about 18ins. apart. Two men should have had no difficulty in carrying it safely even if one had to go in front and one behind because of the narrow space as the men actually did.

There is no explanation of how the accident happened. At the moment when one side of the urn was dropped, McDonald was at the handle at the back which he dropped, Taylor being at the front. It might have been easier for the two men to carry the urn side by side. But having regard to its size and the closeness of the two handles to each other, I cannot see any difficulty in carrying it as the two men were doing. McDonald was not called. It is left to pure conjecture how he came to lose hold of the handle. It may have been a momentary physical faintness or a sudden stumble ; perhaps some hot tea may have splashed on his hand, but that is not likely with the urn only about half full and the lid on even if not screwed down. There is no evidence and no probability that children pushed against him and caused him to lose his grip. Any defect in the floor is excluded. There seem to be only two possible alternatives, either a mere accident or negligence. In my opinion, neither hypothesis could impose liability on the appellants. As to negligence, the two men were not their servants ; they were not responsible for their acts ; that the men should be negligent in so simple an operation was not likely to happen. It was a mere possibility, not a reasonable probability. The men, if negligent, were no doubt responsible for their own negligence, but from the standpoint of the appellants, the risk of negligence was a mere unlikely accident which no reasonable person in Mrs. Alexander's position could naturally be expected to foresee. The same is true of an accidental slip or loss of grip. To hold the appellants liable on either basis would be to make them insurers, which, under the authorities, they are not. In my opinion, no breach of duty or negligence by the appellants to the respondents has been established.

Notwithstanding the number of cases dealing with invitation, it is not easy to find authorities covering the exact circumstances of the present case. But *Cox v. Coulson* (7) is an illustration of a danger created by a licensee or concessionaire. The trouble arose not from any structural defect in the premises,

A but from the use of the premises made by licensees under a permission or licence given by the defendants. The premises were a theatre and the plaintiff was a member of the audience who had bought a ticket. The position, therefore, depended on the express or implied terms of the contract. These might impose either a greater or a less burden on the contractor than the general law of invitation or of negligence imposes on the invitor. In *Cox v. Coulson* (7) the Court of Appeal treated the terms to be implied in the contract as in substance imposing a duty identical with that between invitor and invitee. The performers were an independent theatrical company, not in the employment of the occupiers of the theatre. The Court of Appeal held that the relationship of the parties raised the same duty as that between invitor and invitee. At p. 191, BANKES, L.J., said :

B It seems to me obvious that the duty of the invitor in a case like the present is not only confined to the state of the premises, using that expression as extending to the structure merely. The duty must, to some extent, extend to the performance given in the structure, because the performance may be of such a kind as to render the structure an unsafe place to be in whilst the performance is going on, or it may be of such a kind as to render the structure unsafe unless some obvious precaution is taken.

C As an instance of the latter, BANKES, L.J., instanced the case of a tight rope dancer : there the obvious precaution which must be taken is the provision of a net, in the absence of which the premises could not be said to be reasonably safe. But the court emphasised that the occupier does not warrant the security of the premises nor does he warrant that there shall be no negligence or want of skill on the part of the persons to whom he grants the licence or concession to use the premises in the particular manner.

D In the present case, as I have stated, as the permitted operation was intrinsically innocuous, I do not think any obligation rested on Mrs. Alexander to attempt to supervise how it was carried out. As a reasonable person, not having any ground for anticipating harm, she was entitled to go on with her proper work and leave the church party to do what was proper. There might, of course, be circumstances in which, because there was an obvious risk, a duty might rest on the occupier to supervise how the operation was actually conducted, if the permission was given. I do not see what Mrs. Alexander could have done in that respect, unless she had seen that all the children were removed from the passage when the urn was being carried through. That might be her obligation if the operation she permitted had been intrinsically dangerous, but it was not so in the circumstances as I apprehend them. No doubt some difficult questions of fact may arise in these cases.

E In the present case, however, as I think that there was no reasonably foreseeable danger to the children from the use of the premises which the appellants permitted to be made, I think the respondent's claim cannot be supported.

F In my judgment, the appeal should be allowed.

G LORD ROMER [read by LORD THANKERTON] : My Lords, the question to be decided on this appeal is whether the accident that befell the respondents on June 15, 1940, was due to a breach of a duty owed to them by the appellants. That there was such a duty is not and cannot be denied. For the respondents were present in the place where the accident occurred as the appellants' invitees. Nor can there be any serious doubt as to what the nature of that duty was. H It was the duty to take through their agents and employees all proper precautions to ensure that the respondents while on the premises of the appellants should not be subjected to any unusual risk that would have been within the contemplation of any reasonable person. If any such risk had materialised and caused damage to the respondents or any of them, the appellants would undoubtedly have been liable. Had it, for instance, been proved that the accident was due to the jostling of McDonald by the children as the urn was being carried to the tea rooms along the passage where the children were, or to McDonald tripping over some irregularity in the floor of the passage of which Mrs. Alexander, the manageress of the tea rooms, knew or ought to have known, the appellants would properly have been held liable for the damage sustained by the respondents. The risk of these things happening should have been within the contemplation of Mrs. Alexander. But, unfortunately for the respondents, they failed to show how it came about that McDonald lost control over the urn. It being thus unknown what was the particular risk that materi-

alised it is impossible to decide whether it was or was not one that should have been within the reasonable contemplation of Mrs. Alexander or of some other agent or employee of the appellants, and it is accordingly also impossible to fix the appellants with liability for the damage that the respondents sustained. For, with all respect to LORD CARMONT, I am unable to agree with the opinion that he expressed to the effect that, if it were the duty of the appellants to see that the children were not in the passage-way in order to prevent the children being subjected to a risk that should have been within the contemplation of the appellants :

. . . there would be no escape from liability even if it were proved that the actual damage to the invitees happened through the tea urn being spilt in a way that could not reasonably have been anticipated.

I cannot think, for instance, that, if the accident had been occasioned by a portion of the ceiling falling down on McDonald owing to a defect in it of which they neither knew nor ought to have known, the appellants could have been made liable, even if it had been their duty (and I see no reason to suppose that it was) to remove the children altogether from the passage to avoid the risk of Taylor and McDonald being jostled as they carried the urn along. In such a case the breach of this last-mentioned duty would not have been the cause of the accident to the respondents. It might have been a *causa sine qua non*. It certainly would not have been the *causa causans*. In my opinion, the appellants can only be fixed with liability if it can be shown that there materialised a risk that ought to have been within the appellants' reasonable contemplation. As this has not been shown the appeal should, in my opinion, be allowed.

LORD CLAUSON : My Lords, the crucial question in this matter appears to me to be whether Mrs. Alexander ought as a reasonable woman to have had in contemplation that, unless some further precautions were taken, such an unfortunate occurrence as that which in fact took place might well be expected. For myself, I find it quite impossible to answer this question in the affirmative. I appreciate that, to some minds, it would appear proper to answer this question in the affirmative : but those to whom it so appears would, in my humble judgment, be applying a standard of foresight not to be expected, in the world as it stands, in the ordinary reasonable man. I accordingly find myself unable to do otherwise than concur with my noble friends whose opinions have already been delivered in advising your Lordships that this appeal ought to be allowed, and the judgment of the LORD ORDINARY ought to be restored.

Appeal allowed. Judgment of the LORD ORDINARY restored.

Solicitors : *Martin & Co.*, agents for *Sampson & Merrick, W.S.*, Edinburgh (for the appellants) ; *Herbert Macpherson*, Edinburgh (for the respondents).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

NO-NAIL CASES PROPRIETARY, LTD. v. NO-NAIL BOXES, LTD.

[KING'S BENCH DIVISION (Atkinson, J.), **March 24, 1943.**]

Patents—Licence—Licensees sub-contractors to Government department—Written authority to use patents for service of Crown—Whether royalties payable under licence—Minimum royalty clause—Patents and Designs Acts, 1907-1939, s. 29.

The plaintiffs were the owners of a patent relating to a process for the manufacture of boxes without nails and the defendants were their sole licensees. The grant of the licence was made by a deed dated July 5, 1935, which, by cl. 6, provided for the payment of royalties based on the output of the machines, and by cl. 7 provided for the payment of a minimum amount irrespective of output. From 1939-1941 the defendants obtained several contracts from agents of and contractors to the Air Ministry for the supply of such boxes and the appropriate royalties were duly paid to the plaintiffs. On Dec. 10, 1941, the Ministry of Aircraft Production, which acted on behalf of the Air Ministry in matters relating to patents, wrote to the defendants asking them to request the licensors to waive further

payments of royalty in respect of containers manufactured for the service of the Crown and to cease payment of royalty in respect of such containers after Dec. 31, 1941, and giving them authority under the Patents and Designs Acts, 1907-1939, s. 29, to use such patents as were necessary in the manufacture of such containers. In accordance with the instructions contained in this letter, the defendants paid no royalties in respect of supplies delivered after that date. The plaintiffs contended that, since no statutory authority was necessary to empower the licensees to use the patent, the user was by virtue of the licence and they were entitled to the royalties payable thereunder. Alternatively, they claimed a declaration that the clause relating to minimum royalties was still operative. The defendants contended that the minimum royalties were payable only if the machines were idle, that the statute rendered the clause inoperative and that, according to the wording of the clause, a declaration and guarantee of the maximum capacity of each unit was a condition precedent to any liability thereunder:—

HELD: (i) the containers were supplied to a company as agents for the Air Ministry, and were being used in the service of the Crown. The proviso to sect. 29 therefore applied and the only payment recoverable was that provided for by sect. 29 and to this extent the licence was inoperative.

(ii) since the terms of the minimum royalties clause in no way concerned the use of the invention for the services of the Crown, the clause was not rendered inoperative by sect. 29 of the Act and the minimum royalty was recoverable.

[EDITORIAL NOTE.] The statutory provisions relating to the payment of the nature of royalty to be made by Government departments to patentees are very necessary in war-time when important processes and inventions might be available to the country only at the price of the payment of heavy royalties. For this reason it is provided that the country shall have the benefit of inventions subject only to the payment of a compensation to be determined by the manner prescribed in the Act. It was contended that this provision, which in terms refers only to the Government department and the patentee, had no effect on the contract between the patentee and his licensee. Such a result would be obviously unfair to the licensee and is rejected. It is, however, held that, where the licence provides for the payment of a minimum royalty, that payment has to be made, although the Government department avails itself of its statutory right to restrict the payments by way of royalty to be made by it.

AS TO USE OF PATENTS BY THE CROWN, see HALSBURY, Hailsham Edn., Vol. 24, pp. 532, 533, para. 1019; and FOR CASES, see DIGEST, Vol. 36, pp. 690, 691, Nos. 1668-1674.]

Cases referred to:

- * (1) *Akt. für Autogene Aluminium Schweissung v. London Aluminium Co., Ltd.* (No. 2) (1923), 40 R.P.C. 107; 36 Digest 823, 3073.
- (2) *Dixon v. London Small Arms Co.* (1876), 1 App. Cas. 632; 36 Digest 690, 1670; 46 L.J.Q.B. 617; 35 L.T. 559.
- (3) *R. v. Dibdin*, [1910] P. 57; *sub nom. R. v. Dibdin, Ex p. Thompson*, 79 L.J.K.B. 517; 42 Digest 660, 689; 101 L.T. 722.

ACTION by the patentee claiming royalties in respect of articles manufactured by the licensee under a patented process and supplied to a Government department.

The plaintiffs are the owners of a patent relating to boxes, cases and containers made without nails. The boxes are made of plywood or wood fibre, angled steel strips with teeth punched out of the metal taking the place of nails. The whole process of making the box is effected by the use of one machine, which is a very complicated and expensive one. On July 5, 1935, the plaintiffs granted the defendants a licence to use such machines or parts thereof and to use and sell the products manufactured by the use of such machines within a specified territory. The consideration for the grant was a cash payment of £40,000 to be utilised in taking up 40,000 shares in the defendant company and the payment by the defendants to the plaintiffs of a royalty with provision for the payment of a minimum royalty. Up to 1938, the production was not on a very large scale, but in that year the big oil companies and the War Office became interested in these boxes as containers of tins of petrol. This interest spread to the Ministry of Supply and the Air Ministry, and the defendants executed large contracts with the Shell group of oil companies, the latter acting as

agents for the Air Ministry. After the formation of the Ministry of Aircraft Production, that Ministry undertook all matters relating to accountancy and patents which had previously been dealt with by the Air Ministry. On Dec. 10, 1941, the Director of Contracts of the Ministry of Aircraft Production gave notice to the defendants that, under the Patents and Designs Act, 1907-1939, s. 29, it would, in the circumstances, be reasonable for the plaintiffs to allow the use of the invention for the purposes of the Crown without further payment. The plaintiffs, after some negotiations with the Ministry, sued the defendants for the royalties due, contending that the section did not affect the position as between licensor and licensee and that, in any event, the minimum royalty was still operative and payment must be made under it.

Cl. 7 of the licence (the minimum royalty clause) was in the following terms :

Unless the aggregate of the royalties payable by the licensee in respect of each unit operated by the licensee (except No. 1 unit . . .) under the provisions hereof during the first 6 months following the expiration of one year from the date upon which payment of the first monthly instalment of royalties in respect of such unit commences amounts to a sum equivalent to that which would have been payable if such unit had been operated at one-quarter of its full capacity the licensee shall pay to the licensor such an amount as together with the actual amount paid and/or payable shall equal the sum which would be payable in respect of such unit if working at one-quarter of full capacity. Similarly for the succeeding 6 months and thereafter during the continuance of this licence in respect of each period of 6 months the minimum amount to be paid by the licensee in respect of each unit shall never be less than the sum which would be payable in respect of each unit if working at one-half the full capacity of such unit. The maximum capacity of each unit shall be declared and guaranteed by the licensor upon installation of such unit from which shall be calculated the full capacity of each unit based on the amount of double yardage of channelled metal strip capable of being produced and affixed to the relative boxes cases and containers during a 50-week year of normal union working hours with a 20 per cent. allowance for fall-off and a further reasonable allowance for fall-off due to wear and tear whereby such unit is unable to maintain full capacity.

G. Granville Sharp and Kenneth Diplock for the plaintiffs.

Sir Walter Monckton, K.C., and Valentine Holmes for the defendants.

ATKINSON, J. : The Patents and Designs Act, 1907-1939, s. 29, provides as follows :

A patent shall have to all intents the like effect as against His Majesty the King as it has against a subject : Provided that any Government department may, by themselves or by such of their agents, contractors, or others as may be authorised in writing by them at any time after the application, make, use or exercise the invention for the services of the Crown on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Treasury, between the department and the patentee or, in default of agreement, as may be settled in the manner hereinafter provided. And the terms of any agreement or licence concluded between the inventor or patentee and any person other than a Government department, shall be inoperative so far as concerns the making, use or exercise of the invention for the service of the Crown . . .

In this case, the view seems to have been taken that a very high royalty was being paid, in view of the fact that so many boxes were being ordered, and on Dec. 10, 1941, the Director of Contracts of the Ministry of Aircraft Production gave to the defendants this notice in writing authorising them to make, use or exercise their invention for the service of the Crown on the terms which are provided for in that section.

The opening words are important :

I am directed to inform you that this department, which deals with the question of royalties payable on equipment manufactured for the Air Ministry, has carefully considered the royalty payments now being made by you under your licence agreement in respect of the use of patents in the manufacture of containers for the Air Ministry. The notice thus purports to be given on behalf of the Air Ministry. Then the letter refers to sect. 29, which I have just read, and continues :

. . . The department is informed that you have paid during the period Sept., 1939, to Nov., 1941, a total of £22,984 in respect of royalty on containers manufactured for Government purposes. Bearing in mind that in addition to royalties you have paid to your licensors £40,000 in cash and a commission on all the machines purchased for the manufacture of the containers, the department considers that it would be reasonable for your licensors to allow the use, for the purposes of the Crown, of the invention covered by their patents without further payment. The department will be glad, therefore,

A if you will forthwith approach your licensors and ask them whether they will be good enough to waive the question of further royalty payments in respect of containers manufactured for the services of the Crown. Meanwhile I am to request you to include no royalty in the prices charged for containers manufactured for the services of the Crown after Dec. 31, 1941, and to pay to your licensors no royalty in respect of such containers. In order that manufacture of containers may continue according to law, you are hereby authorised to use any patents so far as such use is necessary in the manufacture of containers for the services of the Crown. This authority is given under sects. 29 and 58a of the Patents and Designs Act, 1907-39. The department will deal with and settle any claim arising out of the use of such patents within the terms of this authority. Any such claims received by you should be forwarded to this department.

The defendants were then told to keep records. A letter or two followed, and on Feb. 5, 1942, this further letter was written by the same Director of Contracts :

B I am directed to confirm that the request to cease royalty payments on containers for the services of the Crown as from Dec. 31, 1941, made in the department's letter of Dec. 10, 1941, applies to all containers supplied either directly or indirectly for the services of the Crown whether the containers are ordered from you by this department, by other departments or by other contractors.

C I will deal straight away with one point which only arises to a very slight extent. I say at once that I do not agree that that letter accurately states the position. A department may use by itself or by someone authorised by it in writing. I quite agree that the Ministry of Aircraft Production have a right as agents of the Air Ministry to authorise the defendants within the terms of that section, but they have no authority to exercise that right on behalf of or as agents of any other department unless proof is given that that other department had constituted the Ministry of Aircraft Production its agent for that purpose. That was the view I formed very early on, and when the Director of D Contracts, a most helpful witness, had that point put to him, he agreed with me.

E After this letter a number of contracts were entered into by the defendants with the Shell Refining and Marketing Co., Ltd., who were in fact agents of the Ministry, and all the boxes which were made during the period in dispute, that is, after the beginning of 1942, were made under these contracts, or precisely similar ones. Just to make it quite clear that these contracts were being placed with the authority of and on behalf of the Air Ministry, I will refer to an order from the oil company. Having set out what was wanted, it proceeds as follows :

F The prices specified . . . include gross profit of 1d. a box. In accordance with instructions received from the Ministry of Aircraft Production no royalty is to be charged in respect of these supplies . . . This order is placed with you on instructions contained in Air Ministry letter dated June 10, 1942, and the boxes are required for direct use in connection with delivery of our products to the Air Ministry. This is a firm order, but the price is subject to Air Ministry approval, pending which all payments will be provisional and subject to adjustment . . . If there is delay in the execution of the contract resulting solely from circumstances outside the control of the contractor, such later date as the Secretary of State may allow . . .

G Therefore it seems to me with regard to all these contracts that it is fully established that the boxes were used in the services of the Crown, that they were being supplied by the defendants to the oil company for a contract entered into by the oil company with the Ministry, and that the oil company were ordering them as agents for the Ministry.

H The plaintiffs then tried to agree with the Ministry of Aircraft Production as to some fair recompense for the use of their patent. Whoever it was they saw had the strange idea that they ought not to be paid anything. His view was " You have had enough." Figures were supplied showing that the plaintiffs had expended £133,756, that they had received in royalties in all some £40,000 and that they were £93,000 odd out of pocket. The Ministry would agree to pay nothing and, therefore, the plaintiffs had to take what steps they could. They could have set in motion the appropriate procedure for establishing what would be fair remuneration but instead of doing that, they decided first to test the legality of what was being done and they have brought this action against the defendants claiming royalties in respect of boxes supplied under the contracts to which I have referred.

The plaintiffs' two main contentions are these : first, they say there is no power under this section to interfere as between patentee and licensee, that the section

does not touch a dealing between a patentee and a licensee because, quite apart from the section, the Crown, or any Government department, or any private individual, could always deal legally with the licensee. No one needed any statutory authority to place orders with a licensee and, if the licensee chose to accept the orders in such circumstances, he must pay the royalty he had agreed to pay. I think counsel for the plaintiffs put his argument in this way : Sect. 29 never comes into play because the proviso only relates to user which, but for the proviso, would be unlawful under the enacting terms of the Act. Then he says, alternatively, if he is wrong about that, at least he is entitled to a declaration that the clause relating to minimum royalties is still operative and effective.

I doubt whether any authority is very relevant to the point I have to determine. The only one to which I am going to refer on this matter is the *Aluminium Co.'s* case (1). I am merely going to read a passage from pp. 116, 117. That was a case in which one of the matters which SARGANT, J., had to consider was the position under sect. 29 of licensees or manufacturers supplying contractors to a Government department. The issues there had really arisen under the Act of 1907. Although the amendments in the 1919 Act had in fact been made before the hearing, whatever had been done had been done under the earlier Act. The earlier Act, following, I think, the wording of a still earlier Act, was this :

Provided that any Government department may by themselves, their agents, contractors or others at any time after the application use . . .

There was no proviso about the terms of a licence being inoperative. SARGANT, J., said this, at p. 116 :

The third question is this : A large number of articles were supplied which were undoubtedly intended for Government use, and were in fact used by the Government. Sect. 29 of the Act reads in this way . . .

Then, curiously enough, he read from the 1919 Act, although it is quite clear from his judgment that he had got the earlier Act and the provisions of the earlier Act well in his mind. Then he said, at p. 116 :

The origin of the section, of course, is well-known ; it is to be found undoubtedly in the decision of the House of Lords in *Dixon v. London Small Arms Co., Ltd.* (2), where it was held that the right of the Crown to use a patented article or process could not extend to contractors who were employed as contractors by the Government. The difficulty that arises is this : In some cases it is clear that the defendants, who were the direct contractors with the Government, were told to use this particular process, and in those cases it is not questioned by Sir Arthur Colefax that no damages can be assessed. The right of the patentees in that case will be under sect. 29 by going to the Treasury or, if the parties think fit, going to the Royal Commission on Awards to Inventors. But there are a number of cases where the facts are nothing like so simple, cases where the company, the defendants, have not been contracting directly with the Government, but have been, for instance, supplying persons who themselves were the direct contractors with the Government ; in those cases it is said that the protection of the section does not apply and that the patentees accordingly are entitled to the ordinary remedy against the defendant company. It seems to me really that it is impossible to deal as a whole with the various contracts that are now in question. In my judgment, the section is primarily an agency section, that is to say, protection is afforded to the Government department and to any person or persons, contractors or others, who are acting as agents for, or by the express or implied authority of, a Government department. In each case, it will have to be ascertained, if the parties think fit to fight out each individual case, whether the acts of the defendant company in that particular case were acts done for the purposes of the Crown, and with the authority, or by the direction, of the Crown.

I think that the section was amended in 1919 because those difficult questions had arisen. They cannot very well arise again because there has got to be a written authority. Here there is the written authority and, therefore, *prima facie*, the case is within the section.

Of course, all that does not touch the contention of counsel for the plaintiffs that, when the agent making and using the patent is the licensee, neither the department nor the licensee is using by virtue of the statute but by virtue of the licence. He says that the right that the licensors have under the licence is to receive their royalty ; that precisely the same user could have been made of the patent if the proviso were not there ; that the proviso cannot be deemed to be per-

mitting what is already permitted ; and that what is not prohibited in the main section cannot be affected by the proviso. The principle he relies upon is probably stated in the simplest words in *R. v. Dibdin* (3), where FLETCHER MOULTON, L.J., says, at p. 125 :

The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment.

I have read the argument several times and I think that it would be absolutely sound if the proviso referred merely to use, but it does not. It refers to use and permits use on certain terms, terms different from those in the licence, namely, such terms as may be agreed between the department and the patentee with the approval of the Treasury or, in default, as provided by the Act. But for the proviso, user on those terms would not have been possible, and the section is dealing not only with use, but with use on terms not otherwise possible. I think that is emphasised by the final words, that the terms of any agreement or licence shall be inoperative so far as concerns the making, use or exercise of the invention for the services of the Crown.

As I see it, the broad intention of the section is this : "the Crown shall not be entitled to use a patent without paying recompense to the patentee, but it is not going to be made to pay just what the patentee chooses to demand or what some licensee has had to agree to pay in order to get his licence. The Crown shall be in a better position than a subject to this extent, that, though it must pay, though it cannot use without paying something, it shall pay that which is fixed in a particular way and not that which is fixed by an agreement between the patentee and the licensee. In my judgment, therefore, neither the Ministry, nor its contractors, nor the Ministry's authorised agents when using for the purposes of the Crown are liable to pay the patentee for such user any royalty other than a sum arrived at as provided.

Therefore, I have to consider the second claim, the claim for minimum royalties. This depends in part upon the proper construction of the licence and in part upon the effect of sect. 29 upon the obligation, whatever it is, contained in the licence. What is the event upon which the minimum royalty is to be payable ? The wording is really quite simple :

... unless the aggregate of the royalties payable [by the defendants] in respect of each unit operated by the licensee ... under the provisions hereof during [each period of 6 months] amounts at least to a sum equal to that which would have been payable if such unit had been operated at half its full capacity the licensee shall pay ... such an amount as together with the actual amount paid and/or payable ... would be payable ... if working at one-half of the full capacity. The amount to be paid by the licensee in respect of each unit shall never be less than the sum which would be payable ...

Bearing in mind cl. 16, which says that the licensee shall not during the continuance of this licence use, import, export, sell or deal, except under and in pursuance of the licence, it is clear that the words "if working at half of its full capacity" must mean "if working under this licence at half its full capacity." Practically nothing has been paid in respect of the two periods of six months making up the year 1942, but those are not, I think, the relevant periods. The relevant period for each machine must be calculated from the expiration of eighteen months from the date upon which the first monthly instalment was commenced. That is only a detail of working out. It seems to me, therefore, that the event has happened. The royalties payable by the licensee in respect of these periods have not amounted to that sum which would have been payable if the machines had been working at half the full capacity under the agreement. Therefore, I think that, as far as the event is concerned, the plaintiffs must be right.

There are three reasons advanced to support the contention that the minimum royalty is not payable. The first is this : it is said that, although, *prima facie*, it may appear to come within the wording of cl. 7, it is really payable only if the machine is idle. I can see no reason for limiting the *prima facie* meaning of the language. It would be very strange if it is to be payable although idle for want of work, but is not to be payable when working 24 hours a day for seven days a week. It would be a very strange result. I can see no basis for

the argument that, although people who because of lack of trade make no use of the machines at all are to pay the minimum royalty, they are not to be liable for that minimum royalty when they are working at maximum capacity outside the agreement.

The next point is this. It is said that sect. 29 nullifies this clause as much as it nullifies the royalty clause. Again I cannot agree. After all, the life of a patent is limited and the life of these machines is limited. *Prima facie* the amount has got to be paid, it is not an amount which is payable in respect of anything which is made by the licensee: it is something which is payable in respect of a failure to make under the licence. The words in the section are:

The terms of any agreement or licence shall be inoperative so far as concerns the making, use or exercise of the invention for the services of the Crown.

I cannot see that cl. 7 has any relevance whatever to the making, using or exercising of the invention for the services of the Crown. The defendants, in breach of cl. 16, have accepted orders which they were only offered and were not bound to accept. They are orders on which they have made large sums of money, apparently, and for which the plaintiffs so far have been paid nothing. I cannot see that this minimum royalty concerns in any way the boxes made for the Crown. I repeat, it is not a payment which is made in respect of anything which has been manufactured or made; it is a payment which is to be made because that which has been done under the licence has not reached a certain figure.

Then the third reason, and a more difficult one, was this. It is said that the words in cl. 7, "the maximum capacity of each unit shall be declared and guaranteed by the licensor on installation of such unit from which shall be calculated . . ." mean that a declaration and guarantee is a condition precedent to the minimum royalty clause coming into operation, a condition precedent to any liability. Well, all I can say is that the operative part of the clause says nothing whatever about it. It says that, on a certain event, which I think has happened, there shall be a certain sum payable, a minimum sum. The later clause is merely indicating the method by which that sum has to be calculated. The maximum capacity is an ascertainable fact. It has to be declared and guaranteed certainly, but also it is to be the basis from which the full capacity can be calculated. If there had been some change of position of the words, if the clause had read "the maximum capacity from which shall be calculated," etc., "shall be declared and guaranteed," the matter would not have been arguable, I imagine. I think the words "from which" refer to the words "the maximum capacity." It is not said anywhere that the clause is to be operative only if the maximum capacity is declared and guaranteed and, therefore, in my view, a declaration and guarantee is not a condition precedent. But if I am wrong about that, it seems to me that the declaration and guarantee were at all times in fact waived. It is plain that the maximum capacity has been in fact known to them all, proved to them all—when I say all I mean the directors of both companies—seen by them and learned by them of their own knowledge, and people do not want declarations or guarantees of what they have seen for themselves. Obviously, there would have been no difficulty in getting a declaration or guarantee at any time if they had asked for it. Whatever is received under the provisions of sect. 29 of the Act will, of course, have to be taken into account, and that amount has not been arrived at yet. Whatever sum is determined would, I think, come under the heading of royalties payable by the licensee, and, therefore, I can do no more than make a declaration that this clause is still operative. If what is ultimately determined to be due is less than the minimum royalty, there will be something payable. If it is more than the minimum royalty, there will not.

Declaration accordingly.

Solicitors: Markby, Stewart & Wadesons (for the plaintiffs); George Martin & Co. (for the defendants).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

COE v. LONDON & NORTH EASTERN RAILWAY CO.

[COURT OF APPEAL (Scott and du Parcq, L.JJ.), April 6, 20, 1943.]

Workmen's Compensation—Scheme—Acceptance by workman of certified scheme—Effect on right to sue independently of Act—Whether workman and dependants precluded from maintaining action by terms of separate contract—Fatal Accidents Act, 1846 (c. 93)—Workmen's Compensation Act, 1925 (c. 84), ss. 29, 31.

The deceased, who was employed by the respondent company, had, in 1909, joined a scheme of compensation and benefit certified by the Registrar of Friendly Societies and had regularly paid his contributions and participated in the distributions made thereunder. The form of application for membership of the scheme, which was signed and countersigned so as to form a written contract, provided that, if the deceased or any person claiming under him made any claim under or by reason of the provisions of the Employers' Liability Act, 1880, or any Act or Acts amending the same or at common law, he would accept the contribution agreed to be made by the railway company under the scheme and any compensation or provision which might be allotted to him thereunder, in satisfaction of any such claim. On Feb. 2, 1941, the deceased was killed in an accident arising out of and in the course of his employment and his widow sued for damages under the Fatal Accidents Acts and the Employers' Liability Act, 1880. The respondents relied on *Taylor v. Hamstead Colliery Co.* (1), as establishing the proposition that the acceptance by a workman of a certified scheme under the Act operated as an exercise of his statutory election under the Workmen's Compensation Act, 1925, s. 29, and debarred the workman and his dependants from the right to damages at law. They further contended that the terms of the application for membership above set out precluded the workman from maintaining an action or recovering damages and that he, therefore, had no claim to which his dependants could succeed under the Fatal Accidents Act, 1846 :—

HELD : (i) the language of *Taylor v. Hamstead Colliery Co.* (1) is not strong enough to support the proposition that the legislature intended that the right of election conferred by the Workmen's Compensation Act, 1925, s. 29, should be exercised by the elector without full knowledge of the relevant facts. The acceptance by a workman of a scheme under s. 31 cannot, therefore, in law be an exercise of the option given him by s. 29.

(ii) the scheme was intended to operate within the same limits as the Act and provided no machinery for the assessment of compensation where a workman claimed independently of the Act. Notwithstanding the provisions of the scheme and the terms of the application for membership the workman and his dependants retained their rights to maintain an action for damages under the Fatal Accidents Act, 1846.

[EDITORIAL NOTE.]—It was contended that the Court of Appeal was bound by the decision in *Taylor v. Hamstead Colliery Co.* (1) and must, therefore, find that the workman had exercised his option under the Workmen's Compensation Act, 1925, s. 29, and that his widow could not proceed under the Fatal Accidents Acts and the Employers' Liability Act, 1880. The court with some doubt have expressed the view that they were not bound by the earlier case and are clear that in the present case the workman could have had no such knowledge of the relevant facts as is required for an election by him under sect. 29. Apart from this, however, it was contended that by the terms of the application for membership of the scheme, the workman, for himself and his dependants, expressly contracted out of all his rights save those given him by the scheme. SCOTT, L.J., was prepared to hold that such provision, if it was included in the scheme, was illegal because the Act provides that any scheme must be equally advantageous to the workman as his rights under the Act. DU PARCQ, L.J., did not find it necessary to decide this question of legality and was of opinion that the clause upon its proper construction did not prevent the widow from bringing an action under the Fatal Accidents Acts or the Employers' Liability Act, 1880, but at the most might possibly limit the amount of damages recoverable.

AS TO EFFECT OF JOINING A SCHEME, see HALSBURY, Hailsham Edn., Vol. 34, pp. 1002-1005, paras. 1376-1383; and FOR CASES, see DIGEST, Vol. 34, pp. 500, 501. Nos. 4126-4136.]

Cases referred to :

- * (1) *Taylor v. Hamstead Colliery Co.*, [1904] 1 K.B. 838; 34 Digest 491, 4065; 73 L.J.K.B. 469; 90 L.T. 363.
- * (2) *Nunan v. Southern Ry. Co.*, [1924] 1 K.B. 223; 36 Digest 135, 896; 93 L.J.K.B. 140; 130 L.T. 131.
- (3) *Kinneil Cannel & Coking Coal Co., Ltd. v. Sneddon (or Waddell)*, [1931] A.C. 575; Digest Supp.; 100 L.J.P.C. 113; 145 L.T. 289; 24 B.W.C.C. 181
- (4) *Codling v. Mowlem (J.) & Co., Ltd.*, [1914] 2 K.B. 61; *affd.* [1914] 3 K.B. 1055; 34 Digest 491, 4067; 83 L.J.K.B. 1727; 111 L.T. 1086; 7 B.W.C.C. 786.
- (5) *Bennett v. Whitehead (L. & W., Ltd.)*, [1926] 2 K.B. 380; 34 Digest 492, 4068; 135 L.T. 329; 19 B.W.C.C. 133.
- (6) *Lysons v. Knowles (Andrew) & Sons, Ltd., Stuart v. Nixon & Bruce*, [1901] A.C. 79; 34 Digest 423, 3433; 70 L.J.K.B. 170; 84 L.T. 65.
- (7) *Fuller's Theatre & Vaudeville Co. v. Rofé*, [1923] A.C. 435; 31 Digest 381, 5266; 92 L.J.P.C. 116; 128 L.T. 774.
- (8) *Matthews v. Smallwood*, [1910] 1 Ch. 777; 31 Digest 379, 5251; 79 L.J.Ch. 322; 102 L.T. 228.
- (9) *Lissenden v. Bosch (C.A.V.), Ltd.*, [1940] A.C. 412; [1940] 1 All E.R. 425; Digest Supp.; 109 L.J.K.B. 350; 162 L.T. 195; 33 B.W.C.C. 21.
- (10) *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1940] 4 All E.R. 20; Digest Supp.; 109 L.J.K.B. 919.
- (11) *Lochgelley Iron & Coal Co., Ltd. v. M'Mullan*, [1934] A.C. 1; Digest Supp.; 102 L.J.P.C. 123; 149 L.T. 526; 26 B.W.C.C. 463.

APPEAL by the widow of the deceased workman from an order of His Honour JUDGE HUNTER, dated July 8, 1942. The facts are fully set out in the judgment of SCOTT, L.J.

F. W. Beney and E. L. Minty for the appellant.

G. J. Lynskey, K.C., and *Gerald Heward* for the respondents.

SCOTT, L.J.: The deceased was a locomotive driver in the employment of the respondent company (hereinafter referred to as the company). His death was caused by an accident which arose out of and in the course of his employment, and his widow sued for damages under the Fatal Accidents Acts and the Employers' Liability Act, 1880. The county court judge assessed the damages due to her at £885 but, purporting to act on the authority of the decision of this court in *Taylor v. Hamstead Colliery Co.* (1), held that, though she was not debarred from making such a claim, her right to recover any damages under those Acts had been excluded by the act of her late husband in joining a scheme certified by the Registrar of Friendly Societies under the Workmen's Compensation Act, 1925, s. 31. He accordingly gave judgment for the company with costs.

Most of the relevant facts were formally and mutually agreed; they appear on a single sheet of paper headed "Admitted Facts." The deceased had joined the scheme in 1909 as a "call-boy"; had always paid his contributions and at the five quinquennial distributions, upon recertification of the scheme by the registrar, had received from the fund a total of £2 13s. 0d. as his share of the distributable balances. The only relevant facts not so admitted consist of three documents and their contents—the scheme, some rules, and a contract of membership. The scheme itself is contained in the first 16 pages of a printed booklet entitled "Scheme and Rules" (No. 6), except for an immaterial amendment of the scheme (presumably duly signed by the Registrar) pursuant to the Workmen's Compensation (Supplementary Allowances) Act, 1940, s. 5, which is typed at the end of the scheme. The rules (printed on pp. 17-21 of the booklet), which incorporate a form of application for membership, which is printed on p. 22, form no part of the scheme; nor does the signed form of application, which is separate. So far as concerns any issue to be decided in this appeal, I do not think that there is any material difference between the 1897 Act, s. 3 (1), the 1906 Act, s. 3 (1) (under which the scheme joined by the deceased in 1909 was probably certified), and the 1925 Act, s. 31. There is equal similarity between the 1925 Act, s. 29 (1) and the 1897 Act, s. 1 (2) (b), and the 1906 Act, s. 1 (2) (b), which preserve to the workman an option to recover damages at law if he can, instead of enforcing his right to workmen's compensation.

The Court of Appeal decided in the case of *Taylor v. Hamstead Colliery Co.* (1), that the workman in that case by the act of joining the scheme under the 1897

Act, s. 3 (1), had then and there exercised the option between his common law right of action for damages and his right to workmen's compensation which had been given him by the Workmen's Compensation Act, 1897, s. 1 (2) (b), and thereby had elected to rely exclusively upon his workmen's compensation rights whether based on the Act directly or indirectly through the scheme he had joined, and accordingly had irrevocably waived his rights of action under the Employers' Liability Act, 1880, or at common law. The court further decided that this waiver of his personal rights had the effect in the event of his death of barring the rights of his dependants, on the ground that persons "claiming through" the deceased workman were "equally debarred from taking proceedings independently of the Act." There was no reference in the judgment to the 1897 Act, s. 7 (2), which provides that any reference to a workman shall include :

... a reference to his legal personal representatives or to his dependants, or other person to whom or for whose benefit compensation is payable :

That provision was repeated in the 1906 Act, (s. 13), and again in the 1925 Act (s. 48 (3)). The decision seems, therefore, to have been based purely on the views taken of the combined effect of sects. 1 (2) (b) and 3 of the 1897 Act. Apart from the scheme, that is to say, if there had been no scheme but the deceased had made an agreement with the company outside the scheme as to some pecuniary limit to his own right to damages at common law or under the Employers' Liability Act, 1880, the decision of this court in *Nunan v. Southern Ry. Co.* (2) is authority binding on us that such a contract with the company to limit the amount of damages for injury to himself would not have impaired the right of his dependants to sue in respect of his death, or affected the amount of damages which they could recover. So, too, the decision of *Kinneil Cannel & Coking Coal Co., Ltd. v. Sneddon (or Waddell)* (3) is clear that recovery of compensation in proceedings under the Workmen's Compensation Act by one dependant within the meaning of that Act still leaves the employer liable to other dependants who sue at common law. But neither decision quite disposes of the present appeal—though they afford help in the solution of its problems.

The facts and scheme in the present case are sufficiently similar to those in *Taylor v. Hamstead Colliery Co.* (1) to make it necessary to analyse that decision with care, as well as to see whether there are any material differences in the facts. I confess to feeling some difficulty in being sure about the real decision there, and still more in the grounds of decision. I could understand an argument for the employer based on the contention that the 1897 Act, s. 3, authorised a scheme which could impose on the workman who joined it a final abandonment of all his own rights of action at law, and that in a particular case the scheme did so ; though I should, if I am free to do so, certainly disagree with such an interpretation of the section, and probably also with such an interpretation of that scheme in *Taylor v. Hamstead Colliery Co.* (1) (so far as it is reported) ; but I cannot understand how joining a scheme under the Acts could be construed as an exercise of the option deliberately kept open by Parliament in the 1925 Act, s. 29 (1), and its predecessors in the Acts of 1897 and 1906.

It is important to see what was decided. The headnote summarises the case as deciding, in effect, that the acceptance by a workman of a scheme under the Act operates as an exercise of the option given to him by s. 1 (2) (b) to choose between workmen's compensation and damages at law—and that such final exercise also debars his dependants from proceedings at law. The judgments were extemporary, and they do not seem to me to proceed wholly on one and the same ground. MATHEW, L.J., at p. 847, says in terms that the workman by joining the scheme exercised his statutory election under the 1897 Act, s. 1 (2) (b), meaning that he waived his right to damages at law. COLLINS, M.R., towards the foot of p. 845, says the same thing. ROMER, L.J., may mean the same thing when he says, at p. 846, that when a workman has joined a scheme he

... and those claiming through him are in the same position as if he or they had taken advantage of the provisions for compensation provided by the Workmen's Compensation Act.

However, COLLINS, M.R., also rested his judgment on a quite different ground, viz., that the word "only" in the sentence contained in s. 3 (1), "and

thereupon the employer shall be liable only in accordance with the scheme"; should in his opinion be construed as meaning "and shall not be liable to the employee in any action for damages at law"; whereas in my respectful opinion it means merely that the employer's liability should be only contractual under the scheme and not statutory under the Compensation Act.

That interpretation by COLLINS, M.R., of those words necessarily imports that the "scheme" section in each of the three Acts (which is the only permission for contracting out anywhere in the Acts) enables the employer to obtain complete freedom from liability in proceedings at law for damages for negligence not only at the instance of the workman, but also, upon his death, at the instance of his dependants. LORD ATKIN, when a judge of the King's Bench, expressed the same view, *obiter*, in *Codling v. Mowlem (J.) & Co., Ltd.* (4) at p. 69, and, when a Lord Justice, in *Bennett v. Whitehead* (5), at p. 409; but his view was expressly disapproved by the House of Lords in *Kinneil Cannel & Coking Coal Co., Ltd. v. Sneddon (or Waddell)* (3); see per LORD BUCKMASTER, at p. 581. How far COLLINS, M.R., in *Taylor v. Hamstead Colliery Co.* (1) was basing his judgment on that ground, and how far on the supposed exercise by the workman of his statutory option, it is impossible to say: but I humbly conceive that the above point, even by itself, to some extent shakes *Taylor v. Hamstead Colliery Co.* (1) as an authority binding on this court.

That is not the only point, however, on which subsequent expressions of superior judicial opinion are inconsistent with the reasoning of *Taylor v. Hamstead Colliery Co.* (1). I think its main *ratio decidendi*, that a workman who joined an authorised "scheme" elected under the option section to give up his common law rights, and thereby to free the employer from liability thereunder, is opposed to higher authority enunciated since 1904. But before referring to the decisions, and assuming my freedom, I will state the difficulty which I feel in accepting the *Taylor v. Hamstead Colliery Co.* (1) view that the acceptance by a workman of a "scheme" constitutes, *ipso facto*, an exercise of the option given him by each of the Acts. That option is beyond doubt a legal right of election; and no election can be exercised by the elector without full knowledge of all material facts affecting his choice. Under the 1897 Act, s. 1 (2) (b), or s. 29 of the present Act he must know the circumstances and nature of the accident, of its cause, of the facts indicating presence or absence of such negligence as would tend to permit—or prevent—a successful action against the employer for damages, as well as of the facts affecting the alternative right of claiming workmen's compensation, whether under the Act or under a scheme substituted for the Act. These considerations apply with equal or even greater force to an election by the workman which is to bind his dependants in the case of his death, not only in view of the greater pecuniary stake at issue, but because it is a man's moral duty to take more unselfish interest in their welfare than in his own. It is worth noting that the right of election conferred by s. 29 is solely in favour of the workman: and the legislature must be taken to have realised that election can only be made in the light of full knowledge of the relevant facts. That it did realise this appears from its allowing the workman, if he makes a mistake about his facts and fails in an action at law, a *locus poenitentiae* in the provision of s. 29 (2) which forgives his mistake by suspending his final election till by his failure he has learnt the real facts. In view of the precise and definite language of s. 29 and its predecessors in 1897 and 1906, I find it impossible to suppose that Parliament intended to impose on the living workman the duty of deciding in advance, when perhaps he is not married, whether his future wife and children should as dependants in the event of his death by accident make their claim under the Workmen's Compensation legislation for compensation, or outside it for damages at law. Very clear language would be needed to justify the inference that Parliament had any such unreasonable intention; and in truth the language used appears to me wholly inapt for such an interpretation. The same sort of point on ambiguity of language arose for consideration in *Lysons v. Knowles (Andrew) & Sons, Ltd., and Stuart v. Nixon & Bruce* (6). The Court of Appeal had decided that as the quantum of compensation in the 1897 Act was based on "an average of weekly wages" casual labourers employed for any period less than two weeks could have no "average weekly wages" and were, therefore, outside the Act altogether. The House of Lords reversed

of Appeal, and one ground of their decision was that the phrase in

question was wholly insufficient to carry so heavy a burden of implied meaning as to deprive the workman of rights given elsewhere in the Act. So here, as it seems to me, much more explicit language in the Act would have been necessary to carry the burden of the decision in *Taylor v. Hamstead Colliery Co.* (1). If the decision was right it meant that the young "call-boy" who joined the company's scheme in 1909 was thereby committed to an election which deprived his future widow in 1941 of her independent statutory right to claim damages at law. The authority of *Taylor v. Hamstead Colliery Co.* (1) is shaken on this ground also, in my opinion.

Finally, I regard as impossible the basic conception on which *Taylor v. Hamstead Colliery Co.* (1) was decided, viz., that the decision of a workman to join a contractual scheme for compensation in substitution for a statutory system equally for compensation could operate as an election then and there to abandon (at least for the duration of his membership of the scheme) all his own rights of action for damages.

Since the option conferred by the Workmen's Compensation Acts is truly a right of election, it must be subject to all the legal characteristics inherent in the exercise of that right. First and foremost is the requisite condition that the elector should be in possession of such knowledge of the material facts as will enable him (possibly with the help of legal advice) to make an effective comparison of the probable results to himself of his choosing the one course rather than the other, so open to him. This legal principle is common to many legal acts which involve election. Waiver is one: the much criticised maxim that "a man cannot both approbate and reprobate" rests on, or at least involves, the same principle of election: ratification is another such act; affirmation of a voidable contract is another; and finally the equitable doctrine of election affords a particularly clear illustration. In all these cases sufficient knowledge to permit of a real election, made with understanding, is a condition precedent to a legally effective exercise of the right. In *Fuller's Theatre & Vaudeville Co. v. Roze* (7), LORD ATKINSON delivering the judgment of the Privy Council on a question of waiver said, at p. 443:

In *Matthews v. Smallwood* (8) PARKER, J., laid down in terms which have often since been approved of, the law upon this question of waiver with his accustomed clearness and accuracy. "Waiver," he said, "of a right of re-entry can only occur where the lessor, with knowledge of the facts upon what his right to re-enter arises, does some unequivocal act recognising the continued existence of the lease. It is not enough that he should do the act which recognises, or appears to recognise, the continued existence of the lease, unless, at the time when the act is done, he has knowledge of the facts under which, or from which, his right of entry arose."

In *Lissenden v. Bosch (C.A.V.) Ltd.* (9) LORD MAUGHAM, at p. 418 ([1940] 1 All E.R. at p. 429), distinguished a common law election between remedies and an election in equity between rights; and on p. 419 ([1940] 1 All E.R. p. 430) in speaking of equitable election said:

In the fourth place no person is taken to have made an election until he has had an opportunity of ascertaining his rights, and is aware of their nature and extent. Election in other words, being an equitable doctrine, is a question of intention based on knowledge.

The election conferred by s. 29 is indeed something more than a choice of remedies; it is in some degree a choice of rights because of the differences in the amounts recoverable: but whether that be true or not, I think that LORD MAUGHAM's fourth principle applies to such an election as is given by s. 29. In *United Australia Ltd. v. Barclays Bank, Ltd.* (10), LORD ATKIN, at p. 30, said this:

On the other hand, if a man is entitled to one of two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose.

These authorities appear to me to be conclusive that the acceptance by a workman of a scheme under s. 31 cannot, in law, be an exercise of the option given by him by s. 29.

The most fundamental feature of the workmen's compensation legislation is its prohibition of contracting out—undoubtedly enacted as a special protection to the workman. The one exception to that prohibition is s. 31; and there

great pains were taken by Parliament to make the contractual alternative at least as favourable to the workman as the statutory system. It seems to me—and I say so with great respect to the court in *Taylor v. Hamstead Colliery Co* (1)—that when the rights and remedies of a workman had become, by his joining the scheme, purely contractual, it was wrong to say, as COLLINS, M.R., says on p. 845 of that case, that when the workman seeks to enforce the provisions of the scheme he does so “under the Act,” and equally wrong to say, as he does, on p. 846, that :

... the workman by his assent to the scheme, which assent is binding on his representatives, has placed them in the same position as if they were claiming compensation under the Act.

On the same page, ROMER, L.J., repeats the same view. The claim was a claim under the contract and not a claim to enforce a statutory right. If that be so, it would seem at first sight that the next step is to consider the scheme itself in the present case ; but, as the scheme certainly contains no clear words excluding the dependants’ right to claim, it is more convenient to consider first what the section intends it to contain.

Sect. 31 has one object, and as I think, one object only, viz., to permit the translation into contractual rights and obligations of the statutory rights and duties relating to workmen’s compensation contained in the workmen’s compensation legislation ; and so to effect a change from statute to contract without any change of content (except in favour of the workman). The section contains no provision which, directly or indirectly, requires a workman to surrender in advance, on behalf of himself or his representatives or dependants, any right of action for damages ; and I think it would be wrong, and indeed *ultra vires* the registrar, to pass a scheme which did so. In case of ambiguity in that respect contained in the scheme, it should be resolved against the employer, both because that is, in my opinion, the meaning of the Act and on the principle of *contra proferentem*. In short a scheme which is truly within the Act, does not exclude the independent right of dependants to sue for damages ; and in my opinion the Act prohibits the insertion of such a provision in the scheme.

I now turn to the scheme, rules and application in the present case. The application is a separate document, and was signed by both parties and thus became a written contract. It constituted membership for the deceased, but also contains further terms. Neither the rules nor the form of application are any part of the scheme. The signed contract has had, and could have no certification by the registrar, but it contains a clause (B), on which counsel for the respondent relied as an alternative ground for dismissing the appeal. The form begins properly enough :

I desire to become a member of the Great Eastern Railway Accident Fund upon the terms of the scheme certified by the Registrar of Friendly Societies and I authorise the deduction from my wages of one penny per week as my contribution to the said fund, and I agree with the London & North Eastern Railway Co. as follows :

Then after a perfectly proper clause marked (A) it continues :

(B) That in any case in which I or persons claiming under me make any claim under or by reason of the provisions of the Employers’ Liability Act, 1880, or any Act or Acts amending the same or at common law I will accept the contribution agreed to be made by the railway company under the said scheme and any compensation or provision which may be allotted to me under the said scheme in satisfaction of any such claim so made by me or persons claiming under me as aforesaid.

It was then countersigned on behalf of the railway company so as to turn it into a bilateral written contract with the company.

The first question to decide is the meaning of clause (B). Apart from the particular aspect of its effect upon the rights of dependants in the case of the death of the signatory by an accident within the purview of its provisions, it plainly does not exclude the making of a claim, on behalf of the member, by an action at law for damages ; for it assumes that such a claim can and will be made. It therefore does not in terms purport to make the signatory himself abandon his right of action ; still less to free the employer from liability. Counsel for the appellant on this footing argued that the clause only went to the amount of damages, and that the present case is, therefore, distinguishable from the wording of the clause in *Taylor v. Hamstead Colliery Co*. (1). Up to a point I agree with that contention, but, if the contract bound the dependants, the distinction

does not help the widow in the present case, for she would, on that assumption, be tied by the money limits of the company's contribution in case of death—see p. 4, para. II (i) and pp. 6 and 7, cl. (A)—with its maximum of £600, taken from the Workmen's Compensation Act itself. In some cases in an action at common law, e.g., for breach of a statutory duty, the difference between the maximum sum recoverable under the Workmen's Compensation Act, or a scheme under it and the damages recoverable in the action, might be very much greater than in the present case. A further point was made by counsel for the appellant on the language of cl. (B) that the words "persons claiming under me," do not include dependants who stand upon their own statutory right conferred by the Fatal Accidents Acts, whether they sue in their own name or in the name of the personal representatives of the deceased. On the whole, though frankly with doubt, I think that the words in question are ambiguous and that, therefore, they should be construed *contra proferentem* i.e., against the company as not including dependants claiming under the Fatal Accidents Acts.

This conclusion, however, only disposes of the defence based on the interpretation of the special contract contained in the signed and countersigned application form; and, if my interpretation is wrong, the validity of the terms of that contract call for serious consideration. It went far beyond the mere election by the deceased to become a member of the fund and thereby to join in the scheme as contemplated by s. 31; it contained a wholly separate contract in the added cl. (B)—a contract which when made by the deceased as an infant in 1909 was not binding upon him, but which—if it was a valid contract—he frequently ratified afterwards as an adult both by his contributions of a penny a week, and by receiving small sums at the quinquennial renewals; and apart from the Workmen's Compensation Act, 1925, s. 31, there is no legal impediment against an adult workman contracting out of his rights at common law or under the Employers' Liability Act, 1880, if he understands what he is doing, as there is in the Workmen's Compensation Act. In my view the intention of s. 31 is to lift the Act's ban on contracting out only within rigorously defined limits—and solely in order to translate statutory rights to workmen's compensation into contractual rights not less advantageous to the workman than those conferred by the Act. It is important to note that there is in s. 31 no reference to s. 29. In my opinion s. 31 has nothing whatever to do with the workman's rights of action at law; still less with such rights of action at the instance of his dependants. It seems to me absurd to suppose that the Registrar of Friendly Societies was given by Parliament delegated power to pass his opinion upon such complicated legal questions as would be involved for him in the duty of determining whether the scheme gave dependants a fair equivalent for their rights (preserved for them by the Workmen's Compensation Acts), under the Fatal Accidents Acts to enforce claims at common law for the "personal" negligence of the employer as for breach of an absolute statutory duty (as illustrated for instance by the case of the *Lochgelley Coal & Iron Co., Ltd. v. M'Mullan* (11)), or under the Employers' Liability Act, 1880. If that view of the restricted scope of s. 31 is well founded, the conclusion follows that the registrar would have no power to certify any scheme containing such a provision, and, therefore, that ambiguous words in the certified scheme should here too be construed so as to exclude such an interpretation. On that footing of construction I am of opinion that the scheme in the present case contains no such provision.

If that be the law, and that be the scheme, what follows as regards the separate contract which the workman was invited by the company to sign as a condition of joining in the scheme? If I may use a metaphor, cl. (B) was "a clog on the equity," in the sense that it was improper for the company to incorporate it in their invitation to the deceased to join in the scheme; but I go further and say that in my opinion that clause was inconsistent with the terms of membership of the scheme which it was the statutory duty of the company under each of the Workmen's Compensation Acts to offer to the deceased. The certificate of the Registrar of Friendly Societies was intended by the Acts to be a certain assurance to the workmen, upon which they could rely with a sense of security, that by accepting membership they were exchanging for their statutory rights under the contemporary workmen's compensation legislation contractual

rights which might be more advantageous for them, but could not be less advantageous than those of the Act itself. I regard the terms of s. 31 and its predecessors as mandatory upon the employer, and as carrying an implicit prohibition against any addition to the certified scheme which was, or might be, prejudicial to the workman or his dependants in the sense I have indicated. The result is that that portion of the contract of membership should be treated by this court as a nullity. It would be no answer to this reasoning to say that the men's trade union passed cl. (B), even if that had been proved in evidence. The basic principle of the Workmen's Compensation Acts limits freedom of contract. The rights of action at common law and under the Employers' Liability Act, 1880, for damages have been preserved with paternal care from the very first, beginning with the Workmen's Compensation Act, 1897, s. 1. The course adopted by the company in the obnoxious addition of cl. (B) to their invitation to their workmen is contrary to the spirit of the careful preservation in the statute of the workman's option, an option which for reasons which I have given could not be exercised before knowledge of the facts giving rise to the need of choice. That aspect confirms my conclusion that the clause is illegal on the grounds I have stated. A B C

For the above reasons, if I am not bound by *Taylor v. Hamstead Colliery Co.* (1) to decide otherwise, I hold (though with a little doubt as to my freedom) that the appeal succeeds and that the judgment below must be set aside and judgment entered for the appellant for £885 with costs here and below, the latter on Scale C.

DU PARCQ, L.J. : The respondents' case in this appeal may be summarised as follows. (i) *Taylor v. Hamstead Colliery Co.* (1) is relied upon as establishing the proposition that, when employer and workman have agreed that the provisions of a certified scheme shall be substituted for the provisions of the Workmen's Compensation Act, the employer is freed from any liability to the workman or his dependants at common law or under the Employers' Liability Act, 1880, in respect of injuries by accident in the course of and arising out of the workman's employment. (ii) It is said that the terms of the agreement entered into between the workman and his employers in the present case were such as to preclude the workman while he lived from maintaining an action or recovering damages. It is contended that, as the workman purported to bind those "claiming under him," the plaintiff is no more able than the workman himself would have been to succeed in an action for damages. Further, it is said that she can have no rights under the Fatal Accidents Act, 1846, because it is essential to a claim under that Act that the deceased, if death had not ensued, should have been entitled to maintain an action and to recover damages. D E

I will deal with these two contentions in their order. As to the first, if I had been considering this case without regard to any authority, I should have thought it hopeless to argue that when a workman agreed to accept a scheme in substitution for the provisions of the Act, he thereby necessarily abandoned all, or any of, his rights against his employer at common law or under the Employers' Liability Act, 1880. The intention and the words of the Act are plain. For convenience sake I will refer to the Act of 1925, which reproduced the material provisions of the earlier Acts. Sect. 29 provides that nothing in the Act shall affect any civil liability of the employer, and gives the workman a right, at his option, either to claim compensation under the Act, or to take proceedings independently of it. Sect. 31 enables the contracting parties to put the provisions of a certified scheme in the place of the provisions of the Act. If they do so, and if the scheme does not itself contain any provision which restricts the right of the workman to bring an action against his employer, I fail to see how his adherence to the scheme can affect that right. It is not suggested that sect. 29, which contains the words "nothing in this Act shall affect any liability of the employer," is one of the "provisions of the Act" for which the "provisions of the scheme" are to be substituted. On the contrary, the words now contained in that section are relied on by the respondents, as they were by the successful appellants in *Taylor v. Hamstead Colliery Co.* (1). F G H

The only words in sect. 31 which give any support to the respondents' argument are those which occur at the end of its first subsection, but, with all respect to the able argument of counsel for the respondent, I find it almost frivolous to suggest that the words "shall be liable . . . only in accordance with the

scheme " are apt to free an employer from all liability for torts which result in injuries arising out of and in the course of a workman's employment. It seems to me to be too plain for argument that the scheme is to replace the Act within the limits within which the Act operates. The Act does not affect the civil liability of the employer. Normally the scheme will not affect it either, and indeed I would venture to say that, if the Registrar of Friendly Societies acts as Parliament expected him to act, a scheme which he has certified will never affect civil liability any more than the Workmen's Compensation Acts themselves affect it. In the present case, the scheme which the Registrar certified does not contain anything which purports to affect the civil liability of the employers, and in my opinion the workman's agreement to accept it would not, of itself, in any way affect those of his rights which are correlative to that civil liability.

I should, therefore, reject the first of the respondents' submissions without any hesitation at all were it not for the decision in *Taylor v. Hamstead Colliery Co.* (1). The county court judge has felt himself compelled by the authority of that case to decide in favour of the employers. Unfortunately the report of the case in the Law Reports, to which alone the attention of the county court judge was directed, is so inadequate as to be misleading, since the facts are not sufficiently set out in it. The facts are to be found, however, in 20 Times Law Reports, where it is made plain that the scheme itself provided as follows :

The contributions made by the employers to this society [that was a society formed under the powers given by the Workmen's Compensation Act, 1897, s. 3] are to be in lieu of and to exempt them from any further claims which otherwise the members of this society may be entitled to prosecute as the result of accidents occurring during their employment.

If it be assumed that this term could lawfully be included in the contract by which the workman agreed to adopt the provisions of the certified scheme, it seems reasonably clear that the workman had wholly abandoned his right to bring an action under the Employers' Liability Act, 1880, so that a claim on behalf of his dependants necessarily failed. It was on this short and simple ground that the county court judge had decided against the personal representatives in *Taylor v. Hamstead Colliery Co.* (1) : see the statement of the facts found by him at pp. 838 and 839 of the Law Reports.

I confess that even, when the facts are fully grasped, some of the language used in the judgments in the Court of Appeal, as they are reported, seems to me to be difficult to follow, and it is no matter for surprise that the county court judge has supposed that the decision of this court in that case supports the wide proposition contended for by the respondent employers. I am by no means convinced, however, that, if the scheme which was being considered in *Taylor v. Hamstead Colliery Co.* (1) had not contained a provision exempting the employers from liability, the decision of the Court of Appeal would have been the same. For this reason, and because the mind of the court was not directed to a case like the present, where no such provision is to be found in the certified scheme, I do not feel bound by the authority of *Taylor v. Hamstead Colliery Co.* (1) to accept a proposition which I am satisfied is unsound, and I hold that the first point of counsel for the respondents fails.

I must now deal with the second submission, which was rejected by the county court judge and is the subject of the respondents' cross-appeal. It is not, I think, accurate to say that the workman's widow claims " under him." Under the Fatal Accidents Acts she has, as was said in *Nunan v. Southern Ry.* (2) " a new cause of action " (see especially *per* SCRUTTON, L.J., at pp. 227, 228). She claims in a different right, and her claim is for a different remedy. It is true, however, that unless the deceased workman had at the time of his death, a right to maintain an action and to recover damages for the act, neglect or default now complained of, the widow's claim must fail. The question is whether, by signing the document dated July 19, 1909, the workman gave up that right. The answer to this question must depend on the true construction of cl. (B) of that document.

The problem is not an easy one. For the employers it is said that in effect the workman promised to make no claim for damages under the Employers' Liability Act, 1880, or at common law. It was for the committee under the scheme to say what sum, if any, was to be allotted to the workman as compensa-

tion under the scheme. The committee might think that he was entitled to nothing, and he cannot, therefore, be said to have had a right to anything. Even if he had a right to recover anything, what he would recover would be not damages, but compensation under the scheme. The argument, as it was presented, seems to me to overlook the fact that the clause assumes that the workman may have a good claim at common law or under the Employers' Liability Act, 1880, since it speaks of "satisfaction of" that claim. Such a claim can, I think, only be satisfied by payment of damages. The Employers' Liability Act, 1880, itself speaks of "compensation" but it is clearly correct to describe sums awarded under it as damages. At the same time, it must be admitted that, if the clause means that, in the event of his making a common-law claim, the workman is to get no more than the committee may choose to give him, he cannot be said to have a right to recover damages. A

The difficulty of construing the clause is due, I think, to the fact that the draftsman appears to have forgotten that the workman cannot prosecute in respect of the same injury a claim both under the scheme and independently of the scheme. That the workman cannot do this is, I think, clear. The Workmen's Compensation Act, 1925, s. 29, precludes the workman from claiming both under the Act and independently of the Act, and a claim under a scheme sanctioned by the Act is a claim under the Act. This was laid down in *Taylor v. Hamstead Colliery Co.* (1), and, apart from authority, seems to be clearly right. It seems illogical and inconsistent, therefore, to talk of a claim made independently of the scheme being satisfied by the contribution made by the railway company and the payment of compensation under the scheme. If the workman claims independently of the Act, his claim will not come within the jurisdiction of the committee established under the scheme, and the scheme provides no machinery for the assessment of compensation by that committee except when a claim is made under the scheme. B C D

On the whole, and not without doubt, I have come to the conclusion that the workman, notwithstanding the terms of cl. (B), retained his right both to maintain an action and to recover damages. I can best explain my reasons by considering how the matter would have stood if the workman, during his lifetime, had alleged, and the employers had denied that he had suffered injuries in the course of and arising out of his employment through the negligence of a fellow servant. Let it be supposed that, instead of making an application under the scheme, he had brought an action under the Employers' Liability Act, 1880. It was suggested that the employers could have had his action dismissed on the ground that he was disentitled by his agreement from recovering damages and, therefore, had no cause of action. But to this the workman might have answered: "The very agreement on which you rely supposes that I may have a claim, and a claim which is to be satisfied, and it can only be satisfied by a payment which, call it what you will, must, from the nature of the case, be a payment of damages. True it is that, if the committee choose to allot compensation to me under the scheme, I must accept as damages what they allot to me. Be it so. If, however, nothing is allotted to me under the scheme, I shall retain my right to have damages awarded to me by a court of law." That answer would, I think, have been justified by the language of the clause. It must be confessed that it leaves unanswered the question whether, on a claim being made under the Employers' Liability Act, 1880, the committee would have any authority to allot compensation under the scheme, and if so, whence they derive such authority. E F G

It may be that the agreement contained in cl. (B), though it is clearly outside the scheme, confers authority on the committee as assessors to fix the amount of damages on the same basis as if they were assessing compensation under the scheme. Or it may be that the committee would not have been competent, in the circumstances supposed, to deal with the matter at all, and that the workman, there being no possibility of an allotment of compensation to him under the scheme, would have been remitted to his legal remedy in the courts, where the judge's jurisdiction to award damages would not have been restricted by cl. (B). H

It is enough to say that I am not satisfied that in the case supposed the workman's action could have been dismissed, and, if he had proved the facts necessary to establish the employers' liability, he would, I think, in one way or another,

have recovered damages against them, though those damages might have been limited in amount. It follows that the widow is in a position to prove all that the Fatal Accidents Act, 1846, requires.

For these reasons, I am of opinion that the respondents' second submission also fails.

A I have assumed throughout this judgment that, when a workman is invited to adhere to a certified scheme, it is lawful to require him, as a condition of the employers' acceptance of the scheme, to contract out of his rights at common law and under the Employers' Liability Act, 1880. I have had the advantage of reading and considering the judgment of SCOTT, L.J., who has come to the conclusion that such a condition may not lawfully be introduced into an agreement by which the provisions of a scheme are substituted for those of the Workmen's Compensation Acts. I must not be taken to dissent from that conclusion. I am indeed disposed to agree, having regard to the Workmen's Compensation Act, 1925, s. 29, that it cannot have been the intention of the legislature to allow such a term to be grafted on a contract made under sect. 31 (1), even though it must be conceded that, in an independent transaction, a workman may lawfully barter away his rights at common law and under the Employers' Liability Act, 1880, for good, though possibly quite inadequate, consideration.

C I prefer, however, to found my judgment on the narrower grounds which I have stated, and, for the reasons which I have given, I agree that the appeal should be allowed.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Kenneth Brown, Baker, Baker* (for the appellant); *W. H. Hanscombe* (for the respondents).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

D

INGRAM v. UNITED AUTOMOBILE SERVICES, LTD. AND ANOTHER.

E [COURT OF APPEAL (MacKinnon, du Parcq, L.J.J., and Uthwatt, J.),
May 19, 1943.]

Tort—Joint tortfeasors—Apportionment of liability—Variation of apportionment on appeal—Limitation of jurisdiction—Same rule applicable to road collisions as to sea collisions.

F The respondent was injured as the result of an accident to an omnibus. A lorry owned by the first appellants had been left standing near a bend in the road early in the morning while the black-out was still operative and when the road was covered with a sheet of ice. The omnibus in passing the lorry ran into the parapet of a bridge. The judge found that both appellants were negligent and apportioned the damages as to two-thirds to the owners of the lorry and as to one-third to the owners of the omnibus. G The owners of the lorry appealed, alleging that they ought to be absolved from all liability, or, alternatively, that, if they had been at all negligent, the damages had been wrongly apportioned. The owners of the omnibus cross-appealed, alleging that the other appellants should bear the whole damages:—

H **HELD:** the judge was correct in his decision that both appellants had been negligent, and that being so, the court should not interfere with his apportionment of the damages. The same rule is applicable in road collision cases as in cases of collisions at sea.

[**EDITORIAL NOTE.** The House of Lords in *British Fame v. MacGregor* (2) decided that only in exceptional circumstances should the Court of Appeal interfere with the apportionment of damages by the trial judge. That case arose out of a collision at sea, and the question naturally arises whether the rule is the same in the case of collisions on the road. It is here decided that precisely the same rule applies.

AS TO APPORTIONMENT OF LIABILITY, see HALSBURY, Hailsham Edn., Vol. 32, pp. 188, 189, para. 282; and FOR CASES, see DIGEST, Supp., Tort, No. 72a.]

Cases referred to:

* (1) *The Testbank*, [1942] P. 75; [1942] 1 All E.R. 281; Digest Supp.; 111 L.J.K.B. 49.

* (2) *British Fame v. MacGregor*, [1943] A.C. 197; [1943] 1 All E.R. 33.

APPEAL and cross-appeal by the defendants from a judgment of HALLETT, J., who held that the negligence of both defendants had contributed to the accident and he apportioned the damages according to the degree of blame. The facts are fully set out in the judgment of MACKINNON, L.J.

Humfrey Edmunds for the first appellants.

Gilbert Beyfus, K.C., and *Dr. Charlesworth* for the second appellants.

S. R. Edgedale for the respondent.

MACKINNON, L.J.: The plaintiff was a passenger in an omnibus from Newcastle to Whitley Bay. In the course of that journey the omnibus ran into the parapet of a bridge at the side of the road along which it was proceeding, and the plaintiff was injured. She brought her action against the owners of the omnibus and also against the owners of a lorry which had been left stationary on the side of the road; it was while passing the lorry that the omnibus ran into the parapet of the bridge. The plaintiff claimed that her injuries were caused by negligence in the driving of the omnibus, or, alternatively, by the negligence of the owners of the lorry in leaving it on the road. If she established negligence against either of them, she could have recovered her whole damage against that one, and, if there was negligence on the part of the other, then the one would be entitled to claim contribution from the other. That is provided for by the Law Reform (Married Women and Tortfeasors) Act, 1935. HALLETT, J., gave judgment for the plaintiff against both defendants and held that the owners of the lorry were liable for two-thirds of the damages and the owners of the omnibus were liable for one-third. The owners of the lorry appeal, alleging that they ought to be absolved from any liability, and, alternatively, they say that, if they were at all negligent, the attribution of two-thirds of the damages to them was a wrong apportionment and that they ought to pay a great deal less and the owners of the omnibus a great deal more. There is a cross-appeal by the owners of the omnibus who want to say that all the damages ought to be put upon the owners of the lorry.

When that is stated it might be thought to involve difficult questions of law, but, in my view, there is no law at all in this case. It is a pure question of fact. If it had been an appeal from a verdict of a jury, it would have been unarguable. In fact it is an appeal from the judgment of the judge based upon his findings of fact.

I am in agreement with the judge that both the defendants were negligent. The owners of the lorry had left the lorry standing near a bend in the road early in the morning while the black-out was still operative and when the road was covered with a sheet of ice. I also agree with him that the omnibus was negligently driven, having regard to the difficulties of passing the stationary lorry. Therefore, I agree with him that both defendants were liable for this collision.

There remains the second question that we have to decide, the proportion of the damages to be borne by each of the defendants. The judge put two-thirds of the damages on the lorry and one-third on the omnibus. Counsel for the owners of the lorry says that is wrong and the proportion ought to be more favourable to his clients. With regard to this, a question arises which is of some difficulty: whether it is open to us to review the apportionment of liability found by the judge. That question arose recently in an Admiralty case, the *Testbank* (1). The apportionment of blame for a collision between two ships is the function of the judge who tries the case, pursuant to the Maritime Conventions Act, 1911. There was a dictum in this court, some years ago, that it would be undesirable, except in exceptional circumstances, for this court to vary the degree of blame which the judge trying the case in the Admiralty Court had apportioned when he found both ships to blame. This court thought that that was only a dictum and that, in principle, there was no reason why this decision of fact of the judge below should not be open to review like any other decision of fact, and we pointed out in the course of our judgment that exactly the same question would arise with regard to the apportionment of liability between two defendants under the Law Reform (Married Women and Tortfeasors) Act, 1935. However, in *British Fame v. MacGregor* (2), the House of Lords thought

that we were wrong and that, the Admiralty Court having applied the provisions of the Act of 1911, the Court of Appeal ought not, if they agree with the finding of fact as to the liability of both parties, to interfere with the apportionment or extent of that liability made by the judge who decided the case. VISCOUNT SIMON, L.C., said, at p. 199 ([1943] 1 All E.R. 34) :

A But subject to rare exceptions, I submit to the House that when findings of fact are not disputed and the conclusion that both vessels are to blame stands, the cases in which an appellate tribunal will undertake to revise the distribution of blame will be rare.

B We had in this court expressly referred to the arising of an exactly similar question under the Act of 1935, and I venture to think it would have been kinder, at any rate, to the members of this tribunal, faced with these difficulties, if the House of Lords had intimated for our guidance what the position is under the Act of 1935 and whether the same rule is to be applied as under the 1911 Act with regard to a ship ; but not one of their Lordships condescended to say a single word about that problem which we had expressly raised. For my part, since they are both modern statutes, I cannot see that there can be any difference in the duty imposed upon a judge of first instance first of all by the Act of 1911 and secondly by the Act of 1935. As at present advised, I think, applying the rule laid down by VISCOUNT SIMON, L.C., that, since the findings of fact are not disputed, we ought not to interfere with the apportionment of the blame by the C judge, two-thirds to the lorry and one-third to the omnibus, but I am not at all sure that I should not agree with him, even if I were free to examine the question, which I think I am not. The result is that both the appeal and the cross-appeal must be dismissed with costs.

D DU PARCQ, L.J. : I agree, and there is not very much I wish to add. With regard to the point which was dealt with last by MACKINNON, L.J., I agree that it seems to follow from the decision of the House of Lords in *British Fame v. MacGregor* (2), that the court ought not to interfere with the apportionment of responsibility and damages by the judge at the trial unless there is some error in law or fact in his judgment. I come to that conclusion particularly because of the reasons which are given by LORD WRIGHT in his speech at p. 121, All E.R. It is, perhaps, a matter rather of academic interest in this particular case as far as E I am concerned because I should not have been prepared to differ from the judge on this point, although I do not mean by that, that, if I had tried the case, I should necessarily have come to the same conclusion as that to which he came upon the facts, and would have apportioned the damages in precisely the same way ; but this court has never, I think, taken the view, apart from the decision in the case in the House of Lords, that it would alter the apportionment unless there was, in its view, something necessarily wrong with it. I should F certainly not be prepared to say that there was anything seriously wrong with the view that the judge took about it in this case, so that, even apart from that decision of the House of Lords, I do not think we ought to interfere with that part of the judgment.

G The only other part of the case about which I wish to say a few words is that which was the main subject of the argument of counsel for the second defendants —not so much the amount of the damages as the question whether the second defendants ought to pay any at all. I must not be thought to be saying anything disrespectful to his argument or to the very valuable opinions and judgments which he has read to us when I say that I think the cases are comparatively few in which much light is obtained by a liberal use of Latin phrases. I noted what LORD WRIGHT said about the phrase *novus actus interveniens*, and, like him, I abstain from criticising it, but I think that anybody who has tried a good many running-down cases with a jury will appreciate that not very much H assistance is given to the judge by decisions which turn on a somewhat subtle analysis of questions which are of very great interest to lawyers. Nobody can derive any assistance from the phrase *novus actus interveniens* until it is translated into English, and, if the judge is going to sum up a case to a jury, I think that, by the time he has done, he will probably find he could have got on equally well without it.

In this case the judge seems to me to have applied exactly the right principle of law. If one reads his judgment, it is quite apparent how he would have summed up to a jury if he had been trying the case with a jury. The first question would

have been whether there was any negligence on the part of the driver of the lorry, and as to that the question for the jury would have been, I think, whether a reasonable person would have apprehended that, if he left the lorry where in fact it was left, in all the circumstances of the case, he would be adding materially to the ordinary risks of the road. I do not doubt that it is perfectly possible, and I should think right on the evidence, to give an affirmative answer to that—that he would have so apprehended. The judge thought so, and I, personally, do not think he was wrong. The remaining question would have been whether the accident which in fact happened was due in part to that act of negligence. A
 It seems to me that the answer to that question is clearly : Yes. That answer must be given, unless it can be said that the risk which was created by the presence of the lorry in the place where it was left was, so to speak, only an irrelevant risk and one unconnected with the accident. I do not think that any jury would have been likely to say that it was an irrelevant risk and that it was unconnected with the accident. B
 It is quite true the accident would not have happened, as the judge has found—and again I agree with him—unless there had been negligence on the part of the driver of the omnibus, but, in my view, it is entirely wrong to say that, because there was negligence on the part of the driver of the omnibus, it was the cause, or, if you like, part of the cause of the accident, and, therefore, the people who left the lorry in a dangerous position are necessarily free from liability. C
 That suggestion is entirely inconsistent with what I think is the settled law on the matter. It is just when two people are negligent, perhaps in different degrees—and usually it is in different degrees—and the negligence of both substantially contributes to the happening of an accident, that both of them should be liable to the plaintiff, and, of course, until quite recently, both of them were liable jointly and severally for the whole amount of the damages. D
 It is familiar to us all that very often a plaintiff preferred to rely on his claim against the less negligent of two possible defendants because he happened to be the person able to pay. The law has not been substantially altered, so far as that goes, by recent legislation, for it now provides for contribution in certain cases between the tortfeasors.

It is very often possible for each of the tortfeasors to say : “ I may have been negligent, but this accident would never have happened but for the negligence of the other tortfeasor.” Each can say that of the other. The law says : You were negligent in some respect, and, if your negligence in part caused the accident, E
 then in part you must pay, and between you you must pay the injured party the whole of the damage. That is the law, and I am glad to think we have not disturbed it.

I do not wish to add anything on the other points that have been raised. I agree that the order of the court should be that proposed by MACKINNON, L.J.

UTHWATT, J. : I agree, and have nothing to add. F

Appeals dismissed with costs.

Solicitors : Stanley & Co., agents for J. H. Sinton & Co., Newcastle-upon-Tyne (for the first appellants) ; Isadore Goldman & Son, agents for R. R. Crute & Son, Newcastle-upon-Tyne (for the second appellants) ; Eric G. Floyd (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.] G

WATKINSON v. HOLLINGTON.

[KING'S BENCH DIVISION (Oliver, J.), May 5, 1943.] H

Emergency Legislation — Distress damage feasant — Whether leave of court required Courts (Emergency Powers) Act, 1939 (c. 67), s. 1 (2) (a) (i).

The plaintiff's cattle strayed on to the land of the defendant who distrained upon them on the ground that they were damage feasant. The plaintiff made a demand for their return and on this being refused brought an action in detinue for their recovery or their value and for damages. He maintained that the detention constituted a “levying of distress”

for the exercise of which leave from the appropriate court was required in accordance with the Courts (Emergency Powers) Act, 1939. The defendant contended that the Act did not apply to distress damage feasant:—

HELD: distress damage feasant came within the Act and the leave of the court was necessary before seizure.

[EDITORIAL NOTE.] It is clear that the ordinary remedy of distress comes within the Courts (Emergency Powers) Acts, but distress damage feasant is a remedy of a nature where application to the court for leave to seize does not seem to be practical. Common sense seems to suggest that in most cases the animal will have escaped beyond hope of capture before such leave can be obtained. It is held, however, that, on the proper construction of the Acts, such leave is necessary.

AS TO THE COURTS (EMERGENCY POWERS) ACT, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 946.]

ACTION in detinue to recover cattle detained by the defendant distress damage feasant or their value and for damages. The plaintiff's cattle strayed on to land belonging to the defendant who distrained upon them on the ground that they were damage feasant. The plaintiff's demand for their return being refused he brought an action in detinue for their recovery or their value and for damages. He maintained that the detention constituted a "levying of distress" for the exercise of which leave from the appropriate court was required by the Courts (Emergency Powers) Act, 1939, s. 1 (2) (a) (i), which provides as follows:

Subject to the provisions of this section, a person shall not be entitled, except with leave of the appropriate court: (a) to proceed to exercise any remedy which is available to him by way of—(i) the levying of distress . . .

The defendant contended that the Act had no application to distress damage feasant.

H. Malone for the plaintiff.

H. Brown for the defendant.

OLIVER, J.: It is quite unnecessary, in view of what has happened, for me to give judgment in detail in this case.

The plaintiff has satisfied me—the onus not being a very heavy one upon him—that he is the owner of these cattle. I do not see how one can disbelieve a man who says: "I bought these cattle and paid for them; I paid by a cheque on my own banking account," and whose evidence is borne out by a farmer, who says he sold the cattle to the plaintiff and was paid by cheque, and by a letter from the plaintiff's bank giving evidence that he had a banking account and that on the date of the transaction his cheque was drawn upon the bank.

The view I take on the construction of the Act is that, while I am firmly convinced that the draftsmen and probably the legislators themselves never considered this case at all, yet they have nevertheless used language so plain in saying that no distress may be levied except with the leave of the appropriate court that there is no escape from it, although the effect of my decision—as counsel for the defendant properly said—is, for practical purposes, to deprive people of their right of distress damage feasant. Nevertheless, if the Act of Parliament has used words which have that effect, I must not be deterred by that somewhat curious result from interpreting them in what seems to be their plain meaning. That being the case, I must find that these cattle were distrained without any right, and, since proper demand for their return was made, an action in detinue is made out. The plaintiff succeeds, and, in my judgment, is entitled to the return of such of the beasts as survive.

Judgment for the plaintiff for the return of the surviving cattle with damages for the detention and costs.

Solicitors: *Edward F. Iwi*, agent for *Vyvyan Wells & Sons*, Finchley (for the plaintiff); *Pothecary & Barratt*, agents for *T. Anderson Davis*, St. Albans (for the defendant).

[Reported by HUBERT B. FIGG, ESQ., Barrister-at-Law.]

BLUNT v. BLUNT ET E CONTRA

Principles laid down by VISCOUNT
SIMON, L.C., at p. 78, applied.
LOWE v. LOWE. [1952] 2 All E.R. 671.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Macmillan,
Lord Porter and Lord Clauson), April 2, 5, 6, 8, 9, June 9, 1943.]

*Divorce—Discretion—Grant of decree to guilty party—Principles on which appellate
court should act—Cross petitions—Adultery admitted by both parties at late
stage of proceedings.*

Where the trial judge is not shown to have acted under any misapprehension of fact in the exercise of his discretion by either giving weight to irrelevant or unproved matters or omitting to take into consideration matters which were relevant, the Court of Appeal ought not to reverse the decision of the trial judge. A

Where both parties ask the court to exercise its discretion in his or her favour, injustice may be done by exercising it in favour of one party and refusing to exercise it in favour of the other. There is no reason in law why, in cases where such injustice will result, the court should not exercise its discretion in favour of both parties and pronounce the decree without drawing a distinction between them. B

Decision of the Court of Appeal ([1942] 2 All E.R. 613) *reversed and order of*
HODSON, J., restored.

EDITORIAL NOTE. The House of Lords have reversed the decision of the Court of Appeal and restored the order of HODSON J. for the reason that they take a rather different view of the facts. As to the principles which should guide an appellate court upon such occasions there is little difference between the decisions of the appellate courts but this unanimous pronouncement of the House must necessarily be regarded as the more authoritative statement on the matter. The House has pointed out that it is open to the court to exercise its discretion in favour of both parties and that there are cases where a refusal to adopt this course may work injustice. There is a certain handicap in having a decree made against one and, in a case where both parties are at fault, this may be and should be avoided by the exercise of the discretion of the court in favour of both parties. C

AS TO DISCRETION OF COURT IN GRANTING A DECREE see HALSBURY, Hailsham Edn., Vol. 10, pp. 686-690, paras. 1018-1025; and FOR CASES, see DIGEST, Vol. 27, pp. 359-367, Nos. 3446-3538.] D

Cases referred to:

- * (1) *Todd v. Todd* (1907) 24 T.L.R. 28; 27 Digest 365 3505. E
- * (2) *Wickins v. Wickins* [1918] P. 265; 27 Digest 348, 3292; 119 L.T. 268.
- * (3) *Holland v. Holland*, [1918] P. 273; 27 Digest 483, 5124; 87 L.J.P. 142; 119 L.T. 266.
- (4) *Otway v. Otway*, *Otway v. Otway and Hoffer* (1888), 13 P.D. 141; 27 Digest 368, 3539; 57 L.J.P. 81; 59 L.T. 153.
- (5) *Anichini v. Anichini* (1839) 2 Curt. 210; 27 Digest 368, 3545.
- (6) *Morgan v. Morgan and Porter* (1869), L.R. 1 P. & D. 644; 27 Digest 347, 3288; 38 L.J.P. & M. 41; 20 L.T. 588. F
- (7) *Joseph v. Joseph and Wentzell* (1865), 34 L.J.P.M. & A. 96; 27 Digest 366, 3522.
- (8) *Coleman v. Coleman* (1866), L.R. 1 P. & D. 81; 27 Digest 365, 3497; 35 L.J.P. & M. 37; 13 L.T. 684.
- * (9) *Wilson v. Wilson* [1920] P. 20; 27 Digest 360 3448; 89 L.J.P. 17; 122 L.T. 223.
- * (10) *Wilkinson v. Wilkinson and Seymour* (1921) 126 L.T. 29n; 27 Digest 360, 3449; 37 T.L.R. 835n.
- * (11) *Apted v. Apted and Bliss*, [1930] P. 246; Digest Supp.; 99 L.J.P. 73; 143 L.T. 353. G
- (12) *Osenton & Co. v. Johnston* [1942] A.C. 130; [1941] 2 All E.R. 245; Digest Supp.; 110 L.J.K.B. 420; 165 L.T. 235.

APPEAL by both parties from a decision of the Court of Appeal given on Nov. 6, 1942, and reported [1942] 2 All E.R. 613, the wife also asking for the discretion to be exercised in her favour. The facts sufficiently appear from the judgments in the Court of Appeal reported as above, but in some respects that statement is commented on in the opinion of VISCOUNT SIMON, L.C., here reported. H

Patrick Hastings, K.C., and Victor Williams for the appellant.

Gilbert Beyfus, K.C., and E. Holroyd Pearce for the respondent.

VISCOUNT SIMON, L.C.: My Lords, at the conclusion of the oral arguments in this case, the House intimated its unanimous view that the appeal should be allowed and reserved to a later day the statement of its reasons for that conclusion. These reasons I now proceed to state. I have had the great advantage

of the co-operation of the other members of the House in preparing this opinion and I understand that they concur in it.

This appeal concerns the exercise of the so-called "discretion" of the Divorce Court to grant a decree of divorce notwithstanding that the petitioner has been guilty of adultery. Appeals from the Divorce Court on this issue are rare: there are apparently only three previous cases in the reports, in each of which the Court of Appeal confirmed the view of the trial judge and upheld his refusal to exercise this discretion: *Todd v. Todd* (1), *Wickins v. Wickins* (2) and *Holland v. Holland* (3). In the present case the Court of Appeal (MACKINNON, GODDARD and DU PARCQ, L.JJ.), has reversed the decision of HODSON, J., who exercised his discretion in favour of the appellant (the husband) and granted to him a decree on the ground of his wife's (the respondent's) adultery, notwithstanding that the appellant admitted that he also had committed adultery. From this conclusion both parties appeal, the wife also asking for the discretion to be exercised in her favour. There thus comes before this House for the first time, 86 years after the passing of the Matrimonial Causes Act, 1857, the important question of the nature and proper exercise of the discretion which was originally conferred on the Divorce Court by the proviso to sect. 31 of that Act.

Before HODSON, J., there was a consolidated suit between the appellant and respondent, each spouse petitioning for dissolution of the marriage on the ground of the other's adultery, and each spouse lodging a "discretion statement," under the Matrimonial Causes Rules, 1937, r. 28, which admitted that spouse's adultery and asked for the exercise of the court's discretion in his or her favour respectively. There is one child of the marriage. The respondent in her original petition had asked for the marriage to be dissolved on the ground of her husband's cruelty, to which the ground of his adultery was added by supplemental petition. HODSON, J., came to the conclusion that there was not the slightest indication of any cruelty upon which a divorce could be founded.

In this situation, when the respective charges of adultery have been proved (assuming there has been no condonation, connivance, or collusion), any one of four results is conceivable:

(i) The court may exercise its discretion by pronouncing a decree of dissolution of marriage in the husband's favour, while dismissing the wife's petition.

(ii) The court may exercise its discretion by pronouncing a decree in the wife's favour, while dismissing the husband's petition.

(iii) The court may refuse to exercise its discretion in favour of either party, whereupon both petitions will be dismissed and the marriage remains undissolved.

(iv) Theoretically (though this practice has been almost unknown in connection with cross charges of adultery) the court might exercise its discretion in respect of both parties and pronounce the decree in favour of each party. I propose to make some observations later in this opinion as to the use of this last course.

In the present case, HODSON, J., adopted course (i): the Court of Appeal has reversed this and substituted course (iii). Both parties appeal, the appellant seeking to restore the decision of HODSON, J., and the respondent arguing for course (ii) or even course (iv).

The statutory enactment endowing the Divorce Court with "discretion" in these cases is now to be found in the Matrimonial Causes Act, 1937, s. 4, where the mandatory requirement that the court shall pronounce a decree of divorce if satisfied on the evidence that the case for the petitioner has been proved and that there has been no condonation, connivance or collusion is followed by a proviso that:

... the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery ...

A provision to the like effect has been part of the statute law of divorce ever since the Act of 1857. Previously, the Ecclesiastical Courts had maintained the rule that a party seeking relief must come with clean hands (see the exposition of this topic in *Otway v. Otway* (4)) though condoned adultery was not regarded as a bar to divorce *a mensa et thoro* or to a judicial separation: *Anichini v. Anichini* (5).

For many years after 1857 the cases in which the court exercised its discretion to grant a decree were strictly circumscribed. LORD PENZANCE, in *Morgan v.*

Morgan (6), mentioned certain examples : (i) cases like *Joseph v. Joseph and Wenzell* (7), where the respondent had induced the petitioner to believe that she was dead and the petitioner in this belief had married again ; (ii) *Coleman v. Coleman* (8), in which the petitioner satisfied the court that her husband had compelled her to live a life of prostitution ; and (iii) possibly, cases in which an act of adultery of the husband had been condoned by the wife and in no way conduced to her subsequent misconduct. This last would be following the rule that had prevailed in the Ecclesiastical Courts. LORD PENZANCE added that there probably were other classes of case which called for a favourable exercise of the court's powers, but he deprecated "a loose and unfettered discretion" exercised as "a free option subordinated to no rules," and added that "the duty of reducing its exercise to method devolves upon the court."

The scope within which the Divorce Court has thought it right to exercise a favourable discretion has been greatly widened since the pronouncement of LORD PENZANCE, and in contrast with his view it has for long been the practice to regard the discretion as "unfettered." It is impossible to lay down strict rules for its exercise, and to attempt to do so would really be to restrict the liberty conferred by the language of the statute. I would adopt the view of the Court of Appeal, expressed a quarter of a century ago in *Wickins v. Wickins* (2), per SWINFEN EADY, M.R., at p. 272, that :

... where Parliament has invested the court with a discretion which has to be exercised in an almost inexhaustible variety of delicate and difficult circumstances, and where Parliament has not thought fit to define or specify any cases or classes of cases fit for its application, this court ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised, or to place greater fetters upon the judge of the Divorce Division than the legislature has thought fit to impose . . .

The utmost that can be properly done is to indicate the chief considerations which ought to be weighed in appropriate cases as helping to arrive at a just conclusion. In *Wilson v. Wilson* (9) SIR HENRY DUKE, P., in dealing with the particular case before him, mentioned four circumstances which, in his view, warranted the exercise of the judicial discretion in the petitioner's favour, and these four considerations were referred to with approval by LORD BIRKENHEAD, L.C., when he was sitting in the Divorce Court and deciding *Wilkinson v. Wilkinson and Seymour, the King's Proctor showing cause* (10). These four points are : (a) the position and interest of any children of the marriage ; (b) the interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage ; (c) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife ; and (d) the interest of the petitioner, and in particular the interest that the petitioner should be able to remarry and live respectably.

To these four considerations I would add a fifth of a more general character, which must indeed be regarded as of primary importance, viz., the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It is noteworthy that in recent years this last consideration has operated to induce the court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused.

It is to be observed that, in the case last quoted, divorce was decreed notwithstanding that the petitioner's misconduct was only disclosed after the King's Proctor had intervened, and this was also the facts in *Wilson v. Wilson* (9), and in other cases. Nevertheless, it is important to emphasise, as LORD BIRKENHEAD said in *Wilkinson v. Wilkinson* (10) at p. 29, that :

It is the duty of every petitioner in this court to place the facts of his or her case most fully before the court and the wholesome and well-established rule that on the intervention of the King's Proctor a decree may be rescinded, if there is a failure to deal with the court with the utmost good faith, is one that is not to be relaxed.

Some years later, the exercise of the discretionary power of the Divorce Court to grant a decree notwithstanding the petitioner's adultery was the subject of elaborate consideration by LORD MERRIVALE, P., in *Apted v. Apted and Bliss* (11),

when previous decisions and judicial pronouncements were carefully reviewed. LORD MERRIVALE, P., rejected as a practical impossibility any precise formulation of the grounds on which discretion is to be exercised. He pointed out, however, at pp. 255, 256, that :

... a judicial discretion cannot be rightly exercised except upon due ascertainment of the relevant facts and every interest involved is a proper matter for consideration. Upon these facts a judgment is to be formed in accordance with a statutory duty.

A When the court has used its authority to secure knowledge of the material facts, and a decree is pronounced upon due presentment of them, it must I think be assumed to be a decree based on the statutory requirements.

This brings me to a consideration of the circumstances in which an appeal may be successfully brought against the exercise of the Divorce Court's discretion. If it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted

B to take into account matters that are relevant, there would, in my opinion, be ground for an appeal. In such a case the exercise of discretion might be impeached, because the court's discretion will have been exercised on wrong or inadequate materials. But, as was recently pointed out in this House in another connection in *Charles Osenton & Co. v. Johnston* (12) at p. 138 ([1941] 2 All E.R., at p. 250) :

C ... to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations ... then the reversal of the order on appeal may be justified.

D *Osenton's* case (12) was one in which the discretion being exercised was that of deciding whether an action should be tried by an official referee, and the material for forming a conclusion was entirely documentary and was thus equally available to the appellate court. The reason for not interfering, save in the most extreme cases, with the judge's decision under the Matrimonial Causes Act, 1937, s. 4, is of a far stronger character, for the proper exercise of the discretion in such a matter largely depends on the observation of witnesses and on a deduction

E as to matrimonial relations and future prospects which can best be made at the trial. In *Holland v. Holland* (3), SWINFEN EADY, L.J., defined the only issue that can be raised in the Court of Appeal in challenge of the exercise of the divorce judge's discretion thus, at p. 280 :

The question for consideration by this court is whether his judgment is erroneous, and not whether we should have exercised the discretion in the same manner as the judge below did. There is no appeal from his discretion to our discretion, and the

F appellant is not entitled to succeed unless the judgment is erroneous.

I now turn to the judgments pronounced in the Court of Appeal. They deserve, and they have received, the most careful study, especially as the three Lords Justices all reached the same conclusion, though not, I think, entirely upon the same grounds. MACKINNON, L.J., was obviously deeply impressed by the deplorable behaviour of the husband towards his wife during the period

G when they were living together. The Lord Justice, while accepting the findings of HODSON, J., in the petitioner's favour on the issues of cruelty and of conduct conducing to the wife's adultery, says (and I am not disposed to differ from him), at p. 615 :

... his conduct to his wife was certainly proved to have been very bad. He compelled her to consort with drunken stable boys and affronted her by his and their coarseness and indecencies. The incidents about money including his refusal to pay a surgeon and nurses attendant on his infant son are shocking. In short he behaved as a cad.

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It is necessary to add that the Lord Justice's conclusion as to the moral character of the wife was even more condemnatory. But it is difficult to see how the bad behaviour of the husband deprived HODSON, J., of the right to weigh such considerations as I have set out above as bearing upon the exercise of his discretion. For example, how can the judge's duty to consider the interests of the child of the marriage be affected thereby ? Moreover, with all respect to MACKINNON, L.J., his view seems to have been coloured by some misconception of the facts.

The husband's admission of his own adultery was not made "on the third and last day of the hearing"—on the contrary, it was stated to the court by his counsel in his opening speech. The admission that he had condoned the wife's earlier misconduct, as to which he had sworn falsely in a previous King's Bench action, was not "dragged" from the appellant in the course of the divorce suit, but was stated when he gave evidence, though he at first suggested false excuses for his previous falsehood. It is a mistake to suppose that the appellant attempted to deceive the Divorce Court about this condonation; the discreditable fact is that he committed perjury about it in the previous action. A

The judgment of GODDARD, L.J., is based on a proposition which I accept and which he formulates as follows, at p. 618 :

That this discretion is one with which this court should be slow to interfere is unquestionable but, if it is of opinion that HODSON J. has proceeded on wrong grounds or has not taken into account facts which ought to have been considered, this court not only can, but ought, to substitute its view for that of HODSON J. below. B

My difficulty, however, is that, after a most careful study of that judgment as a whole, I cannot discover what were the wrong grounds or what were the facts not taken into account. We asked counsel for the respondent to point out the facts which it was considered that HODSON, J., had not taken into account, and he was unable to give us satisfaction on this head. One particular incident referred to by GODDARD, L.J.—that relating to the Cumberland Hotel—was, I think, manifestly included in the review of the facts by HODSON, J., and, in any case, it would be rash to assume that a judge of his experience has failed to take into account a relevant fact merely because at the end of the three days' trial he does not make specific mention of it in his judgment. C

As regards the grounds upon which a favourable discretion can be exercised, GODDARD, L.J., was careful to emphasise that the discretion must be unfettered, and he added, at p. 619 :

But there is one rule which must obviously obtain, and that is the duty of disclosure, full and frank, for without it the court has not the material upon which it can form an opinion whether relief should be granted or not. Such insistence has been laid, and rightly so, on the duty of disclosure that there is some danger that it may come to be regarded as the only material matter. The public interest has to be considered in all its aspects, and not only from the point of view that it is undesirable, as it surely is, to keep two adulterous spouses fettered in the bonds of wedlock. D

I am in full agreement with this pronouncement, but I venture to think that GODDARD, L.J., did not apply it correctly to the facts of the present case. He continued, at p. 619 :

The law requires the sanction of the court for the dissolution of a marriage, and, if people deliberately set out to deceive the court, even if the truth be wrung from them at the last moment, surely that is a most material fact in considering whether discretionary relief should be given. It is here that I feel compelled to differ from HODSON, J. He said that the important matter for his consideration was whether in the end he had got the truth of the matter from the petitioner. That looks to me very like saying that, if disclosure is somehow obtained, nothing else matters very much. E

I cannot agree with this criticism of the judgment of HODSON, J. It seems to me clear that he took into consideration the petitioner's conduct in relation to the court, but that he came to the conclusion that he had finally succeeded in ascertaining the relevant facts, including the facts as to the petitioner's attempts at deception, and that on the sum total of those facts he ought to exercise his discretion in the petitioner's favour. The reference by HODSON, J., to the importance of getting at the truth of the matter does not justify an inference that he had erroneously failed to pay due regard to the petitioner's earlier attempts at deception. The weight to be given to the petitioner's misconduct in that respect was a matter to be determined by the judge; and I can find nothing to enable me to reach the conclusion, which GODDARD, L.J., would seem to have reached, that there was some misconception in the judge's mind which would justify an appellate court in treating the judge's conclusion in regard to this matter as "erroneous" within the meaning of that word as used by SWINFEN EADY, L.J., in *Holland v. Holland* (3). F

In his judgment *DU PARCQ, L.J.*, fully recognised that discretion in these cases is "at large," but he was plainly influenced in his conclusion by the circumstance that he personally took a more favourable view of the wife's conduct than of the husband's. With the greatest respect, I cannot but think that, G

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even if this were a legitimate ground for reversing on appeal the decision of the trial judge (which, in my opinion, it was not), it was a conclusion resting, to a material extent, on a misreading of the facts; for example, DU PARCQ, L.J., says of the husband, at p. 624 :

He perjured himself with a view to perverting the course of justice in the very proceedings in which he is craving the indulgence of the court.

A I have already pointed out that the perjury did not occur in the Divorce Court at all. Again, the Lord Justice interpreted a phrase in a letter written by the wife to her husband as showing that "the wife gave her husband a real opportunity of reconciliation which he made no effort to grasp"; but, in so saying, the Lord Justice omitted to observe that the wife in answer to her own counsel repudiated this interpretation and said of this very letter that she did not intend "to go back to the old life together."

B Having regard to the considerations which should govern the exercise of the judge's discretion in the Divorce Court and to the principles which limit any review of the exercise of that discretion in an appellate tribunal, this House has come to the conclusion that the decision of HODSON, J., should have been allowed to stand and must be restored by order of this House.

C Before parting with the case, I desire to add some observations on the use, in appropriate cases, of the course numbered (iv) at the beginning of this opinion, namely, that which is open to the court, when both parties have committed adultery, of exercising its discretion in favour of both sides and pronouncing a decree on that basis. In the present case, this course would not be proper, for HODSON, J., has declined to exercise his discretion in favour of the wife, and the members of the Court of Appeal all support him in this decision, though DU PARCQ, L.J., did not himself approve of the judge's conclusion that it was the conduct of the wife which broke up the matrimonial home. If it were permissible to review such a finding of fact, I should certainly agree with HODSON, J.

E Speaking more generally, however, it appears to me that cases may not infrequently arise in which each party, while proving the case for his or her petition, has been guilty of such conduct as by the terms of the statute entitles the court to dismiss the petition, where injustice may be done if discretion is exercised in favour of one of the parties only. There is no reason in principle why, where both sides are in mercy, if the judge decides to exercise his discretion, he should not exercise it in favour of both parties and pronounce the decree without drawing a distinction between them. If, for example, the blame for the breakdown of the marriage must be equally shared and the circumstances are such as do not justify a judicial preference for one party as compared with the other, serious injustice may be done if a decree of divorce is pronounced in favour of one party while the petition of the other party is dismissed. Under the F Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, the court in fixing, on any decree for divorce, what payment is to be secured by the husband to the wife is to have regard "to the conduct of the parties"; and the wife may be unduly favoured, or unduly handicapped, if the judge, in a case where there is little to choose between the parties, only pronounces a decree in favour of one spouse. There is, of course, the alternative of refusing the exercise of discretion to either G side, but where the judge decides that it is his duty to exercise his discretion and thus bring the marriage to an end, the method of doing so above referred to should, in proper instances, not be overlooked.

H The order of the House, which has already been made, therefore, is that the appeal should be allowed and the order of HODSON, J., restored. The cross-appeal is dismissed. As regards costs, there will be no costs in the Court of Appeal and each party will pay his or her own costs in this House. The appellant not objecting, the respondent may take her costs in this House out of the £300 provided by him under the order of the Court of Appeal: any balance to be returned to the appellant.

Appeal allowed. Cross-appeal dismissed.

Solicitors: *Tamplin, Joseph & Flux* (for the appellant); *Kenneth Brown, Baker, Baker* (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

BUCKMAN v. BUTTON.

[KING'S BENCH DIVISION (Charles and Tucker, JJ.), **March 26, 1943.**]

Emergency Legislation—Offences under Defence (General) Regulations—Exception to general provision—Onus of proof—Summary Jurisdiction Act, 1848 (c. 43), s. 14—Summary Jurisdiction Act, 1879 (c. 49), s. 39 (2)—Defence (General) Regulations, reg. 55—Limitation of Supplies (Miscellaneous) (No. 5) Order, 1940 (S.R. & O., 1940, No. 2031)—Limitation of Supplies (Miscellaneous) (No. 11) Order, 1941 (S.R. & O., 1941, No. 700).

Statutes—Retrospective operation—Amendment increasing penalty subsequent to offence.

The appellant was charged before a court of summary jurisdiction with two offences under the Defence (General) Regulations. The alleged offences were that the appellant, after the date prescribed by certain orders, had carried on a business in respect of which he was required to make an application for registration, and had failed to make such application. After the commission of the offences, but before the hearing, the regulations were amended by orders which increased the penalties for such offences. At the hearing the appellant proffered no evidence on his own behalf and he was convicted and fined, and, in default of payment, was sentenced to imprisonment, the penalties being to the extent permitted by the amending orders. On appeal the appellant contended: (i) that the prosecution had failed to discharge the onus of proving that he was a person obliged to register and that he had failed to make an application to be so registered, and (ii) that the amending orders were not retroactive and, therefore, the increased penalties, which were not in existence at the time of the commission of the offences, should not have been imposed on him :—

HELD : (i) there was sufficient evidence that the appellant was a member of the class of persons required to register, and the onus was on the appellant to show that he had applied for registration or that he came within one of the exceptions.

(ii) the justices were right in law in imposing the higher penalties provided by the subsequent orders which were in force at the date of the hearing.

[EDITORIAL NOTE.] The case confirms the decision in *Director of Public Prosecutions v. Lamb* (1), in so far as it deals with the position where the penalty is increased after the offence is complete. The regulations made during the war make registration necessary in many cases, and there is here the important decision that, where a person is required to register, the onus is on him to prove that he has registered or that he is in one of the exempted classes where the regulations provide for exemption.

AS TO RETROSPECTIVE EFFECT, see HALSBURY, Hailsham Edn., Vol. 31, pp. 513-516. para. 670; and FOR CASES, see DIGEST, Vol. 42, pp. 693-697, Nos. 1083-1138.] Case referred to :

^{*} (1) *Director of Public Prosecutions v. Lamb*, [1941] 2 K.B. 89; [1941] 2 All E.R. 499; Digest Supp.; 110 L.J.K.B. 480; 165 L.T. 59.

APPEAL by the accused by way of case stated from a decision of justices sitting as a court of summary jurisdiction at Aldershot. The facts are fully set out in the judgment of CHARLES, J.

G. O. Slade for the appellant.

G. Justin Lynskey, K.C., and *Valentine Holmes* for the respondent.

CHARLES, J. : This matter comes before the court by way of case stated by the justices of the peace for the county of Southampton sitting as a court of summary jurisdiction at Aldershot, and it raises certain interesting and important points relating to the Defence (General) Regulations which govern the purchase and sale of certain controlled goods.

The history of the case I can put quite shortly. Between June 5 and June 15, 1941, Buckman was charged under the Defence (General) Regulations, reg. 55, with the offences that he

... being a person who was required by the Limitation of Supplies (Miscellaneous) (No. 5) Order, 1940, to make an application to be registered under the said Order, did after the date prescribed by the said Order, namely, Dec. 15, 1940, carry on a business of a kind referred to in art. 1 of the said Order without having made such application; and, secondly, that between June 15, 1941, and Nov. 30, 1941, at Aldershot aforesaid being a person who was required by the Limitation of Supplies (Miscellaneous) (No. 11)

Order, 1941, to make an application for registration under the said Order, did after the date prescribed by the said Order, namely, June 15, 1941, unlawfully carry on a business in respect of which he was required to make an application for registration without having made such application.

A The consideration of those informations came before the court at Aldershot on June 29, 1942. The justices, having considered the matter, convicted the appellant and fined him £250 and 50 guineas costs for the first offence and £750 in respect of the second offence. They allowed him 1 month in which to pay the fine and costs imposed for the first offence, and, in default, owing to the gravity of the offence, he was sentenced to 3 months' imprisonment. He was allowed 3 months within which to pay the fine imposed for the second offence, and, in default, owing to the gravity of the offence, he was sentenced to 6 months' imprisonment.

B The first point taken for the appellant was that there was no evidence that the appellant was a person liable to register under the Orders, and that there was no evidence that the appellant was not one of the excepted persons under the No. 5 and the No. 11 Orders.

C There is attached to the case a very full and very frank statement made by the appellant which contains statements from which, I think, the bench could very well have come to the conclusion that he was not one of those excepted persons. They have found as a fact that he did buy and sell wholesale certain controlled goods to the total value of £663, being goods described in the Limitation of Supplies (Miscellaneous) (No. 5) Order, Sched. I. I think counsel for the appellant, who did not urge his first point very strongly inasmuch as it would be of no effect if his second point was decided against him, indicated that the appellant was within that class of person.

D His second point was that there was no evidence that the appellant had not made an application to be registered. In considering that, the attention of the justices was called to the terms of the Summary Jurisdiction Act, 1848, and the Summary Jurisdiction Act, 1879. There is the following proviso in the Summary Jurisdiction Act, 1848, s. 14 :

E Provided always, that if the information or complaint in any such case shall negative any exemption, exception, proviso, or condition in the statute on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he would have the advantage of the same.

These are very clear and plain words, and the Summary Jurisdiction Act, 1879, s. 39 (2), provides as follows :

F Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, byelaw, regulation, or other document creating the offence, may be proved by the defendant, but need not be specified or negated in the information or complaint, and, if so specified or negated, no proof in relation to the matter so specified or negated shall be required on the part of the informant or complainant.

Further, the Limitation of Supplies (Miscellaneous) (No. 5) Order, 1940, art. 1 (5) provides as follows :

G No person who is required by this article to make an application to be registered shall carry on any business referred to in this article after the prescribed date, unless he has made that application.

H It is quite clear that, unless he makes that application he cannot trade in the way prescribed, and it is for him to show that he has made the application, or that he has an excuse for not having done so. In my view, the justices took the proper course in saying that it was not for the complainant to call evidence to show that this man had not made an application. It was for the appellant himself to give evidence or call evidence to show that he had that excuse or exemption which the Act had given him. Since in this case he called no such evidence, I think the justices came to the proper conclusion.

We come to the third point, which is interesting and important. It relates to the fact that, by S.R. & O., 1942, No. 501, the penalties were increased over and above the penalties which were in existence at the time of the commission of the offence by the appellant ; and it is said that that order, which was by way of amendment and did not come into operation until Mar. 23, 1942, had no application to the offence committed by this appellant in June, 1941.

It is necessary to see how the matter starts and how S.R. & O., 1942, No. 501, comes into operation at all. The Defence (General) Regulations, reg. 55, is, so far as it affects this matter, as follows :

A competent authority, so far as appears to that authority to be necessary in the interests of the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community may, by order provide (a) for regulating or prohibiting the production, treatment, keeping, storage, movement, transport, distribution, disposal, acquisition, use or consumption of articles of any description, and, in particular, for controlling the prices at which such articles may be sold.

The penalties for a breach of that regulation are set out in reg. 92 which provides as follows :

If any person contravenes or fails to comply with any of these regulations, or any order, rule or byelaw made under any of these regulations, or any direction given or requirement imposed under any of these regulations or under any order, rule or byelaw made under any of these regulations, he shall, save as otherwise expressly provided by or under these regulations, be guilty of an offence against that regulation ; and, subject to any special provisions contained in these regulations, a person guilty of an offence against any of these regulations shall (a) on summary conviction, be liable to imprisonment for a term not exceeding 3 months or to a fine not exceeding £100, or to both such imprisonment and such fine.

The later regulations which affect this particular case are two in number. First, S.R. & O., 1941, No. 1981, para. (1b), provides as follows :

Where an order under para. (1) of this regulation contains any such provisions as are mentioned in sub-para. (a) of that paragraph and a person is, in respect of any article, convicted of an offence against this regulation consisting of a contravention of any such provision, he shall, subject to the provisions of this paragraph, be liable, in addition to the penalties provided for by reg. 92 of these regulations, to a fine or further fine ...

That increased the penalty. By inversion it says precisely what is said in reg. 92. It says "a person ... convicted of an offence against this regulation consisting of a contravention of any such provision ..." and reg. 92 provides :

If any person contravenes or fails to comply with any of these regulations ... he shall be guilty of an offence against that regulation ...

and a person guilty is liable on conviction to a fine. I think it is the same thing put in another way. Secondly, S.R. & O., 1942, No. 501, which came into operation on Mar. 23, 1942, created two new offences and then in para. (1d) increased the penalties for existing offences. Para. (1d) provides :

Any person guilty of an offence against this regulation, being a breach of the control or an offence referred to in para. (1b) or para. (1c) of this regulation shall be liable (a) on summary conviction, to a fine not exceeding the maximum amount provided in para. (1e) of this regulation or to imprisonment for a term not exceeding 1 year, or to both such fine and imprisonment.

Those fines are greater and those terms of imprisonment are longer than you find in the earlier regulations.

Counsel for the appellant argued that that regulation could not be regarded as retroactive or retrospective, whichever word you care to use, because shortly before S.R. & O., 1941, No. 1981, was passed, a case had been considered, *Director of Public Prosecutions v. Lamb* (1), in which expressions were used that the word "convicted" was of great importance in considering whether penalties of this sort could be regarded as being retroactive or not. I will refer to that case in one moment. I desire to say that I think it would be improper to regard S.R. & O., 1942, No. 501, without looking closely at the original penalty regulation, the Defence (General) Regulations, No. 92. If you do that, you find that the terminology of the section so far as guilt or a guilty person is concerned, is reproduced. The matter is absolutely free from ambiguity, for read in its ordinary connotation in regard to the word "guilty" must mean "found guilty." I cannot, myself, see that it makes sense otherwise.

The judgment of HUMPHREYS, J., in *Director of Public Prosecutions v. Lamb* (1), states with perfect clarity what the duty of a justice is in such a case. He said, at p. 99 ([1941] 2 All E.R. at p. 502) :

Those matters came before the magistrate on Sept. 4, 1940. The information had been laid on Aug. 17. The offences were alleged to have been committed between Sept. 3,

1939, that is, the day when these Defence (Finance) Regulations came into force, and May 11, 1940, that being the date, as we were told, when in fact disclosure was made by the defendants. On Sept. 4, 1940, therefore, the magistrate, looking to see what his powers were in the matter, would find them contained in reg. 9 of the Defence (General) Regulations. By Sept. 4, 1940, however, the additional power had been provided by an order in council of June 11, 1940, as an alternative to imposing a fine of £100, to impose a fine equal to three times the value of the currency or whatever it may be which is the subject of the breach of the regulation. The fine may be whichever sum is the larger. The law was, therefore, altered at a date considerably before the . . .
A hearing of them.

Then HUMPHREYS, J., said at p. 101 ([1941] 2 All E.R. at p. 505) :

For that reason I take the view that the magistrate was wrong in considering that that doctrine hampered him in any way in giving effect to the perfectly plain language of this order in council. It was totally immaterial for him to consider what would have been his powers if this matter had come before him 6 months earlier than it did.
B He was sitting on Sept. 4. All that he was concerned with was what were his powers on Sept. 4. His powers were clearly stated in the order which had existed since June 11.

In the same way, in this case, the justices had before them offences committed in June, 1941. Between the commission of the offences and the hearing on June 29, S.R. & O., 1942, No. 501, came into operation on Mar. 23, 1942. The justices, therefore, had before them Order No. 501. In my view, they
C acted correctly thereon and the appeal must be dismissed.

TUCKER, J. : I agree.

I only desire to add a few words on a minor matter, namely, the first point taken by counsel for the appellant, that is, that there was no evidence that the appellant was a person liable to register under the orders.

In my view, having regard to the judgment which has just been delivered by
D my Lord with regard to counsel for the appellant's second point, namely, that the onus is on the appellant in the circumstances of this case to show that he was a person who had made an application, with which judgment I agree, I think it clearly follows that the first point of counsel for the appellant must fail because the Limitation of Supplies (Miscellaneous) (No. 11) Order, which is the one I am referring to, and No. 5, are, to all intents and purposes, to the same effect. I find in art. 1 :

E Subject to the provisions of paras. (3), (4) and (5) of this article, every manufacturer of controlled goods of any class . . . shall before the prescribed date make an application to the Board of Trade . . .

It is found in this case that the appellant was a wholesale dealer in controlled goods of the kind in question, and it was, accordingly, his duty to make the application in prescribed form unless he was one of the excepted persons referred
F to in paras. (3), (4) and (5). The offence is that, being a person who is required to make an application, he carried on business without having made that application, and I think that, in view of the finding that he was a wholesale dealer in controlled goods of this kind, the onus was upon him to show that he came within one of the excepted classes of persons in paras. (3), (4) and (5), and it is for that reason, speaking for myself, that I think the first argument of counsel for the appellant fails, rather than by reason of the statement made by the appellant attached
G to the case.

I should also add for the purpose of record, to say that counsel for the appellant, in the course of his argument, did at one time rely on the Interpretation Act, 1889, s. 38 (2), but, having heard the submission on that point by counsel for the respondent, counsel for the appellant subsequently abandoned that point and was content to rely solely on the language and interpretation of S.R. & O., 1942, No. 501.

H I agree with the judgment of my Lord in these cases.

Appeal dismissed with costs.

Solicitors : Phoenix, Levinson, Walters & Shane (for the appellant) ; Solicitor to the Board of Trade (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

HIGGINS v. HIGGINS AND BANNISTER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pilcher, J.), **May 10, 1943.**]*Divorce—Adultery—Condonation of adultery—Subsequent desertion but not for statutory period—Whether desertion revived adultery.*

In November, 1941, the petitioner filed a petition for the dissolution of his marriage on the ground of his wife's adultery with the co-respondent. In Aug., 1941, the wife had admitted the adultery, but a reconciliation had taken place and the petitioner and his wife had co-habited for several days, after which the wife had gone away with the co-respondent and had not returned since. The petitioner was unable to prove any adultery other than that admitted:—

HELD: the petitioner had condoned his wife's adultery, but her leaving him amounted to desertion which, although in itself insufficient to sustain a petition for divorce inasmuch as the statutory period for desertion had not elapsed before the petitioner instituted proceedings, amounted to a matrimonial offence which revived the condoned adultery.

[EDITORIAL NOTE.] It is clear that a matrimonial offence which has been condoned can be revived by a subsequent matrimonial offence. The only question was whether desertion in itself was a matrimonial offence or whether it was necessary that there should be desertion for a period of three years immediately preceding the petition, which is the statutory requirement for granting a divorce on the ground of desertion. It is decided that desertion independent of its duration is a matrimonial offence for the purpose of reviving a condoned matrimonial offence and, therefore, it is not necessary for that purpose that the desertion should be proved to have continued for three years immediately preceding the petition.

AS TO CONDONATION AND REVIVAL OF OFFENCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 679-680, paras. 1004-1006; and FOR CASES, see DIGEST, Vol. 27, p. 343, Nos. 3236-3240, pp. 345, 346, Nos. 3266-3276.]

Case referred to:

**(1) Jordan v. Jordan*, [1939] P. 239; [1939] 2 All E.R. 29; Digest Supp.; 108 L.J.P. 104; 160 L.T. 368.

PETITION by the husband for the dissolution of his marriage on the ground of his wife's adultery. The facts are fully set out in the judgment.

William Latey for the petitioner.

PILCHER, J.: In this case Hedley John Higgins seeks a dissolution of his marriage with his wife, Muriel Enid Higgins, on the ground that she has committed adultery with Frederick Charles Ernest Bannister, the co-respondent named in the petition.

Prior to Aug., 1941, on dates which are not material for the purposes of this case, the wife admitted to the husband that she had committed adultery with the co-respondent, and there is no question that this adultery was, in fact, committed on dates prior to Aug., 1941.

On or about Aug. 5, 1941, the husband, who had for some time entertained suspicions with regard to his wife's conduct, taxed her with having committed adultery with the co-respondent; she admitted the adultery, and the petitioner and respondent had a long discussion, at the end of which the respondent promised to give up the co-respondent and to have nothing to do with him in future. The petitioner was anxious for a reconciliation and, accordingly, on his wife giving him this promise, he agreed to forgive her past lapses, and on or about Aug. 5, 1941, after this conversation between the husband and wife, they spent the night together and marital intercourse took place. On the following day the wife seems to have had doubts as to whether she had really meant what she had told her husband on the day before, and 2 days after the reconciliation the wife turned up at the husband's house or lodgings with the co-respondent. The husband once again did his best to induce his wife to give up the co-respondent. She, however, said she did not propose to do so, and eventually an extremely violent scene took place, in which the wife and the co-respondent attacked the petitioner, and the co-respondent seems to have injured the petitioner—superficially at any rate—knocked him down and, I think, to some extent, knocked him out. The wife and the co-respondent then went upstairs and packed, and went off together. Since that date the wife has never returned to her husband, and, I think, the husband has had some difficulty in tracing her. Eventually he was able to serve her

and the co-respondent with the petition, but he has never been able to obtain any proof of subsequent adultery between his wife and the co-respondent.

A On those facts certain propositions of law call for consideration. In the first place, it is pretty clear that, when the husband forgave his wife in respect of her past admitted adultery and took her back and had marital intercourse with her, he thereby condoned his wife's previous adultery. I do not know, and I have no means of knowing, how far the wife's promise to give up the co-respondent was a *bona fide* promise at the time it was made. I have no reason to suppose she had her tongue in her cheek when she made this promise, and it would be quite improper for me to infer any such thing. I must assume, therefore, for the purposes of this case, that the wife intended at the time when the reconciliation took place to give up the co-respondent. In those circumstances, the husband and wife slept together, and it has been held more than once that, where a husband has marital intercourse with his wife with full knowledge B that she has in the past committed adultery, he thereby condones her past adultery, and the fact of sleeping with her and having marital intercourse with her is conclusive evidence of such condonation.

C It is suggested by counsel for the petitioner that condonation is, or might in some cases be, forgiveness with a condition, and he sought to argue that where, as in this case, a husband forgives his wife's past adultery on the condition that she gives up the co-respondent, that is forgiveness with a condition, and that, in such circumstances, subsequent marital intercourse between the parties will not afford conclusive evidence of condonation against the husband. In my view, that proposition is ill-founded; at any rate in the absence of something which amounts to fraud, as in the case to which I was referred where the wife falsely pretended to her husband that the adultery which she admitted had taken place at a time when she had been doped, and it was said that subsequent marital intercourse between husband and wife in those circumstances D did not afford conclusive evidence of condonation against the husband. That one can well understand; but, in the absence of any such suggestion as that of fraud by the wife, I am of opinion that the marital intercourse at the instance of the husband with full knowledge of past adultery by the wife affords conclusive evidence of condonation.

E That leaves the question as to whether or not the events which transpired after the reconciliation afford any ground for saying that the wife's past adultery, condoned by the husband, was revived by the wife's subsequent conduct. In order to revive a condoned matrimonial offence, a subsequent matrimonial offence must be committed. It has been held in a number of cases that condoned adultery will be revived by subsequent cruelty or by desertion in the statutory sense or by failure to comply with an order for restitution of conjugal rights, which constitutes the matrimonial offence of desertion. In this case, after the violent F scene which I have described, the respondent and the co-respondent went off together, and there is no question at all that at that time the wife deserted her husband without cause; but the desertion took place in Aug., 1941, and the petition is dated Nov., 1941, so there is, of course, no question of the desertion having taken place more than 3 years before the institution of the proceedings. None the less, in the ordinary sense of the word, in Aug., 1941, the respondent G did desert her husband, and in Nov., 1941, when the husband filed his petition, she had been in desertion for several months.

H In a case of this kind one has very considerable sympathy with the petitioner, who did his best to become reconciled with his wife; his wife promised him she would give up the co-respondent, and within a day or two broke her promise and left him without any cause. However, I must not allow myself to be swayed by any sympathy I may feel towards a party to an action. Luckily, it is not necessary for me to be guided by my own sympathetic feeling because there is, in *Jordon v. Jordan* (1) a passage in the judgment of SIR BOYD MERRIMAN, P., at p. 251 ([1939] 2 All E.R., at p. 36), which deals with the offence of desertion and makes it clear that, whilst judges have in the past studiously refrained from attempting to give any definition of the word "desertion", the fact of desertion can exist quite independently of the duration of the desertion. SIR BOYD MERRIMAN, P., there points out that desertion, as a matrimonial offence, is a creature of statute. He deals at some length with his ground for saying that the offence can exist independently of its duration, and it is quite unnecessary

for me to repeat here what he says there. I respectfully adopt the view which he expresses at the page to which I have referred, and I am satisfied that, if it be necessary, in order to revive condoned adultery, that there should be a matrimonial offence in the strict sense, then desertion, independent of its duration, is a matrimonial offence, although, in so far as divorce or judicial separation are concerned, no remedy may lie unless the desertion has continued for the statutory period.

In this case, I am satisfied that, by leaving her husband in the way in which she did, and by remaining away from him for the months which she did prior to the institution of the proceedings in this case, and by continuing to remain in desertion until the present day, the respondent committed the matrimonial offence of desertion, and that, although that desertion has not continued for the statutory period of 3 years, it is the type of offence which will revive condoned adultery. In the circumstances, I pronounce a decree *nisi* in favour of the petitioner in this case.

Decree nisi granted. Costs to be paid by co-respondent.

Solicitors: Gibson & Weldon, agents for Randle J. Evans, Wolverhampton (for the petitioner).

[Reported by D. ARMSTEAD FAIRWEATHER, ESQ., Barrister-at-Law.]

Re THE ANGLO-INTERNATIONAL BANK, LTD.

[COURT OF APPEAL (Lord Greene, M.R., Luxmoore and Goddard, L.JJ.),
May 4, 17, June 1, 1943.]

Companies—Notices—Article requiring personal service or service by ordinary post—Special resolution—Shareholders in enemy and enemy-occupied territory—Enemy shareholders not notified—Validity of resolution—Companies Act, 1929 (c. 23), ss. 115, 117—Trading with the Enemy Act, 1939 (c. 89), ss. 1 (2), 2 (1), 15—Defence (Trading with the Enemy) Regulations, 1940 (S.R. & O., 1940, No. 1092), para. 2 (1).

An English company with an issued capital of 1,960,008 shares of £1 each, of which 46,552 were held by 99 shareholders whose registered addresses when the notices calling the meeting were sent out were in enemy or enemy-occupied territory, passed a special resolution reducing its capital by way of return of capital. No notices were sent or attempted to be sent to the 99 shareholders in question. It was contended that no effective resolution had been passed as required by the Companies Act, 1929, s. 117:—

Held: (i) the company was forbidden by law to have or attempt to have any communication with any of the 99 shareholders and their right to receive notices of meetings during the continuance of the war was suspended. Therefore, the special resolution was validly passed.

(ii) the company was under no obligation to apply for a licence to communicate with the shareholders in enemy or enemy-occupied territory. Such an obligation could exist only by virtue of some contractual right and no such right existed or could be implied.

[EDITORIAL NOTE]—The precise point is whether shareholders resident in enemy or enemy-occupied territory are entitled to receive notices relating to a special resolution, but the decision, which is to the effect that they are not entitled to receive these notices, applies generally to all notices which a company is required to give to its shareholders. In part the decision turns upon the provision in the articles of association relating to notices. The position at common law, which is based upon the view that anything tending to be of advantage to the enemy in time of war is forbidden, seems a little doubtful in some cases, since it is impossible to know how far some of the occupied territories have been subjected to an occupation which is relatively permanent. It may be that in some of them there is no effective control of the civil rights of the inhabitants and the Court of Appeal were inclined to think that this was an important feature to be considered. In short, after a careful review of the speeches in *V/O Sovfracht v. van Udens* (1), the court seem a little doubtful as to the exact extent to which control of an occupied territory must extend to make its inhabitants enemy aliens. The position under the Trading with the Enemy Act, 1939, is clear and, since all communication with the enemy and those in occupied countries is thereby prohibited, the Court of Appeal has held that it is impossible to give the requisite notices where these

are required to be given personally or by post and the company can therefore proceed, so far as these shareholders are concerned, without giving them any notice at all. It is, of course, necessary that the majority of votes required by the articles of association be obtained.

AS TO SERVICE OF NOTICES, see HALSBURY, Hailsham Edn., Vol. 5, pp. 431, 432, paras. 709-711; and FOR CASES, see DIGEST, Vol. 9, pp. 646, 647, Nos. 4275, 4276.]

Cases referred to :

- A * (1) *V/O Sovfracht v. Gebr. van udens Scheepvaart en Agentuur Maatschappij*, [1943] A.C. 203; [1943] 1 All E.R. 76; Digest Supp.
 * (2) *Robson v. Premier Oil & Pipe Line Co., Ltd.*, [1915] 2 Ch. 124; 2 Digest 169, 379; 84 L.J.Ch. 629; 113 L.T. 523.
 * (3) *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Great Britain), Ltd.*, [1916] 2 A.C. 307; 9 Digest 541, 3565; 85 L.J.K.B. 1333; 114 L.T. 1049.
 (4) *Furtado v. Rogers* (1802), 3 Bos. & P. 191; 2 Digest 165, 357.
 (5) *Brandon v. Curling* (1803), 4 East 410; 29 Digest 156, 1116.

B APPEAL by the company from an order of BENNETT, J., dated Apr. 12, 1943. The facts are contained in the judgment.

Harold Christie, K.C., and *Cecil Turner* for the appellant.

There was no respondent either to the petition or to the appeal.

C *Christie, K.C.* : The rights of enemy shareholders in English companies are suspended during the continuance of the war. The contract between the members and the company which is contained in the articles of association must be read in the light of the circumstances produced by the war. The whole contract is not brought to an end but certain matters, such as the right of enemy shareholders to receive a notice of a meeting, must be eliminated. The right to attend a meeting, either personally or by proxy, and vote and the right to receive a dividend are suspended. It must follow that, if an enemy shareholder has no right to receive a notice of a meeting, there is no obligation upon the company to send a notice to him. The articles must be regarded as modified to that extent. There is nothing to prevent a company from carrying on so long as it has a sufficient number of British shareholders to form a *quorum* : *Daimler Co., Ltd. v. Continental Tyre & Rubber Co., Ltd.* (3). During a state of war an enemy alien is not entitled to exercise the right to vote in respect of shares in an English company : *Robson v. Premier Oil & Pipe Line Co., Ltd.* (2). One of the shareholders has his registered address in Monte Carlo. Inquiries have been made and it has been ascertained that enemy authorities have been in occupation of Monaco for some time. We have, however, no information as to the conditions there. The principality is regarded by Great Britain as enemy territory for the purposes of the Trading with the Enemy Act, 1939. [Counsel referred to *V/O Sovfracht v. van Udens* (1), *Furtado v. Rogers* (4), and *Brandon v. Curling* (5).]

F *Turner* followed on the same side.

G LORD GREENE, M.R. [delivering the judgment of the court] : This appeal arises out of the refusal by BENNETT, J., to confirm a reduction of capital which the appellant company claims was duly effected, subject to confirmation by the court, by special resolution. Apart from the question of the validity of the special resolution, BENNETT, J., was prepared to sanction the reduction, which was by way of return of capital, and approved a form of minute. The only question which we have to consider is whether or not he was right in holding that the resolution was not duly passed.

H The issued capital of the company consists of 1,960,008 shares of £1 each. Of these, 46,552 are held by 99 shareholders whose registered addresses at the time when the notices of the meeting were sent out were in enemy or enemy-occupied territory. No notices were sent or attempted to be sent to these shareholders and for that reason BENNETT, J., held that no effective resolution was passed as required by the Companies Act, 1929, s. 117. The question thus raised is one of general importance. In the present case we were told that it has a special importance, since, if it was necessary to send notices of meetings to these shareholders, the result would be to invalidate earlier resolutions of the company and one consequence of this would be that the company would not now have a properly elected board of directors. As there was no respondent to the petition or to the notice of appeal, neither BENNETT, J., nor this court had the advantage of hearing argument from anyone concerned to attack the

validity of the resolution. The judgment of BENNETT, J., does not deal with the matters which were discussed before this court.

The Companies Act, 1929, s. 117 (1), requires for the effective passing of an extraordinary resolution that notice of the meeting shall be "duly given." Subsect. (2) defines a special resolution as one passed by the majority required for an extraordinary resolution at a meeting "of which not less than twenty-one days' notice . . . has been duly given." The meaning of the words "duly given" is to be ascertained by reference to sect. 115 which contains provisions as to notices which are to have effect "so far as the articles of the company do not make other provision in that behalf." In the present case the articles do make other provision and accordingly it is to them that we must turn in order to find what the rights of the shareholders and the duties of the company are with regard to notices of meetings. Art. 55 prescribes that notices of meetings in the form there specified "shall be given to the members in manner hereinafter mentioned." Art. 140 provides that a notice may be served either personally or by sending it through the post addressed to the member at his registered address. A

The position, therefore, is that the right of a member to receive a notice and the obligation of the company to serve it are determined by the contract the terms of which are to be found in the articles. The shareholders are entitled to have and the company is bound to give exactly what the articles require, no more and no less. In the case of this company, all that a shareholder can require is (at the option of the company) either personal service or service by posting to his registered address. No other means of service are provided. C

It cannot, we think, be disputed that, if the right of a shareholder to receive the contractual notice is abrogated or suspended by operation of law—or, putting it another way, if the performance of the company's obligation to serve the contractual notice upon him becomes illegal—the shareholder, during the period of abrogation, suspension or illegality, must be treated as having lost his contractual right to receive notice. The effect of this must be that the articles must be treated as though they had expressly denied to that shareholder the right to receive notices so that a meeting could be regularly called without him. The question in this case is whether or not all the 99 shareholders had lost their right to receive the notice of the meeting by reason of the fact that their registered addresses were in enemy or enemy-occupied territory. D

It cannot, we think, be suggested that for present purposes the status of these shareholders is to be treated otherwise than on the basis that they were at the relevant time resident at the addresses appearing in the company's register of members. These addresses are the only places where, according to the contract, notices sent by post can effectively be served. For the purposes of the contract they have elected to have what in some ways resembles a "commercial domicile" in the countries in which the addresses are situated. It is to them direct or through agents at those addresses that the notices are to be sent and the circumstance that a particular shareholder may in fact have been resident elsewhere, e.g., in a neutral country, seems to us irrelevant. E

On behalf of the company it was argued that the right of these 99 shareholders to receive notices and the obligation of the company to send them were suspended both at common law and under the Trading with the Enemy Act, 1939, and that, if the company had attempted to despatch the notices, it would have been committing an illegal act. Consequently it was said that, as no legal right in the shareholders to receive and no legal obligation on the company to send notices existed at the relevant time, the omission to send the notices did not in law invalidate the proceedings at the meeting. F

The argument based on common law and that based on the Act require separate treatment. We will deal first with the common law position. The shareholders whose registered addresses are in enemy territory must for present purposes be regarded as alien enemies, whatever their nationality: *V/O Sovfracht v. van Udens* (1). So long as they retain the character of alien enemies their right of voting is suspended: *Robson v. Premier Oil & Pipe Line Co., Ltd.* (2). They cannot appoint a proxy and any proxy previously given, like any other mandate of agency, will have ceased to be valid: see *Sovfracht* case (1), at p. 254 ([1943] 1 All E.R., at p. 102), *per* LORD PORTER. It follows, therefore, that, even if notice of the meeting had in fact been given to these shareholders, G

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they could not have voted at the meeting. But the matter does not rest there. The suspension of the rights of an alien enemy shareholder cannot, in our opinion, be limited to his right of voting. It must extend to the ancillary right conferred by the contract under which he holds his shares to receive notices of meetings of the company. That right is a right in relation to property in this country, namely, the shares, and is, in our opinion, suspended just as much as the right to vote (see *per* SARGANT, J., in *Robson v. Premier Oil & Pipe Line Co., Ltd.* (2), at p. 131). If the matter be looked at from the point of view of the company, the same result follows. Quite apart from the suspension of the shareholder's contractual right to receive notices, the company, in our opinion, could not lawfully communicate or attempt to communicate with shareholders who at the time were enemy aliens. In *Robson's* case (2), PICKFORD, L.J., in delivering the judgment of this court, said, at p. 136 :

... all intercourse which could tend to such detriment [to this country] or advantage [to the enemy], whether commercial or not, is . . . inconsistent with the state of war between the two countries and therefore forbidden.

It is true that, in that case, the transaction in respect of which it was claimed that the enemy shareholder could exercise his voting rights was one which unquestionably would have harmed this country and benefited the enemy. We do not think that it is necessary to examine closely the facts of a particular transaction. In the circumstances of war as it is waged to-day, it seems to us impossible to say that any communication with an enemy alien may not tend to the detriment of this country or the advantage of the enemy and the only safe rule to adopt is that all communications are forbidden. All communications "across the line of war" are prohibited: *per* LORD WRIGHT in *V/O Sovfracht v. van Udens* (1), at p. 217 ([1943] 1 All E.R., at p. 82).

If all the 99 shareholders had had their registered addresses in enemy territory they would, in our opinion, for the reasons which we have given, have suffered suspension of their right to receive notices of meetings. The special resolution would not have been invalidated by the omission to send notices to them and this quite irrespective of the fact that the notices would for obvious reasons never have reached them in time, if at all. But a large number had their registered addresses, not in enemy territory, but in territories in enemy occupation, namely, Poland, Czecho-Slovakia, Yugoslavia, Holland, Belgium, Greece, France, Monaco and the Channel Isles. The question whether or not these shareholders are to be regarded as alien enemies at common law depends upon the character of the occupation. In the case of the Netherlands, the question is settled by authority. Those shareholders are alien enemies: see *V/O Sovfracht v. van Udens* (1). In the case of the other countries the position is not so clear and the opinions in the *Sovfracht* case (1) require closer examination. The conclusions of VISCOUNT SIMON, L.C., were, as he said, "in general accord" with those of LORD WRIGHT and LORD PORTER with whose opinions LORD ATKIN and LORD THANKERTON agreed. We, therefore, turn first to those passages in the opinion of LORD WRIGHT which define the nature of the occupation required to create the character of alien enemy. At p. 219 ([1943] 1 All E.R., at p. 84), he says :

It might be better if the epithet applied were "enemy-subjugated." This would show that a mere temporary occupation, for instance, by a military force in the conduct of belligerent operations, is not enough. If the territory is to be deemed enemy territory, it must be subjugated, not merely occupied. It must be held under the dominion and control of the enemy for a period sufficient to give the occupation a settled and relatively permanent character and show the intention to keep it. I do not think that the cases require that there should be formal acts, such as a cession by treaty or a public declaration of annexation. The matter must be decided as a question of fact with due regard to the character, purpose and intention of the occupation and the degree of dominion exercised. All acquisitions in war may be temporary. They may be abandoned on peace being declared, or surrendered or retaken under the pressure of superior force, but there is a sharp distinction between an occupation of territory by armed forces for strategical and temporary purposes and an occupation of territory as being a settled acquisition.

On p. 222 ([1943] 1 All E.R., at p. 85), he states the opinion of LORD STOWELL to have been that "effective subjugation and firm possession with the intention of keeping the conquest" are the test. On p. 229 ([1943] 1 All E.R., at p. 89),

he applies the principles which he had enunciated to the case of Holland. Speaking of the inhabitants, he says :

They are under the dominion and control of the Germans, who exploit them, plunder them, and tyrannise over them for the benefit of the German Reich. It is clear that the Germans do not intend to relinquish their possession unless forced to do so.

These passages would appear to indicate that an intention on the part of the enemy to keep the country which he has subjugated as part of his territorial possessions is an element which must be present. Such an intention was, LORD WRIGHT says, at p. 229 ([1943] 1 All E.R., at p. 89), one of the matters which was before the House were treated as of "common notoriety." On what facts or information this treatment was based does not appear. If an intention of this character is a necessary element, we are not sure to what extent the court is entitled in a case like the present, where there is no opposition, to treat as notorious matters upon which it has no information except what may be gathered from official publications and the public press. Thus we do not see how we can assume that the enemy intends to "keep" France, or Belgium, or Greece, or the Channel Isles in the sense of incorporating them permanently in his possessions. We cannot, however, think that the expression "keep" was intended by LORD WRIGHT to be used in this sense. One object of the common law rule is to prevent advantage to the enemy. Such an advantage may accrue if the occupation is of a character which enables the enemy to deal with the inhabitants of the occupied country and their civil rights in such a way as to secure profit to himself, whatever his ultimate intentions as to the future of the occupied country may be. It is for this reason that a mere military occupation is insufficient to brand the inhabitants as alien enemies since such an occupation does not affect the civil rights of the inhabitants beyond what may be necessary for the purpose of conducting military operations. That we are right in construing the word "keep" as used by LORD WRIGHT in a restricted sense is, we think, shown by a consideration of the opinions of the other members of the House. Thus VISCOUNT SIMON, L.C., at p. 211 ([1943] 1 All E.R., at p. 79), says :

If, as a result of the occupation, the enemy is provisionally in effective control of an area at the material time and is exercising some kind of government or administration over it, the area acquires "enemy character."

LORD ATKIN, at p. 213 ([1943] 1 All E.R., at p. 80), says :

When a British court has to consider what is the nature and extent of the enemy occupation which makes the resident an enemy, I think that in these days one of the most important tests would be the extent to which the enemy, while in occupation, assumes to control the civil rights of the subjects of the occupied country. And if that control be for the material time effective I am inclined to think that it matters not that the enemy contemplate to withdraw that control at some future time or on some future event, whether distant or not.

LORD THANKERTON, at p. 216 ([1943] 1 All E.R., at p. 82), says that it is "a question of degree." LORD PORTER says, at p. 238 ([1943] 1 All E.R., at p. 93) :

The inevitable conclusion must, I think, be drawn that Holland has been for some two years, and is at present, enemy-occupied territory, controlled and administered by the enemies of this country . . .

and at p. 240 ([1943] 1 All E.R., at p. 95), he says :

The solution, in my view, depends on the quality of the occupation, to be judged by the time it endures, the amount of control exercised, and the extent to which the former government is superseded.

He says, at p. 245 ([1943] 1 All E.R., at p. 97) :

It is enough, in my view, if it appears from the known circumstances, that the civil and military jurisdiction of the country is being exercised by the enemy to the exclusion of the former civilian rulers.

In view of these expressions of opinion, we hope that we are justified in reading the language of LORD WRIGHT in a way which will bring it into conformity with that used by the other members of the House who, while agreeing with his opinion, expressed their own views in different language.

But even so, apart from the special case of Monaco, we have no evidence of the nature of the occupation. In the case of Poland, Czecho-Slovakia and Belgium, if we are entitled to accept what may be described as matters of

common notoriety, the occupation would appear to be of the requisite character. In the case of such parts of Yugoslavia and Greece as are under effective enemy control, the case would appear to be the same. In the Channel Islands, if current reports are to be accepted, German interference with and control of the inhabitants and their civil rights would appear to be substantial and effective. What the exact position is in that part of France which was previously unoccupied seems obscure. We have no information as to the extent to which civil rights are being interfered with by the enemy in that part of France, save what is generally known with regard to conscription of labour. In the case of Monaco, where there is one shareholder, we have some information. His name is Giuseppe Cogito, his profession that of *ragioniere* or accountant. His earlier registered address was in Milan and the notepaper on which he notified his change of registered address to Monte Carlo gave two addresses in Italy as well as an address at Monte Carlo. We were invited to infer from these facts that he is an Italian national, but I do not think that we should be justified in doing so. The Foreign Office was unable to give any information as to the date or conditions of the occupation of the Principality by Axis troops which, it said, had clearly been there for some time. The Consul General of Monaco in London in reply to an inquiry says that, so far as he is aware life is normal in the Principality which is, he understands, "not occupied" although Italian troops are there. From this information, for what it is worth, we would infer that the occupation of Monaco is at present only a military occupation, although the Italian claims to the French coast as far as Nice may well suggest an ultimate intention on the part of Italy to annex the Principality as well.

Upon the evidence before us we do not think that it would be safe to hold that all the shareholders whose registered addresses are in enemy-occupied territory are to be regarded as alien enemies at common law. But the position under the Trading with the Enemy Act, 1939, is different, and to an examination of that we now turn.

By sect. 2 (1) of the Act, "enemy" is defined as meaning (among other things) "any individual resident in enemy territory." "Enemy territory" is defined in sect. 15 (1) as meaning "any area which is under the sovereignty of or in the occupation of a Power with whom His Majesty is at war . . ."

Sect. 15 of the Act was amended by the insertion of subsect. 1A by S.R. & O., 1940, No. 1214, as follows:

The Board of Trade may by order direct that the provisions of this Act shall apply in relation to any area specified in the order as they apply in relation to enemy territory, and the said provisions shall apply accordingly.

Under this subsection orders have been made applying the Act to Monaco (S.R. & O., 1940, No. 1476), to what used to be known as unoccupied France (S.R. & O., 1940, No. 1219), to Yugoslavia (S.R. & O., 1941, No. 543), and to Mainland Greece (S.R. & O., 1941, No. 613). So far as we are aware, no similar orders have been made with regard to "occupied France," Poland, Belgium or the Channel Isles, but the occupation of these areas by the enemy is notorious and they fall within the definition of enemy territory contained in the Act itself. By sect. 1 (2) of the Act the offence of trading with the enemy consists in having "any commercial financial or other intercourse or dealings with or for the benefit of an enemy." Particular instances are given, including "(iii) the performance of any obligation to . . . an enemy." By para. 2 (1) of the Defence (Trading with the Enemy) Regulations, 1940, the Act was amended by expressly making it an offence to attempt to trade with the enemy.

As the result of this legislation, the company was forbidden by law to have or attempt to have any communication with any of the 99 shareholders. It would have been an offence merely to put in the post notices addressed to them at their registered addresses. This is equivalent to suspending their right to receive notices and during the period of suspension they can, in our opinion, be in no better position than they would have been if under the articles no right to receive notices had been given to them. The resolution, therefore, was validly passed.

We have not so far referred to the power of the Crown, both at common law and under the Act, to grant a licence to communicate with an enemy. It might be suggested that the company ought to have applied for a licence authorising the sending of the notices and there is reason to suppose that, if it had done so,

a licence would have been granted, at any rate in some of the cases if not in all. In our opinion, there is no substance in this point. At the time when the meeting was called it was in fact illegal to send notices to these shareholders since no licence had been granted. We can find no reason for thinking that there was any obligation on the company to put itself to the trouble of applying for licences. Such an obligation could only exist by virtue of some contractual right in the shareholders concerned and no such right exists or can be implied. All that shareholders are entitled to under the articles is to have the notices put in the post; and this was, at the relevant time, forbidden by law. It is worth observing that, even if a licence had been applied for and obtained, and even if the notices had reached the shareholders, they could not have voted at the meeting otherwise than by proxy, and before proxies could have been accepted and acted upon, the persons to whom proxies were given would themselves have had to obtain licences to act.

The appeal is allowed. The reduction of capital is confirmed and the minute as settled by BENNETT, J., is approved. There will be the usual order about the advertisement.

Appeal allowed.

Solicitors: *Freshfields, Leese and Munns.*

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

DENNIS & SONS, LTD. v. WEST NORFOLK FARMERS' MANURE & CHEMICAL CO-OPERATIVE CO., LTD.

[CHANCERY DIVISION (Simonds, J.), May 18, 1943.]

Discovery—Privilege—Report of accountants concerning construction of article of company—Report ordered before but delivered after the commencement of proceedings—Position of directors of a company in respect of privileged documents.

The plaintiff company was a shareholder in the defendant company and Dennis, the chairman of the plaintiff company, was also a director of the defendant company. A dissension arose among the directors of the defendant company upon the construction of one of the articles of association, Dennis taking one view and other directors another view. On Jan. 7, 1938, the defendant company instructed a firm of accountants to prepare a report on the interpretation of the article in dispute. The report was received on Feb. 5, 1938, but on Feb. 3, 1938, the plaintiffs had instituted proceedings by way of originating summons against the defendant company for the determination of the construction of the article in question, and a decision thereon was given. As a result of the decision the company proposed to alter the article, and the plaintiffs on behalf of themselves and other shareholders brought the present action alleging that the proposed alteration of the article was *ultra vires* the memorandum of association, alternatively, that it was a fraud on the rights of the shareholders, and, further, they claimed an account. The defendants refused to disclose the accountant's report, on the ground of privilege:—

Held: shareholders, like beneficiaries under a trust, are entitled to see all documents relating to the affairs of the company prepared for the purpose of carrying on the business of the company unless there is a dispute between the directors and the shareholders and the document comes into existence as part of the defence against hostile litigation. On the facts here, the report was ordered before any litigation hostile to the directors had been commenced and was not privileged from discovery.

[**EDITORIAL NOTE.**—Persons in a fiduciary position are bound to disclose to the beneficiaries all documents which come into existence in the course of the administration of the trust or business. If, however, a dispute arises between the parties, any documents prepared after the dispute has arisen are privileged as being taken for the defence of the parties attacked against the charges brought against them by the beneficiaries. In this case the document in question was called for before any dispute had arisen but, being a document that would take some little time to prepare, it was in fact completed after certain proceedings had been taken by the defendants. It seems clear, however, that it was not ordered for the purpose of defence against these proceedings but was obtained for the guidance of the directors in the carrying out of their duties. In those circumstances, the report was not privileged from disclosure.]

AS TO LEGAL PROFESSIONAL PRIVILEGE IN RESPECT OF DOCUMENTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 381-385, paras. 462-466; and FOR CASES, see DIGEST, Vol. 18, pp. 146-148, Nos. 958-982. See also YEARLY SUPREME COURT PRACTICE 1940, pp. 514-517.]

Case referred to:

(1) *Gouraud v. Edison Gower Bell Telephone Co. of Europe* (1888), 57 L.J.Ch. 498; 18 Digest 148, 979; 59 L.T. 813.

A ACTION for an account and for a declaration that an attempt to alter an article of association of a company would be *ultra vires* the memorandum of association or, alternatively, that it would be a fraud on the rights of the plaintiffs.

E. M. Winterbotham (for *Gerald Upjohn* on war service) for the plaintiffs.

J. A. Reid (for *P. J. Sykes* on war service) for the defendants.

B SIMONDS, J.: The question I have to determine arises in an action in which the plaintiffs are W. Dennis & Sons, Ltd., who sue on behalf of themselves and all other shareholders of the defendant company, and the defendants are the West Norfolk Farmers' Manure & Chemical Co-operative Co., Ltd. The defendants claim privilege for a certain document, the facts in regard to which are stated in an affidavit of Douglas Houston Reid, the secretary of the defendant company. He admits in the first paragraph of his affidavit that the defendant company have in their possession or power the report of Stephenson, Smart & Co. of Feb. 5, 1938. That is the document in respect of which the defendants C claim privilege and in regard to which the plaintiffs deny that privilege exists. Reid states the grounds upon which he claims privilege. He refers to the nature of the company's business, and he says:

D It is a part of the defendant company's basis of trading to make when the company's profits permit rebates to their customers from the payments made by the latter for their purchases during each trading year; and the manner in which the amounts of such rebates are to be calculated is provided for in art. 7 (a) of the defendant company's articles of association.

Then he says, in para. 5:

E Mr. F. W. Dennis is chairman of the plaintiff company and was also at all times material to this action a member of the board of directors of the defendant company. In August, 1937, Mr. Dennis raised certain criticisms over the manner in which the defendant company's board had construed the provisions of art. 7 (a) in the calculation of rebates. During the following months at board meetings of the defendant company F discussions took place between Mr. Dennis on the one hand and the other members of the board on the other hand on the points raised by Mr. Dennis when means were sought for resolving in a satisfactory manner the issues which had been raised by Mr. Dennis. By January, 1938, it was clear that the attitude adopted by Mr. Dennis was inimical to that held by the other members of the defendant company's board, and that, in expressing his opposition Mr. Dennis was doing so not only in his capacity as a director of the defendant company but also as representing the interests of the plaintiff company (of which he was chairman as aforesaid) as shareholder-customers detrimentally affected by the alleged misconstruction of art. 7 (a).

The only matter in issue between the several members of the board of the defendant company related to the true construction of one article of association of the defendant company; Mr. Dennis taking one view (whether he had others with him I know not) other members of the board taking a different view. As stated in para. 6 of the affidavit:

G It was in these circumstances that instructions were given to Stephenson Smart & Co. by the defendant company to prepare a report upon the proper interpretation of art. 7 (a) and the manner in which the provisions of the said article should be applied in regard to the calculation of rebates.

H Those instructions were given on Jan. 7, 1938. The report was made with reasonable expedition by Stephenson Smart & Co. on Feb. 5, 1938, and I assume for this purpose that it was received, though I doubt whether I should be justified in making that assumption, on the same day; but, in the meantime, on Feb. 3, 1938, legal proceedings had been instituted by the plaintiffs, by way of originating summons, for the determination of the proper construction of the article in question. It is relevant to observe that the parties to those proceedings were the same company as are plaintiffs in these proceedings, W. Dennis & Sons, Ltd., as plaintiffs, and as defendants, one Hart, one Hampson, who were also shareholders of the company and as to whom it was asked that they might be appointed to represent a certain class of members of the company, and the West Norfolk Farmers' Manure & Chemical Corporation Co., Ltd. That action took its

course, and an order was made by BENNETT, J., on Mar. 21, 1939. After that date, on May 8, 1939, these proceedings were started, raising other issues upon the true construction of the article in question, and raising questions of the administration of the affairs of the company in respect of that article. It is in these proceedings, as I say, that the claim is made of privilege in respect of the report so made by Stephenson, Smart & Co.

There are two distinct points raised. First, whether, having regard to the circumstances in which and the date on which the report was made, it is a privileged document. Secondly, whether, even if it were otherwise a privileged document, it is privileged having regard to the fact that the plaintiffs are themselves shareholders in the company which asserts the privilege. Both those questions are of some little difficulty.

I have formed a clear opinion on the second point which disposes of the case. The general rule which applies equally as between a company and its shareholders or as between a trustee and his beneficiaries is stated at pp. 518, 519 of the ANNUAL PRACTICE :

A cestui que trust . . . is entitled to see cases and opinions submitted and taken by the trustee for the purpose of the administration of the trust ; but where stated and taken by the trustees not for that purpose, but for the purpose of their own defence in litigation against themselves by the cestui que trust they are protected . . . On the same principle a ratepayer would be entitled to see cases and opinions taken by the corporation on the subject of rates . . . and so in Gouraud v. Edison (1), an action by shareholders against the company, the plaintiffs were held entitled to see communications between the company and their solicitors : but similarly a shareholder could not see counsel's opinions taken by the company in respect of the matter in dispute between them . . .

Now here it seems to me reasonably clear that when, in January, 1938, the company instructed a firm of chartered accountants to make a report upon the true interpretation of the article, and, therefore, upon the duty of the directors in administering the affairs of the company, they were doing something on behalf of all the shareholders. They were seeking to do no more than to perform their duty ; they were not doing it because some action was threatened against them. They were doing what was no more than their bounden duty having regard to the difference of opinion which had arisen upon the board of the company ; and, that being so, the shareholders became entitled to see what the accountants reported in regard to the rights and duties of the board. That was the position when the report was commanded. Two days before the report was made the shareholders, represented by the plaintiffs, thought fit to institute proceedings, not by an action, but by way of an originating summons, in order that the matter of the construction of the article and their rights might be determined, for that purpose making, as they were bound to make, the defendant company a defendant, and added, and properly added, other shareholders of the company to argue the question of construction before the court. It appears to me that the shareholders, by instituting those proceedings two days before the report was received, did not lose their right to see that which they otherwise would have been entitled to see. In other words, this was not a report got by the defendant company for the purpose of defending themselves against hostile litigation. It is only in such a case, where a report or opinion is got by a trustee or by a company or by a corporation, that privilege can be claimed. It must never be forgotten that the rules as to privilege are strict and, as has so often been said, privilege is not to be extended.

That really disposes of this case, for, if there was no privilege originally, then no privilege has since been created in respect of the document. It may well be that, if it was once privileged, it remains privileged, but, holding, as I do, that no privilege attached to the document in the old proceedings, no new privilege obtains in respect of it now. Coming to that conclusion, I think it is unnecessary to express any opinion upon what I regard as a much more difficult aspect of the case, namely, whether, if the plaintiffs had not stood in the relation in which they do stand to the defendant company, the defendant company might have claimed privilege in respect of this document having regard to the fact that it came into existence after the proceedings had been commenced, although, at the time when it was commanded, such proceedings had not been commenced and, for all I know, were not in serious contemplation. That is a difficult question upon which, in view of the opinion I have formed upon the other part

of the case, it is unnecessary for me to come to any conclusion. I find, therefore, against the defendant company upon their claim for privilege, and direct that the document shall be open to the inspection of the plaintiffs accordingly.

Declaration accordingly.

Solicitors: *Kenneth Brown, Baker, Baker* (for the plaintiffs); *Clifford-Turner & Co.* (for the defendants).

A

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

considered. DENMAN v. BRISE.
[1948] 2 All E.R. 141.

LEIGHTONS INVESTMENT TRUST, LIMITED v. CRICKLEWOOD PROPERTY & INVESTMENT TRUST, LIMITED,
B ARTHUR JAMES PEGLEY AND WILLIAM CHARLES PEGLEY.

[COURT OF APPEAL (Scott, MacKinnon and du Parcq, L.JJ.), May 25, June 4, 1943.]

Contract—Impossibility of performance—Frustration—Lease—Building lease. Landlord and Tenant—Rent—Building lease—Frustration of contract.

C

A building lease for a term of 99 years provided for the building of a number of shops on the demised land and contained the usual provisions of such a lease. Owing to the outbreak of war, it became impossible to erect certain of the shops. In an action to recover the rent reserved by the lease, the defendants contended that the lease was a contract which had been frustrated and that a building lease was a commercial contract to which the doctrine of frustration applied:—

Held: the doctrine of frustration had never been applied to a demise of real property and the plaintiffs were entitled to recover the rent.

Decision of ASQUITH, J., ([1942] 2 All E.R. 580) affirmed.

[EDITORIAL NOTE. It was here attempted to distinguish the case of a building lease from an ordinary lease so far as the application of the doctrine of frustration is concerned, but the court has found itself constrained by the weight of authority to hold that that doctrine has no application whatever to leases.

E

AS TO APPLICABILITY OF DOCTRINE OF FRUSTRATION TO A DEMISE, see HALSBURY, *Hailsham Edn.*, Vol. 7, p. 217, note (e); and FOR CASES, see DIGEST, Vol. 12, p. 399, Nos. 3229-3231.]

Cases referred to:

* (1) *Taylor v. Caldwell* (1863), 3 B. & S. 826; 12 Digest 371, 3093; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356.

F

* (2) *London and Northern Estates Co. v. Schlesinger*, [1916] 1 K.B. 20; 30 Digest 343, 14; 85 L.J.K.B. 369; 114 L.T. 74.

* (3) *Whitehall Court, Ltd. v. Ettlinger*, [1920] 1 K.B. 680; 30 Digest 343, 15; 89 L.J.K.B. 126; 122 L.T. 540.

* (4) *Matthey v. Curling*, [1922] 2 A.C. 180; 31 Digest 342, 4857; 91 L.J.K.B. 593; 127 L.T. 247.

* (5) *Swift v. Macbean*, [1942] 1 K.B. 375; [1942] 1 All E.R. 126; 111 L.J.K.B. 185; 166 L.T. 87.

G

(6) *Innholder's Co. v. Wainwright* (1917), 33 T.L.R. 356; 12 Digest 399, 3232.

(7) *Tay Salmon Co. v. Speedie*, [1929] S.C. (Ct. of Sess.) 593; Digest Supp.

APPEAL by the defendants from a decision of ASQUITH, J., given on Oct. 21, 1942, and reported [1942] 2 All E.R. 580, where the facts are fully stated.

Robert Fortune for the appellants.

H. St. John Field, K.C., and *Gerald Gardiner* for the respondents.

Fortune: The only cases in which the question of the frustration of a lease has arisen have been cases of ordinary leases. The position of a building lease has not been considered. The occurrence of the war has altered the whole commercial basis of the contract and the joint commercial adventure has been frustrated. [Counsel referred to *Innholder's Co. v. Wainwright* (6) and *Tay Salmon Co. v. Speedie* (7).]

Field, K.C.: This was not a joint commercial adventure. The contract has been carried out in part and it cannot be divided into parts of which some have been frustrated. It is impracticable to apply the doctrine and all authority is against the application of the doctrine to leases.

MACKINNON, L.J. [delivering the judgment of the court]: By a lease dated May 12, 1936, Fairway Homes, Ltd., demised certain lands to the defendant company for the term of 99 years from Mar. 25, 1936. The lands demised were specified as ten shop sites coloured red on the annexed plan, and fourteen shop sites coloured blue on that plan. The rent for each of the ten red sites was a peppercorn for the first year, and thereafter £35 per annum. The rent for each of the fourteen blue sites was a peppercorn yearly until the expiry of one year from notification by the landlord to the tenants that conditions had been fulfilled which entitled the tenants to erect a shop on such site, and thereafter £35 per annum for each such site. The defendant company, as tenants, covenanted *inter alia* to erect shops on the ten red sites and on the fourteen blue sites, eight of the shops on the red sites to be completed not later than Mar. 25, 1937, and the remaining sixteen shops to be erected within one year from the above-mentioned notification. A proviso to the lease provided that the defendant company as tenants might purchase the freehold of each of the twenty four shop sites at the price of £700 per site, provided that the ten red sites were all bought at one time, and that the fourteen blue sites were bought not less than four at a time, and after twelve had been so bought, the remainder two at a time. The defendants A. J. Pegley and W. C. Pegley were joined as parties to this lease as guarantors of the rents payable thereunder by the defendant company. By a conveyance of May 17, 1938, Fairway Homes, Ltd., sold the property and their rights under the lease to the plaintiff company. The defendant company pursuant to the option reserved to them in the lease have purchased the freehold of all the ten red sites from the Fairway company or the plaintiffs.

The writ in this action claimed various instalments of rent for blue sites due quarterly at £35 per annum from Michaelmas, 1939, to Lady Day, 1942. There is no question that these rents are due pursuant to the terms of the lease. The total claim is for £417 11s. 3d. The defendants seek to rely by way of defence to the claim upon what is commonly called the doctrine of frustration. Paras. (5), (6) and (7) of the affidavit under R.S.C. Ord. 14 are as follows :

(5) The sites on which the plaintiffs claim rent in this action are sites comprised in the fourteen sites designated the "blue demised property" in the said lease. (6) No obligation on the part of the defendant company to erect shops upon any of these fourteen sites arose until after the outbreak of the present war. By reason of the outbreak of the war the demand for these shops ceased, finance for their erection became unobtainable, and the restrictions placed by the Government upon building and materials therefor made it impossible to erect shops upon any of these sites or to continue the development of the same. (7) In consequence whereof I say that the agreement between the plaintiffs and the defendant company in relation to these fourteen sites has been frustrated and that the defendants are under no liability to the plaintiffs thereunder.

The plaintiffs do not dispute the facts alleged in para. 6, but submit that they disclose no defence in law to the claim.

In our opinion the plaintiffs are clearly right. The doctrine of frustration, which was first clearly enunciated in 1863 in *Taylor v. Caldwell* (1), has been applied to a variety of contracts ; but it has never been applied to a demise of real property. Indeed there is clear authority that it cannot. This is to be found in *London & Northern Estates Co. v. Schlesinger* (2), in *Whitehall Court v. Ettlinger* (3), and in *Matthey v. Curling* (4). All these cases, and many others, have recently been reviewed by BIRKETT, J., in *Swift v. Macbean* (5), in a careful judgment. We do not think it is necessary to examine the question further. It is impossible for the defendants to rely upon the doctrine of frustration to relieve them from their obligation as tenants under a demise of land for 99 years. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : Langford, Borrowdale & Thain (for the appellants) ; Leslie Freeman & Co. (for the respondents).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

R. v. PEEL.

[COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., Humphreys and Lewis, JJ.), April 15, 1943.]

Criminal Law—Recognisance—Charge of embezzling £5—Admission of defalcations amounting to £70—Accused bound over on undertaking to repay £70 by instalments—Enforcement of civil debt by criminal procedure—Validity.

A The appellant was accused of embezzling two sums of money amounting together to £5 13s. 8d., but on investigation it transpired that his total defalcations amounted to £70. His employer gave him the chance to repay at the rate of 10s. per week and this he did until he left his employment at the end of 5 weeks. The appellant was thereupon prosecuted for the embezzlement of £5 13s. 8d., and at quarter sessions was bound over on condition that he paid by instalments the total sum of £70 said to be owing from him. After being brought before the court twice more on account of being in arrears with his repayments, the appellant was, on B Mar. 4, 1943, when he was £1 in arrears with the payments, sentenced to 6 months' imprisonment with hard labour :—

HELD : the court had no jurisdiction to enforce by criminal procedure the payment of what was in effect a civil debt.

C [EDITORIAL NOTE. In this case criminal procedure was resorted to for the enforcement, not of payment of the sum for the embezzlement of which the defendant was prosecuted but for a very much larger sum in respect of which no proceedings had been taken. Clearly everything that was done was done in the interest of the defendant, but, as the court states, there is a paramount objection to the use of criminal procedure for the recovery of a civil debt.

AS TO CONDITIONS OF PROBATION ORDERS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 232, 233, para. 328.]

D APPLICATION for leave to appeal from a conviction for breach of a recognisance at the Middlesex Quarter Sessions.

There was no appearance by counsel.

HUMPHREYS, J., [delivering the judgment of the court]: This is a case in which a procedure was followed at the Middlesex Quarter Sessions which, if it be a practice there, is to be strongly condemned.

E This appellant, who applies for leave to appeal against a sentence of six months' imprisonment with hard labour passed upon him on Mar. 4 last, was originally before the court on Feb. 6, 1941. He then pleaded guilty to two counts in an indictment charging him (i) with having embezzled £3 13s. 10d., the money of his employers, the Streamdale Laundries, Ltd.; and (ii) with having on a different date, the two dates being in Sept., 1940, and Oct., 1940, embezzled £1 19s. 10d., the moneys of his same employers.

F The facts were stated by counsel for the prosecution to be as follows. This man's duty was to collect money from customers; and he embezzled two sums amounting together to just about £5. He was spoken to by the manager about his shortcomings; and he said he had lost the money in a cafe somewhere. Investigation of the matter disclosed total defalcations amounting to £70. He asked for an opportunity to repay; and the manager said he would give him every help and facility. He paid for about five weeks at the rate of G 10s. per week, and then dismissed himself from his employment. He was then prosecuted for embezzlement. The chairman of quarter sessions very properly observed to counsel for the prosecution: "You ought either to treat it as a criminal offence or you ought not. For five weeks it is treated as a civil matter and he has undertaken to repay." Counsel then called a police officer; and the police officer agreed that those were the facts of the case.

H The chairman, no doubt from motives of pity and a desire to do the best possible thing for this man, was induced by the prosecution, and with the full approval of the appellant, to do something which in our opinion was quite irregular. He said that he was binding over the appellant to come up for judgment if called upon; and added: "We shall make it a condition of the recognisance that you pay a sum of at least 10s. every week to the prosecutors. You will be subject to probation; and the probation officer will see that that is being done." Accordingly, he was bound over, one of the conditions being that he should pay 10s. per week every week to the Streamdale Laundries

until he had repaid not the sum of £5 which was mentioned in the indictment, but the total of £70, which it was said was owing from him; but which, if it was owing from him (and he seems to have admitted that it was) was clearly no more than a civil debt. The defendant entered into that recognisance. All that took place in Feb., 1941.

The next date when he came before the court, brought there at the instance of the prosecutors, was on May 1, 1941, when it appeared that he had been paying from time to time, but he had not paid the 10s. regularly—he had paid only £2 11s. 0d. It is quite clear that by that time he had more than repaid the amount of £5, which was all that he was prosecuted for embezzling. After a good deal of discussion the chairman, again no doubt with the most excellent intentions, said that he would let the matter stand over until the next day to see whether the defendant could bring some more money, the expression of the chairman being: "We will give you a little more rope. Understand, it has got to be carried out strictly." He was to get into touch with the persons who were the prosecutors and see whether he could make some arrangement with them as to the repayment. Accordingly, the matter was adjourned until the next day. On the next day, May 2, he was brought up and the chairman was informed that he was prepared to allow 10s. per week to be deducted from his wages—he was then in good employment in another place—and that his employer agreed to deduct 10s. per week from his wages until he had paid the whole amount. Therefore the probation order, the recognisance, was ordered to be continued.

We now come to Jan., 1943. Once more this young man is brought up; and the court is informed that, although for some weeks he had regularly paid 10s. per week, he had not kept his payments up to date; and, therefore, he was brought there as a criminal to be dealt with. It appeared that he had lost his last employment, but he said that he had just got further employment and was earning £5 per week; and that he would be able out of that to pay more money to these prosecutors; and he agreed to pay 10s. per week himself. The result of that was that the matter was adjourned again in order that he might be induced—I use the mildest expression I can—to pay this civil debt. Finally, upon Mar. 4 he was brought up again and it was stated that, whereas he ought to have paid £4 as between that date and the date of his previous appearance, he had only paid £3; so he was £1 short. He is then sent to prison for six months with hard labour.

We have said that we have no doubt at all that the chairman throughout was actuated by the highest motives, and thought that it was the best thing that this man should be helped in that way to pay his debt. But this court desires it to be understood that it deprecates and strongly disapproves of any criminal court making itself the medium of compelling people to pay their debts. That is not what the criminal courts are for. The Court of Middlesex Quarter Sessions in this case was merely turning itself into a debt-collecting society and helping the Streamdale Laundries, Ltd., to recover money which they might have recovered in the county court, where probably they would have got a very much smaller order than 10s. per week. At all events imprisonment for debt is supposed to be abolished in this country. This man, as we know now, has been sentenced to six months' imprisonment, because he has not paid £4 but apparently has paid £3 out of the £4.

We hope that, if this be a practice, the practice will cease, since it is most undesirable that any criminal court should join in any arrangement about the payment of money week by week. It would have been very much better if in the first instance the chairman had done what obviously it was in his mind to do, namely, to say: "This is a civil matter, this man having undertaken to pay the money which he said that he had lost, and although he has now admitted that he embezzled that money and we must deal with him, we are not going to have anything to do with the attempt by his original masters to force him to pay it upon the threat of criminal proceedings." As it is, so far as this appellant is concerned, he applies for leave to appeal against this sentence of six months' imprisonment with hard labour. We allow his application and give him leave to appeal.

We will deal with the appeal here and now, since we are satisfied that the prosecution would not desire in such a case to be represented. The order

which this court makes is that the sentence be altered to a sentence which will enable the appellant to be discharged.

[Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.]

ROYAL CHORAL SOCIETY v. COMMISSIONERS OF INLAND REVENUE.

A [COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.J.J.),
May 31, June 1, 1943.]

Income Tax—Exemption—Charity—Educational charity—Royal Choral Society—Whether established for “charitable purposes.”

The respondent society was formed for the advancement of choral singing in London. Rule 10 of its constitution provides that the income shall be applied solely towards the promotion of the society's objects. Rule 11 provides that, in the event of a winding up or dissolution of the society, all the property remaining after the payment of all liabilities shall be transferred to a society with similar objects. The Special Commissioners found that the society was not “established for charitable purposes only” and that its income was not “exclusively applied for such purposes” and it was contended for the Crown that this finding was a finding of fact which could not be disturbed. It was further contended that the chief object of the society was to provide pleasure, and that its performances had no educative value:—

HELD: (i) whether a particular body is established for charitable purposes is a question of law and in no circumstances can it be a matter of fact.

(ii) the society was a body established for the promotion of aesthetic education. Its objects were charitable and its income was exclusively applied for the purposes of charity. The society was, therefore, entitled to exemption from income tax.

Decision of MACNAGHTEN, J., ([1942] 2 All E.R. 610) affirmed.

[**EDITORIAL NOTE.** The Court of Appeal has affirmed the decision of MACNAGHTEN, J., agreeing with him that, while there are cases in which musical societies are formed and carried on purely for the pleasure and amusement of the promoters, here the dominant object was aesthetic education and that was a charitable object. It is important to notice that it was strenuously contended that a finding by the commissioners that the objects of a society are not charitable is a finding of fact which cannot be disturbed on appeal. This contention is wholly rejected by the court and it is stated that it is a question of law in every case.

AS TO MEANING OF CHARITY FOR INCOME TAX PURPOSES, see HALSBURY, Halsham Edn., Vol. 17, pp. 310-314, paras. 617-621; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 472a-476k.]

F Cases referred to:

**(1) Inland Revenue Comrs. v. Yorkshire Agricultural Society*, [1928] 1 K.B. 611; Digest Supp.; 97 L.J.K.B. 100; 138 L.T. 192; 13 Tax Cas. 58.

(2) Income Tax Special Purposes Comrs. v. Pemsel, [1891] A.C. 531; 8 Digest 241, 1; 61 L.J.Q.B. 265; 65 L.T. 621; 3 Tax Cas. 53.

**(3) Re Allsop, Gell v. Carver* (1884), 1 T.L.R. 4; 8 Digest 257, 192.

(4) Re Ogden, Taylor v. Sharp (1909), 25 T.L.R. 382; 8 Digest 297, 738.

G **(5) Shakespeare Memorial Trust, Re, Lytton (Earl) v. A.-G.*, [1923] 2 Ch. 398; Digest Supp.; 92 L.J.Ch. 551; 130 L.T. 56.

(6) Re Macduff, Macduff v. Macduff, (1896) 2 Ch. 451; 8 Digest 296, 731; 65 L.J.Ch. 700; 74 L.T. 706.

(7) Blair v. Duncan, [1902] A.C. 37; 8 Digest 295, 721; 71 L.J.P.C. 22; 86 L.T. 157.

(8) A.-G. v. National Provincial and Union Bank of England, [1924] A.C. 262; Digest Supp.; 40 T.L.R. 191.

H *(9) Trustees for the Roll of Voluntary Workers v. Inland Revenue Comrs.*, [1942] S.C. 47; 38 Tax Cas.

(10) Whicker v. Hume (1858), 7 H.L.Cas. 124; 8 Digest 292, 699; 28 L.J.Ch. 396; 31 L.T.O.S. 319.

APPEAL by the Inland Revenue Comrs. from an order of MACNAGHTEN, J., dated Oct. 12, 1942, reported [1942] 2 All E.R. 610, where the facts are fully set out.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), J. H. Stamp and Reginald P. Hills for the appellants.

Cyril King, K.C., and Frederick Grant for the respondents.

The Solicitor-General : The Crown say that in the present case there is nothing analogous to the preamble of the Statute 43 Eliz., c. 4, and that the decision of CHITTY, J., in *Re Allsop* (3) is in point. The argument of the respondent society before the commissioners was that the society was established primarily for educational purposes. The finding of the commissioners amounts to a finding of fact that the society was not established for educational purposes. As regards the fourth class in LORD MACNAGHTEN's category in *Pemsel's* case (2), there was a tendency during the nineteenth century to extend charitable purposes to cover objects which now seem rather strange and far removed from the preamble to the Statute of Eliz. Since the decision in *Re Macduff* (6), however, there has been a tendency to go back to the statute and say that there must be a clear analogy in the circumstances; and the court has not been ready to extend the analogy to cases in which by some imaginative minds it might be drawn. This tendency was developed in *Blair v. Duncan* (7), and reinforced 20 years later in *A.-G. v. National Provincial and Union Bank of England* (8). Quite recently, in *Trustees for the Roll of Voluntary Workers v. Inland Revenue Comrs.* (9), the court said that one must get back to the preamble of the Statute of Eliz. It is plain from the decision in *Re Ogden, Taylor v. Sharp* (4) that to encourage artistic pursuits is not a charitable purpose. The distinction I am making is the difference between giving performances and the promoting of education. The promotion of choral singing is not analogous to anything in the Statute of Eliz. The Revenue must hold the scales evenly between charitable societies and people who, with a commercial object, may well be giving performances of the highest class. The question is not whether the purpose of the society, in the present case, is an admirable purpose, but whether or not it is a charitable purpose in law. So far, the court has confined its view of education to teaching. [Counsel referred to *Re Shakespeare Memorial Trust* (5), and *Whicker v. Hume* (10).]

Stamp followed on the same side.

King, K.C. : The society is charitable if one includes under "charitable" the advancement of culture and education. Funds which are unexpended have to be applied *cy-pres*. The society increases the sum of human knowledge. According to its rules, the society exists in order that those who attend its concerts may derive instruction. The society has been formed for the purpose of imparting the art of choral singing. There is no question of that object being departed from. The primary object of the society is to maintain a choir. The object or purpose of maintaining a choir is to educate (a) the performers at the concerts of choral works and (b) the audience at those performances.

The Solicitor-General in reply.

LORD GREENE, M.R. : The Royal Choral Society is an institution which has had a long and honourable history. It has performed services of great value to musical art. It would appear that in general the performances which it has given have been conducted at a loss : but there have been occasions, notably in the year 1937, when "*Hiawatha*" was performed, when a performance was produced at a profit. This circumstance attracted the attention of the Inland Revenue Authorities, who sought to tax the income of the Society, alleging that it is not a society "established for charitable purposes only" ; and that its income is not "exclusively applied for such purposes." The question which we have to decide is whether or not that contention of the Revenue is right.

The Special Commissioners accepted the view put before them by the Revenue : and their finding is contained in para. 13 of the case, where they say this :

Having considered the arguments and evidence adduced before us, we held that the society was not a body of persons established for charitable purposes only, and we refused the society's claims for exemption from income tax.

The preliminary argument presented by the Solicitor-General was to the effect that that finding was, or involved, a finding of fact which was binding upon this court. He quoted some observations of LORD HANWORTH, when Master of the Rolls, in the case of *Inland Revenue Comrs. v. Yorkshire Agricultural Society* (1), from which it would appear that in LORD HANWORTH's opinion the question whether or not a body of persons was "established for charitable purposes" would in certain circumstances be a question of fact.

With all respect, I cannot accept that view. It is the business of the Commissioners to find facts. It is a question of law whether, upon the facts so found, the particular body in question is a body established for charitable purposes. That is a question of law ; and in no circumstances can it be turned into a matter of fact.

A Quite apart from these considerations, however, the passage which I have read, on its true construction, in my opinion, is intended to be a conclusion of law and nothing else. The findings of fact of the Commissioners, so far as they are relevant, are not set out as such in the usual way at the conclusion of the case, but must be collected from the body of the case itself. In the body of the case are to be found several matters which show what the facts were which were established to the satisfaction of the Commissioners. First of all, in para. 3, referring to a petition presented to the House of Lords against a Bill promoted by the Albert Hall Corporation, the Commissioners say :

B The said petition sets out the other facts relating to the origin, management and conduct of the society.

That, therefore, is a finding of fact.

C The next matter relates to the evidence given before them by Sir George Dyson. In dealing with that evidence, they have adopted a form which I have always thought, and on occasions have said, is not a desirable form to use in these cases. They say : "Sir George Dyson gave evidence before us and stated (*inter alia*)" ; and then they set out what his evidence was. To my mind it is quite impossible to interpret that as meaning that, although Sir George Dyson said that, they did not believe him. The only significance and interpretation that can be given to that paragraph is that they accepted that evidence as evidence of fact ; otherwise the paragraph is meaningless, if not misleading. We, therefore, find in the evidence of Sir George Dyson the matters of fact which we must take to have been found by the Commissioners. Further embodied in Sir George Dyson's evidence is certain evidence referred to as taken from the printed report before the select committee on the Bill which I have mentioned. That again, is part of the matters of fact. Sir George Dyson, in dealing with the technical matters relating to the particular art with which he is so familiar, was giving in the ordinary way opinion evidence in many respects ; and those opinions must be taken as having been accepted by the Commissioners. The Commissioners, with that material before them, came to a conclusion of law ; and the question is whether, on the facts as appearing in the body of the case, the Commissioners rightly came to that conclusion. D E MACNAGHTEN, J., held that they did not ; and I agree with him.

F The respondents are a body of ten gentlemen who carry on the work which has been carried on since 1871 by the unincorporated body originally named the "Royal Albert Hall Choral Society." In the petition to which I have referred the history of the society is set out and the method in which it was conducted ; and the work which it was doing is given in some detail. That was in the year 1927. In the case it is stated that the objects specified in a later document drawn up in 1939 have been the objects of the society from the date of its foundation. In point of fact, in 1939 a constitution and rules were drawn up ; and the respondents carry on their work to-day under that constitution and rules. G The objects as they are there set out are, as the Commissioners find, precisely the same as the objects for which the society has been carried on from the date of its foundation. The objects as stated in the petition were "for the purpose of providing choral concerts in the said hall—that is to say, in the Albert Hall—and generally for the encouragement and advancement of choral singing in London." The providing of choral concerts quite clearly is regarded in that language as one of the methods of H encouraging and advancing choral singing. When the objects were formulated in the existing rules, the language used was this :

The society is established to form and maintain a choir in order to promote the practice and performance of choral works, whether by way of concerts or choral pageants in the Royal Albert Hall or as otherwise decided from time to time.

I do not read that language as in any way extending what had all along been the purpose and objects of the society. It seems to me that a very good paraphrase of the language of the existing rules is the phrase found in the petition, namely, "the encouragement and advancement of choral singing." That

is what appears to me to be the meaning of the words "to promote the practice and performance of choral works." "Choral works" must not be regarded as works written for a chorus, or normally sung by what is normally called "a chorus." They are words well-known to mean works which are written for or are sung by a choir, which is a very different thing from what is commonly called a chorus. The type of music which is written for a choir or which is performed by a choir is a special type of music which requires a choir, and a trained choir, for its adequate performance. Examples of the sort of works meant by "choral works" may be found from the actual practice of the society. Familiar names which occur to one, and which appear in the case are, The Messiah, Beethoven's Mass in D, The Elijah and cantatas and oratorios, and so forth. It does not exclude choir singing of other kinds.

An attempt was made in the argument for the Crown to say that one particular performance, namely, "Hiawatha," was something which had no educative or useful value; and fell so far below some assumed standard of music that it must be regarded as nothing more or less than a popular entertainment. I really do not know on what ground that argument was based. "Hiawatha" (which I have never had the pleasure of hearing and about which I know nothing) is, obviously (and indeed, it is so found) a choral work. Of its merits I know nothing: nor is there any evidence or finding about that.

The argument for the Crown raised a number of points. First of all it was said, and said truly, that the problem is to ascertain the purpose for which this society was established. I think that this proposition is incontrovertible. It was then said that the purpose for which it was established may be regarded from three points of view: first of all, the purpose of the ten gentlemen who constitute the society; secondly the purpose from the point of view of the choir which is trained and performs; and, thirdly, from the point of view of the public who go to hear the performances. It was said that, when those are all looked at, the real purpose must be taken to be not one which is educational or otherwise charitable, but one which is of pure entertainment. The public goes to be entertained; the singers sing in order to have the pleasure of singing; and the ten gentlemen encourage and assist those operations in order to have the pleasure of running a choir and listening to the performances. Those, it was said, were the real purposes for which this body was established. With all respect to the argument, nothing, in my opinion, could be a greater travesty of the facts. Curiously enough, some people find pleasure in providing education. Still more curiously, some people find pleasure in being educated: but the element of pleasure in those processes is not the purpose of them, but what may be called a by-product which is necessarily there. It seems to me to be turning the facts of this case upside down to suggest that the real object is to provide pleasure and nothing else.

That, of course, does not conclude the matter; because it has to be shown that the purpose of this body of persons is charitable and only charitable. We are accordingly thrown back upon an examination of the purposes for which it was established and for which it carries on its work. It is the purpose of the members of the society, ten in number, that is relevant. The maintenance of the choir may be regarded in two aspects: first as an educative process for the members of the choir; and, secondly, as an instrument by which the performance of this type of music is presented to the public. I should have said that there is no flavour of commercial profit, or anything of that kind, about this society. So far as the choir is concerned the object, as I have said, paraphrasing the language of the rule, is the encouragement and advancement of choral singing; or, taking the language of the rule, "the promotion of the practice and performance of choral works." Bearing in mind the nature of the works in question and the medium through which they are performed, it seems to me that the objects, so far as the public are concerned, are educational; and in so far as possibly they may not be regarded as educational, they would fall within the fourth case referred to in LORD MACNAGHTEN'S analysis in *Comrs. for Special Purposes of Income Tax v. Pemsel* (2), at p. 533.

Dealing with the educational aspect from the point of view of the public who hear music, the Solicitor-General argued that nothing could be educational which did not involve teaching—as I understood him, teaching in the sense of a master teaching a class. He said that in the domain of art the only thing

that could be educational in a charitable sense would be the education of the executants : the teaching of the painter, the training of the musician, and so forth. I protest against that narrow conception of education when one is dealing with aesthetic education. Very few people can become executants, or at any rate executants who can give pleasure either to themselves or to others ; but a very large number of people can become instructed listeners with a trained and cultivated taste. In my opinion, a body of persons established for the purpose of raising the artistic taste of the country and established by an appropriate document which confines them to that purpose, is established for educational purposes, because the education of artistic taste is one of the most important things in the development of a civilised human being.

In the case of artistic taste, one of the best ways of training it is by presenting works of high class and gradually training people to like them in preference to works of an inferior class. The people who undergo this process go no doubt with the idea of being amused or entertained ; but it is not the state of mind of the people who go to the performance which matters for the present purposes, it is the purpose of the people who provide it which is important. If the people who are providing the performance are really genuinely confining their objects to the promotion of aesthetic education by presenting works of a particular kind, or up to a particular standard, it seems to me that that is just as much education (and, in fact, having regard to the subject-matter the best available method of education) as lecturing or teaching in a class, or anything of that kind. The Solicitor-General referred to a number of cases in which he said it was established that education in the charitable context is limited to teaching in that narrow sense. In my opinion, those cases do not establish any such proposition. I should be very sorry to think that they did. The matters that were being dealt with in those cases have nothing to do with aesthetic education or the cultivation and improvement of public taste in music or the other arts. I cannot help thinking that the Board of Education, which has taken the Council for the Encouragement of Music and the Arts under its wing, would be very surprised to learn that that enterprise, in which public funds are now being used, was not an educative one.

However, when one analyses this particular case, the fact that the performances are given to the public is not of such great importance, because the circumstance that the choir is being trained, that the training and practice of the choir is one of the principal objects, and in fact may be the primary object, of this society leads to the result that the public performance, as *DU PARCQ, L.J.*, pointed out, really may be regarded as something which is a consequential and necessary part of the training ; because you cannot train people satisfactorily if they do nothing but rehearse—they must perform. So far as the performance to the public is to be regarded as an object in itself, it seems to me that the performance of this type of work by a trained choir is designed to raise the standard of musical taste, and to give to the public an opportunity of hearing, becoming familiar with, and appreciating a particular type of music which comprises some of the very finest musical works that have ever been written. So far as the performers are concerned, they are not members of the society ; they are not paid for their services ; but what they are getting is a very high level of musical education in connection with this particular type of music.

I do not want to take up time by referring at too great length to the evidence of the importance of this society from the point of view of musical education. Sir George Dyson said :

It was broadly true that the society was the instrument by which everything that there is to be learned about choral music could be learned . . . The society during its existence has made a large contribution to the higher forms of music which have to do with choral singing. The work of the society is a good means of making the country musical.

He thought the vast majority of the performers joined the society because they wanted to exercise their musical faculties and wanted to get to know musical works. He referred to and agreed with the evidence given by Sir Hugh Allen, another member of the society, before the Joint Select Committee.

Picking out one or two paragraphs from the report of that evidence, Sir Hugh Allen says this in answer to the question : “ Do you regard these performances as a valuable element in the musical education of the country ?—I do.”

Then he says :

I would like, if I may, to say to your Lordships that the Royal Choral Society during its 35 years of existence has made a very large contribution to the higher forms of music which have to do with choral singing . . . It is my opinion that singing in general is the best means, especially the singing of choral societies, for making this country musical.

Then he is asked :

From that point of view, and you have had some experience of musical education, A
you do attach considerable importance to the continued existence of such a society as the Royal Choral Society ? —Most certainly.

There are other passages in the evidence to the like effect.

It seems to me that, if the Commissioners had found upon the evidence before them that the purpose and objects of this society were not educational or did not fall within the fourth class in LORD MACNAGHTEN'S analysis, they would have been coming to a finding for which there was not only no support in the evidence, but which would have been in the teeth of the evidence before them. It is true that you have to find the purpose of the alleged charitable establishment. It may very well be that a purpose which, on the face of it looks to be the real purpose, on close examination, is found not to be the real purpose. A body of persons may purport to set themselves up for educational purposes ; but, on a full examination of the facts, it may turn out that their purpose is nothing of the kind, and is one merely to provide entertainment or relaxation to others, or profit to themselves. In other words, the presence of the element of entertainment or pleasure may be either an inevitable concomitant of a charitable or educational purpose, or it may be the real fundamental purpose, and education may merely be a by-product. Whether a case falls within one class or the other is, no doubt, a question of fact, save and so far as it may depend upon the construction of written documents. But, again, it would have been quite impossible on that evidence, on the facts that they find and on the evidence that they accept, for the Commissioners to say that the real purpose of this society was merely to provide entertainment—to give to the choir the pleasure of using their voices and the feeling of satisfaction of appearing in public, and to the public mere entertainment and relaxation. I cannot think that anyone who really appreciates the facts of this case could for one moment possibly come to such a conclusion.

In my opinion that really disposes of the arguments in this case. They have traversed a wide ground. I have done my best to compress what appeared to me to be the more important points which were brought forward.

A considerable number of cases was mentioned, and I doubt very much whether any useful purpose would be served by going through them. But I ought, perhaps, to mention one paragraph in TUDOR ON CHARITIES, 5th edn., and the two cases there referred to ; because it seems to me that that paragraph in TUDOR is inadequate and, indeed, if read in a certain sense, misleading. The passage says, on p. 39 :

The fine arts, however, are probably not regarded as objects of charity ; and a gift to encourage artistic pursuits was held not charitable. But it is otherwise if the element of instruction is introduced : a gift for an art school is good.

I do not know what that passage means when it says : "The fine arts are probably not regarded as objects of charity." Does it mean that education of artistic taste is not education in the charitable sense ? If it does, I dissent from that most vehemently. There is not a particle of authority in support of such a view. If it means that the only way you can bring the fine arts into the charmed circle of charity is by setting up a class to teach executants, whether to teach actors to act, or painters to paint, or musicians to perform, again I dissent most vehemently from any such proposition. Accordingly, in my opinion, that paragraph is inadequate and, indeed, misleading.

When the two authorities on which it is based are looked at, it is found that they are not authorities for any such proposition. The first is *Re Allsop* (3), which is very shortly reported, where CHITTY, J., said that a society known as the "Nottingham Sacred Harmonic Society" could in no sense be called a charity. MACNAGHTEN, J., in his judgment observes :

In this case the body concerned was interested to say that it was not a charity, because if it was a charity it could not benefit from the testator's benevolence because of the

Mortmain Acts.

It was, therefore, contending and asserting that it was not a charity : but we know nothing about it. We do not know what its constitution was. CHITTY, J., finds as a fact, that although it had other words in its objects, this body was formed with [p. 4] :

... the laudable one of promoting among the public music as an art, yet was at the same time formed and kept up by its members for their own amusement.

A That is what he finds on the facts of that case. What those facts were we do not know : but, having come to that conclusion of fact, the result, of course, followed as was recorded in that case. I find no assistance from *Re Allsop* (3) ; still less do I find any authority in it on which to found the proposition set forth in TUDOR ON CHARITIES.

B The other case was the case of *Re Ogden* (4). There the testator desired that his executors, with the assistance of certain gentlemen and an art master, and any persons they might call in to assist them, should expend his residue [p. 382] :

... in any manner they may think desirable to encourage artistic pursuits or assist needy students in art.

Again, the report of the case is very meagre. LORD COZENS-HARDY, M.R., said that no less than three times in the previous year had it fallen to his lot to express his view on what the law was in that kind of case. He went on, at p. 383 :

C In the present case the Vice-Chancellor had thought that the trustees were bound to spend the money to encourage in some way or other education in art.

With the greatest respect to the Vice-Chancellor, he did not see how it was possible to get that meaning out of the words. I do not myself derive any assistance from that case : but it is worth pointing out that a gift merely "to encourage artistic pursuits" might be expended in a way that nobody would consider charitable ; for instance in merely providing for one or two individuals paints and paint-brushes, or a grand piano on which the beneficiaries could play in their drawingroom. I apprehend nobody would say that that was a charitable object ; but the money could have been spent for some such purpose as that.

D So far as authorities are of assistance, I find considerable support for the view I have ventured to put forward in the decision of P. O. LAWRENCE, J., as he then was, in the case of the *Shakespeare Memorial Trust* (5). I do not propose

E to take up time in referring to the facts of that case ; but, in many respects, particularly from the point of view of public education in matters of art, it falls into line with what I myself have said earlier in this judgment. In that case there happened one of those curious things that frequently happens where the Crown is concerned, for there the Crown, appearing by the Attorney-General, was asserting that the Shakespeare Memorial Trust was a charity,

F since the Attorney-General was appearing there in support of the alleged charitable intention. The Solicitor-General in the present case, appearing for a different branch of the administration, put before us arguments which could never have been put by the Attorney-General in the *Shakespeare Memorial Trust* case (5), and appear to me to be quite inconsistent with those arguments. I make no

G complaint about that. It is a thing which very frequently happens. One department of state takes one view and appears by the Attorney-General and another department of state takes a different view, and, indeed, an inconsistent one, and appears by the Solicitor-General. The result is that the court gets some

H instruction as to both points of view. But it is a little curious that that should have taken place in the present case ; and I must confess that the reasoning of P. O. LAWRENCE, J., in the case of the *Shakespeare Memorial Trust* (5) appears to me to be most satisfactory, and to agree with the view which I have already expressed. There were elements in that case upon which an argument against the trust being a charitable institution might very forcefully have been based ; nevertheless, P. O. LAWRENCE, J., pronounced for the charity. So, in the present case, it seems to me that the objects of this society are charitable, and only charitable ; and its income is applied, and applied only, for the purposes of charity.

In the result I agree with MACNAGHTEN, J., and the appeal must be dismissed with costs.

MACKINNON, L.J. : I agree. LORD GREENE, M.R., has dealt with the facts and the law so fully that I do not think I can usefully add anything.

DU PARCQ, L.J.: I also agree. I am bound to say that this appears to me to be a plain case. I should like to add a few words about the form of the case stated. LORD GREENE, M.R., has already said something about it; and it is a matter of some importance. Not very long ago the court of which I was a member had to send a case back to the Commissioners because they had not stated it in a form which made it possible for the court to deal with it. They had set out the evidence, or some of the evidence, on both sides and then stated their conclusions without making it clear in the least what evidence they accepted and what evidence they rejected. In the present case that difficulty has not arisen, because very early, and no doubt accurately, the Solicitor-General said that we were to treat the statement of the evidence which is set out as the evidence of Sir George Dyson as being accepted by the Commissioners. That has made our task a possible one: but if we had been asked to say that we must assume that they only accepted part of it, and rejected part of it, then I should have thought that we should have had to remit the case to them.

It may be (I hope it is not so) that the Commissioners do not always understand what the object of a case stated is. I say that because I thought there was a suggestion in the argument of the Solicitor-General which, if they heard it might mislead the Commissioners, though it was not so intended, of course. The Solicitor-General said that their conclusion must be supported if there was any evidence to support it. He suggested that if we could find any evidence to support it, we must treat their decision as analogous to that of a jury. With respect, their decision is quite different from that of a jury. When an appeal comes from a decision of a jury the position is this. The jury have, at any rate as a general rule, been correctly directed as to the law; and one, therefore, assumes that the jury know what the law relating to the particular matter in hand was and correctly applied it. Since the jury are not under any obligation to state a case, the only way in which their verdict can be attacked is by saying that there was no evidence to support the finding of fact at which they arrived. If anyone can show anything on which it can be supported, then the verdict must stand. In the case of magistrates or commissioners or arbitrators who have to state a case, it is necessary that they should show to the superior court precisely what facts they have found. Nobody has been there to direct them as to the law. They may have gone wrong about the law. We can only tell whether they have gone wrong about the law by knowing what the facts are: and it is their province to tell us what the facts are. If they do that and then state their conclusion, it is possible for this court to see whether they have accurately applied the law, or whether they have erred in point of law. Sometimes it is necessary to set out a great deal of the evidence, as, for instance, when the point of law stated is that there was no evidence to support the finding at which they have arrived. Usually it is neither necessary nor right to set out the evidence as such at all. Indeed, any tribunal stating a case ought to state the facts which they have found in more or less detail, depending on the circumstances and on the point of law which emerges. I say that because it seems to me to be of great importance that it should be fully understood by the Commissioners who have to deal with these important cases.

In the present case the really crucial question is the true construction of the rules of the society, and particularly of rule 2, which I may perhaps call a codifying rule, because it really puts in written form what has for some time been the guiding principle of this society. It is plain, therefore, that up to that point at any rate the question is entirely one of law; but, if the commissioners had heard no evidence and had merely set out the rule and had said: "Upon this rule we came to the conclusion that this was not a trust established for charitable purposes," then it would be apparent that it was a question of law. As it is they heard evidence; and I think they were fully entitled to hear evidence. The evidence was properly called. It might be called to rebut any suggestion that in fact the moneys in question were not applied to a charitable purpose only. It might properly be called to show that the apparent charitable intention of the rule had not been used as a cloak for the carrying on of entertainments or pursuits of one sort or another which were not charitable at all.

If one looks only at the rule, I am bound to say that it seems to me to be clear on the face of it that the trust was established for charitable purposes. I have tried to think what would be said by any lawyer to a person disposed to assist

with his money the cause of one department of music. Supposing that a wealthy man had said to a lawyer versed in such matters : " I attach enormous importance to choral singing, and I want to establish a trust which will encourage it ; will that be a charitable trust ? " I can hardly imagine that any lawyer would have said : " No, certainly not." I should have thought that the answer would clearly be " Yes," Then supposing he had gone on to say : " When large numbers of people have been trained "—and in this case we are dealing with a choir of over 800 people—" my idea is that they should sing in public and that the public should be admitted, which will serve another purpose, because not only shall I be teaching or causing to be taught music, so far as one department is concerned, to a very large number of people, but I shall also, I trust, be educating public taste." Can it be imagined that the right answer to give him would have been to say : " No, if you do that, the moment you allow your trained singers to sing to listeners who come to listen with appreciation and enjoyment, the purpose of your trust ceases to be charitable ? " It seems to me impossible to suppose that that could have been a proper answer. I agree that the mere fact that the 800 people at any one time are to be taught the art of choral singing is probably enough to show that this is a charitable trust, apart from the further question whether, far from making it less like a charitable trust, it is not making it more clearly a charitable trust when you are trying at the same time not merely to give pleasure to a large number of people, but to educate a large number of the public and to teach them, if one may so put it, to understand and appreciate these choral works.

I find it difficult to know, looking through this case, on what grounds the Commissioners came to the conclusion they did. When that question was put to the Solicitor-General, he suggested that they might have been influenced partly by the finding that most of the performers " joined the society because they wanted to exercise their musical faculties " and partly from the fact that it is recorded that Sir George Dyson agreed " that audiences derived an educational benefit from first-class musical and dramatic performances, whether these were produced by the society or by a producer working for commercial profit." I find it very difficult to suppose that the Commissioners based their conclusion on those findings. If they did, it is quite clear that they were thoroughly bad reasons for their conclusion. To exercise your musical faculties is to have your musical faculties trained. Nobody can learn to sing without exercising his musical faculties. If people take pleasure in exercising their musical faculties, as LORD GREENE, M.R., has pointed out, that does not mean that they are not being taught and trained. It would be an unfortunate thing if preceptors and teachers in any department were told that they must realise that the moment their teaching was found to be giving any kind of pleasure and enjoyment to those who were under their instruction, they must know that they were failing in their duty.

The other matter seems to me nothing to the point at all. That is the suggestion, as Sir George Dyson said, that audiences derived educational benefit from first-class musical performances in the form of entertainments produced by a producer working for commercial profit. That seems to me to have nothing in the world to do with the point. Anybody who endows education, in the sense of education given at the universities, is undoubtedly setting up a charitable trust. It is quite true to say that there are people employed as a result of that who are not doing anything charitable at all, but who are working for their private profit and gain, who teach, and I dare say impart education which is possibly in some cases not less valuable than that imparted by the universities. All that is quite irrelevant to the question whether the object of the trust is a charitable object.

For these reasons, I agree that MACNAGHTEN, J., came to the right conclusion, and that it is impossible to support the decision at which the Commissioners arrived.

Appeal dismissed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellants) ; *Phillips, Cummings & Ashton* (for the respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

LUCAS v. LUCAS AND HIGH COMMISSIONER FOR INDIA.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (PILCHER, J.), April 16, 1943.]

Execution—Garnishee order—Crown servant—Wages for services—Whether, “a debt owing or accruing”—R.S.C., Ord. 45, r. 1.

In 1937 the applicant obtained a decree of judicial separation from her husband, an Indian Civil Servant, and, at a subsequent date, an order for alimony. In 1942, her husband being in arrears with the alimony, she obtained a garnishee order *nisi* against the High Commissioner for India with respect to her husband's overseas pay due to him as a civil servant appointed by the Crown and paid out of public funds. At the hearing of the application to make the garnishee order absolute, the High Commissioner appeared to show cause why this should not be done, contending (i) that he was not the appropriate official to cite in these proceedings and (ii) that the overseas pay due did not constitute a debt owing or accruing from the Crown through the appropriate officer to the respondent debtor within the meaning of R.S.C., Ord. 45, r. 1. With respect to the first contention, it was agreed between the parties that the application for the garnishee order absolute should not be defeated merely because the appropriate official had not been named in the proceedings, and that no objection would be raised to an amendment substituting the proper official:—

HELD: as a servant of the Crown the respondent debtor held his position at His Majesty's pleasure, and could not maintain an action in respect of wages due for his services against the Crown or a superior Crown servant. There was, therefore, no debt “owing or accruing” from the Crown to the respondent debtor within the meaning of R.S.C., Ord. 45, r. 1.

[EDITORIAL NOTE. The pensions and salaries of public servants have always been regarded as given to them for maintaining the dignity of their office or to assure a due discharge of its duties and for this reason have, as a matter of public policy, been held to be unassignable. They have for the same reason been held to be protected from attachment. Such salaries are not due from the Crown or the ministers of the Crown as a debt and cannot be sued for. There is, therefore, this further reason why they are not a debt due or accruing within the meaning of R.S.C., Ord. 45, r. 1, which prescribes what debts may be attached, and it is upon this ground that they are here held to be protected from attachment.

AS TO DEBTS WHICH MAY BE ATTACHED, see HALSBURY, Hailsham Edn., Vol. 14, pp. 109, 110, para. 174; and FOR CASES, see DIGEST, Vol. 21, p. 629, Nos. 2124-2129.] Cases referred to:

- * (1) *Dunn v. R.*, [1896] 1 Q.B. 116; 11 Digest 506, 83; 65 L.J.Q.B. 279; 73 L.T. 695.
- (2) *Dunn v. Macdonald*, [1897] 1 Q.B. 555; 38 Digest 58, 346; 66 L.J.Q.B. 420; 76 L.T. 444.
- (3) *Gould v. Stuart*, [1896] A.C. 575; 11 Digest 505, 79; 65 L.J.P.C. 82; 75 L.T. 110.
- (4) *Denning v. Secretary of State for India in Council* (1920), 37 T.L.R. 138; 11 Digest 506, 82.
- (5) *Gidley v. Palmerston (Lord)* (1822), 3 Brod. & Bing. 275; 38 Digest 60, 362; 1 State Tr. N.S. 1263; 7 Moore C.P. 91.
- (6) *Mulvenna v. The Admiralty (Scot.)*, [1926] S.C. (Ct. of Sess.), 842; Digest Supp.
- (7) *Leaman v. R.*, [1920] 3 K.B. 663; 16 Digest 240, 358; 89 L.J.K.B. 1073; 124 L.T. 159.
- (8) *Smith v. Lord Advocate*, 25 R. (Ct. of Sess.) 112.

APPLICATION for a garnishee order absolute on the ground that the wages due for the respondent debtor's services as a Crown servant was a “debt owing or accruing” to the servant from the Crown within the meaning of R.S.C., Ord. 45, r. 1.

C. Gallop for the applicant.

Z. Vardy for the respondent debtor.

J. Millard Tucker, K.C., and *H. O. Danckwerts* for the respondent garnishee.

PILCHER, J.: On Apr. 30, 1942, Mrs. Anita Florencia Lucas, having obtained judgment against her husband, Mr. Lionel John Lucas, for the sum of £289 5s. 6d. in circumstances to which I shall refer later, was granted a garnishee order *nisi* in the divorce registry against the High Commissioner for India. On Nov. 11, 1942, Mrs. Lucas took the appropriate action in the registry to have the garnishee order made absolute. Objection was taken on behalf of the High Commissioner for India, and the matter was accordingly referred

by the registrar to the judge. I was informed by counsel appearing for the wife and for the High Commissioner for India that the case raised more than one point of general importance, and I accordingly adjourned the summons for argument in open court.

A The facts which give rise to the present proceedings can be stated quite shortly. Mr. Lucas, the respondent debtor, is and has been since 1928 an Indian Civil Servant employed in the province of Bihar. In 1937 he filed a petition for divorce against his wife, and his wife filed a petition for judicial separation against him. Mr. Lucas's petition was dismissed, but Mrs. Lucas was granted a decree of judicial separation against her husband. By orders dated Dec. 10, 1940, and Jan. 29, 1941, Mr. Lucas was ordered to pay alimony to his wife at the rate of £400 per annum free of tax and also to pay £100 per annum for the support of a child of the marriage, free of tax. Mr. Lucas fell into arrears with the payment of these sums, and was eventually made bankrupt by his wife, or at his wife's instance. Mr. Lucas was in fact at the material time in receipt of the sum of £30 per month as sterling overseas pay. This sum was paid through the High Commissioner for India. Mrs. Lucas being unable to obtain payment of the arrears due to her, determined to attach her husband's sterling overseas pay, and accordingly, on Mar. 2, 1942, obtained a garnishee order *nisi* against the High Commissioner for India in respect of a sum of £232, representing arrears of alimony due. This garnishee order *nisi* was made absolute, no objection being taken on behalf of the High Commissioner for India. On Apr. 30, 1942, Mrs. Lucas obtained another garnishee order *nisi* against the High Commissioner in respect of arrears of maintenance amounting to £289 5s. 6d. On this occasion the High Commissioner appeared by counsel in the registry to show cause why the order should not be made absolute, and the matter was accordingly referred to this court.

D The case has been very fully argued before me in open court, and a number of points were taken by counsel who appeared for the High Commissioner for India. In the first instance, he contended that, whatever view might be taken on the legal points which I will refer to later, the High Commissioner for India was not the appropriate official to cite in these proceedings. Whilst denying that garnishee proceedings would lie at all against any official or department in respect of Mr. Lucas's sterling overseas pay, he suggested, without admitting, E that, if any official or departmental body was to be joined, it appeared that the Secretary of State for India might be the appropriate Minister. Counsel who appeared for Mrs. Lucas, whilst he did not in terms admit that he had obtained the garnishee order against the wrong official, was inclined to agree with counsel for the High Commissioner for India that the order would have been more appropriately directed to the Secretary of State for India. That matter is, however, academic, because counsel stated that he would raise no objection F to the formal amendment of the proceedings by the substitution of the Secretary of State for India or any other official or body as garnishee in place of the High Commissioner for India. The case was accordingly argued upon the basis that the wife's claim to be entitled to garnishee her husband's overseas sterling pay in the hands of any officer of the Crown should not be defeated merely by reason of the fact that the wrong official had been named as garnishee in the proceedings.

G R.S.C., Ord. 45, deals with garnishee proceedings, and r. 1 of this order empowers the court on *ex parte* application by a judgment creditor, supported by the necessary evidence that a third person is indebted to the judgment debtor and is within the jurisdiction, to :

... order that all debts owing or accruing from such third person (hereinafter called the garnishee) to such debtor shall be attached to answer the judgment or order It is, therefore, clear from the wording of the rule that before the machinery of the order can be invoked by the judgment creditor he must establish that there is a debt owing or accruing from the garnishee to the judgment debtor. In this case, therefore, Mrs. Lucas, who seeks to attach her husband's sterling overseas pay, must establish that such pay is, in the words of the rule, "a debt owing or accruing" from the Crown through the appropriate officer to her husband. There is no question that Mr. Lucas is still employed as an Indian Civil Servant and is in receipt of overseas sterling pay in England and of basic pay in India appropriate to his rank and seniority in the service. I was informed that Mr. Lucas's pay is in fact provided from the revenues of the province of

Bihar, but for the purposes of this case it is not disputed that he is to be regarded as a civil servant appointed by the Crown and paid out of public funds.

I was referred to all the sections of the Government of India Acts, 1858, 1914, 1919 and 1935, which could have any bearing on the matter under consideration, and also to the rules made under the Government of India Act, 1915, s. 96B, as amended up to 1919. I was also referred to a number of authorities dealing with the position and rights of persons in the service of the Crown. A statement of the circumstances attending Mr. Lucas's appointment to the Indian Civil Service was handed to me together with a *pro forma* letter addressed by the India Office to successful candidates in the final examination, and a deed of covenant under seal executed by Mr. Lucas and two members of the Council of India.

It was not, I think, seriously disputed by counsel for Mrs. Lucas that Mr. Lucas's appointment was during the King's pleasure. There was nothing in the evidence to indicate the contrary, and the deed of covenant to which I have referred recites, *inter alia*, that :

... the Secretary of State in Council has appointed the covenantor [Mr. Lucas] to serve His Majesty as a member of the Civil Service of India ... such service to continue during the pleasure of His Majesty, his heirs and successors.

Mr. Lucas was, then, in this respect in the position of an ordinary servant of the Crown. After his appointment Mr. Lucas proceeded to India and took up his duties, which he has continued to perform until the present day, receiving in respect of his services the pay provided for by the Superior Civil Service Rules above referred to.

If Mrs. Lucas, the judgment creditor in this case, is to succeed, she must establish that there is "a debt owing or accruing" to her husband from the Crown through some officer or department of the Crown. It is conceded that such a debt can only accrue by virtue of a contract between her husband and the Crown through one of its officers or departments. Counsel for Mrs. Lucas conceded that unless he could establish such a contract he must fail. Counsel for the High Commissioner for India contended that no contract of employment existed or could be implied from all the circumstances of the case. There is some warrant for saying that the Crown does not contract with persons in its service. In STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND (18th Edn.), Vol. III, the following passage occurs, at p. 250 :

As a matter of law, the Crown is incapable of entering into a contract of service binding upon it. Such a contract (if contract it can be called) is enforceable by the Crown but not against it ...

Counsel for Mrs. Lucas found some difficulty in spelling out any contract between Mr. Lucas and the Secretary of State for India or any other officer of the Crown. He submitted that the letter of notification from the India Office addressed to Mr. Lucas constituted an offer by the Secretary of State for India to engage Mr. Lucas to serve His Majesty and that Mr. Lucas accepted this offer by signing the deed of covenant to which I have already referred. If Mr. Lucas had been called upon to give the particulars of the arrangement between him and the Secretary of State for India which he relied upon as constituting a contract, I think that the alleged contract might have been pleaded in a number of ways besides that suggested by counsel for Mrs. Lucas. Mr. Lucas was appointed to serve His Majesty in the Indian Civil Service, and the salary which he was to receive was laid down, and the employment was to continue during the King's pleasure. Mr. Lucas has served as an Indian Civil Servant for some 14 years, and in the circumstances I think that it would be difficult to say that the Crown through the appropriate officer did not enter into a contract of service in the ordinary sense of the word with Mr. Lucas. The matter is, however, in my view, quite academic, because the real point here is not whether there was a contract of service in the ordinary sense of the word, but whether such contract was enforceable at law by Mr. Lucas against the Crown or its appropriate officer. I understand that Mr. Lucas receives his sterling overseas pay in this country monthly in arrear. The High Commissioner for India is appointed as the appropriate official in this country for disbursing sterling overseas pay in this country to members of the Indian Civil Service. He acts as a conduit pipe. * The real point for decision in this case is this. If for any reason Mr. Lucas, whilst continuing to hold his appointment in the Indian

Civil Service and to discharge his duties, failed to receive the salary appropriate to his rank, or any salary, could he maintain an action in respect of the salary so unpaid against the Crown through its appropriate officer? If no such action could successfully be maintained by Mr. Lucas, it cannot be successfully argued by his wife that there is, in the words of R.S.C., Ord. 45, r. 1, any "debt owing or accruing" from the Crown through its appropriate officer to Mr. Lucas in respect of salary unpaid.

A I will say at once that, whilst a study of the material sections of the various Government of India Acts might leave an Indian Civil Servant who was minded to take action against the Crown in respect of salary unpaid in very considerable doubts as to the appropriate officer to name as a defendant, there is, in my view, nothing in any of those Acts which lends any colour to the suggestion that Indian Civil Servants have been placed in a more privileged position than other servants of the Crown in respect of rights of action, arising out of their appointment or their conditions of service, against the Crown through the appropriate officer or department. Whilst it would no doubt be competent to His Majesty by appropriate legislation to confer upon his servant a right of action against his appropriate minister or department, the conferring of such a right would be unusual, and one would expect to find it provided for in the most explicit terms. To discuss the sections of the Acts to which I have referred would merely be tedious, and it is sufficient for me to say that, in my view, the position of Mr. Lucas and other members of the Indian Civil Service in regard to actions against the Crown or its appropriate officer arising out of their employment as servants of His Majesty is quite unaffected by the various provisions of the Government of India Act. • It is well recognised that, except in some instances where the matter is expressly dealt with by statute, servants of the Crown hold their office during His Majesty's pleasure, and it is quite clear that D Mr. Lucas's appointment was subject to this condition. It follows that no claim for damages in respect of wrongful dismissal will lie at the suit of such servant against the Crown or any officer of the Crown. This point is well exemplified in *Dunn v. R.* (1). In that case the suppliant was presenting a petition of right, his case being that the Governor-General for the Niger Protectorate, acting on behalf of the Crown, had engaged him as consular agent for a period of 3 years certain and that he had been dismissed before the expiration E of the 3 years. KAY, J., directed the jury to return a judgment for the Crown on the ground that contracts for the service of the Crown were determinable at the pleasure of the Crown. On application being made for a new trial on the ground of misdirection, the Court of Appeal upheld the direction of the trial judge. The grounds of this decision of the Court of Appeal were that there must be imported into all contracts of employment made on behalf of the Crown a term that the Crown may put an end to the employment at its pleasure. F It is interesting to note that Dunn later sued the Governor-General in *Dunn v. MacDonald* (2), for breach of warranty of authority. This action also failed. The plaintiff appealed, and his appeal was dismissed on the ground that a public officer cannot be made personally liable for acts done by him in his public character. I refer to *Dunn v. R.* (1) not because it established any new proposition, but merely because it affords a good example of a whole line G of cases of the same character.

Gould v. Stuart (3), which was a decision of the Privy Council, lays down the same proposition, namely, that the Crown has power to dismiss its servant at pleasure whether the employment of the servant be of a civil or a military character and whether he is employed in this country or in a colony unless there is some express statutory enactment governing the terms of employment of the servant which provides to the contrary. In that case the plaintiff succeeded, H because it was held that certain provisions of the New South Wales Civil Service Act, 1884, were inconsistent with any implied term that the employment of the plaintiff was determinable at the King's pleasure.

In *Denning v. Secretary of State for India in Council* (4), BAILHACHE, J., following *Dunn v. R.* (1) and other cases in the same line of authorities, held that the plaintiff, who had been engaged by a contract which provided that he should be employed for 5 years certain, and had been dismissed on medical grounds before the expiration of the 5 years, was not entitled to recover damages for wrongful dismissal.

* All the above authorities which deal with actions for wrongful dismissal appear to have been decided upon the ground that the Crown servant's appointment or contract of employment, even though it may have been expressed to be for a period of years, was subject to the overriding right of the Crown to terminate the service, and consequently the right to salary, at pleasure. In the present case it cannot be and is not contended that any debt "owing or accruing" within the meaning of R.S.C., Ord. 45, r. 1, could arise as a result of proceedings established by petition of right against the Crown. It is submitted by counsel for the applicant that the decisions to which I have referred do not affect the right of a servant of the Crown to prosecute successfully proceedings against the appropriate officer or department of the Crown in respect of salary actually earned and unpaid so as to create a debt due or accruing due from the appropriate officer or department to the servant. Mr. Lucas's right successfully to maintain such an action is not, as I have said, enlarged by any provisions of the Government of India Act, and it must be assumed that Mr. Lucas would bring his action against the officer of the Crown acting in his official and not in his personal capacity. Can such an action be successfully maintained? I am quite clear that it cannot. In *Gidley v. Lord Palmerston* (5), the executors of one Holland, a retired War Office clerk, brought an action in *assumpsit* against Lord Palmerston in his official capacity as Secretary for War. The action was to recover certain deductions which, during the last years of Holland's life, had been made for the benefit of his creditors from the retired allowance or pension which he would otherwise have received. It was not disputed that a sum representing Holland's full pension had at the material time been at the disposition of the defendant for the payment to Holland of his full retired allowance. In giving judgment, DALLAS, C.J., used these words, at p. 286 :

... it will be sufficient to advert to a class of cases too well known and established to require to be more particularly mentioned, and which, in substance and result, have established, that an action will not lie against a public agent for anything done by him in his public character or employment, though alleged to be, in the particular instance, a breach of such employment, and constituting a particular and personal liability . . .

Later in his judgment he says, at p. 286 :

... on principles of public policy, an action will not lie against persons acting in a public character and situation, which, from their very nature, would expose them to an infinite multiplicity of actions, that is, to actions at the instance of any person who might suppose himself aggrieved . . .

* It will thus be seen that in the year 1822 it was well established on grounds of public policy that actions by servants of the Crown would not lie against ministers or officers of the Crown in respect of acts done in an official capacity by such ministers or officers. In 1926 *Mulvenna v. The Lords Commissioners of the Admiralty* (6) was heard by the Court of Session in Scotland. The facts of that case were that the wife of a dockyard worker at His Majesty's dockyard at Rosyth had obtained from the appropriate Scottish tribunal a separation order against her husband and also an order for the payment by him of 25s. per week for the maintenance of herself and of the child of the marriage, and costs. The husband fell into arrears with the payments in respect of maintenance, and failed to pay all the costs. The wife accordingly brought an action against the Lords Commissioners of the Admiralty for the arrestment, or, as we should say, the attachment, of wages due from the Admiralty to her husband. An order was made attaching the husband's wages. The matter came before the Lord Ordinary, and the Lords Commissioners of the Admiralty put in a number of pleas. The Lord Ordinary sustained the fourth plea in law of the defenders, which was, in effect, that the wages of the husband were not arrestable on the ground that the husband was a servant of the Crown whose pay was intended for his maintenance as a public servant and was provided by the Crown for such purpose. The wife appealed unsuccessfully to the Court of Session. LORD SANDS and LORD ASHMORE affirmed the interlocutor of the Lord Ordinary on the grounds given by the Lord Ordinary. LORD BLACKBURN, after stating his view that "in a question of this sort, there is no room for any difference between the laws of England and the laws of Scotland," reviewed *Dunn v. R.* (1) and other English cases. At p. 859 he said :

These authorities deal only with the power of the Crown to dismiss a public servant, but they appear to me to establish conclusively certain important points. The first

is that the terms of service of a public servant are subject to certain qualifications dictated by public policy, no matter to what service the servant may belong, whether it be naval, military or civil, and no matter what position he holds in the service, whether exalted or humble. It is enough that the servant is a public servant, and that public policy, no matter on what ground it is based, demands that qualification. The next is that these qualifications are to be implied in the engagement of a public servant, no matter whether they have been referred to when the engagement was made or not. If these conclusions are justified by the authorities to which I have referred, then it

A would seem to follow that the rule based upon public policy which has been enforced against military servants of the Crown, and which prevents such servants suing the Crown for their pay on the assumption that their only claim is on the bounty of the Crown and not for a contractual debt, must equally apply to every public servant—See *Leaman v. R.* (7), *Smith v. Lord Advocate* (8), and other cases there referred to. It also follows that this qualification must be read, as an implied condition, into every contract between the Crown and a public servant, with the effect that, in terms of their contract, they have no right to their remuneration which can be enforced in a civil court of justice, and that their only remedy under their contract lies “in an appeal of an official or political kind.” If this is the true conception of a contract between the Crown and a public servant, then the answer to the question in this case is simple, for the arrestment of a sum to which the debtor has no claim which he could enforce in a court of law is clearly inept. It further appears to me that, if this conception of the effect of public policy on the contract itself had been developed earlier, it would have led to the same conclusions in the numerous cases to which the LORD ORDINARY has referred as were reached on different and, in some cases, on somewhat unsatisfying grounds. It would also have avoided the necessity for several statutory provisions applicable to the pay of particular services which must now be regarded as merely declaratory of the common law.

The words of LORD BLACKBURN which I have quoted above were used in a case the facts of which were curiously similar to the case now before me. Whilst the decision in *Mulvenna's* case (6) is not binding upon me, it is, of course, to be treated with great respect. The majority of the court decided the case upon grounds rather different from those given by LORD BLACKBURN. It is, perhaps, sufficient for me to say that LORD BLACKBURN's view of the effect of the English authorities commends itself to me, and I respectfully adopt it. I am satisfied that the rule of public policy to which LORD BLACKBURN refers would prevent Mr. Lucas from successfully prosecuting any action against any officer of the Crown in respect of unpaid salary. There can, therefore, never be any “debt due or accruing” from such officer to Mr. Lucas which can be attached by his wife under the machinery provided by R.S.C., Ord. 45. The garnishee order *nisi* will, therefore, be discharged, and I understand that the High Commissioner for India does not ask for costs.

Garnishee order discharged.

Solicitors : *Kenneth Brown, Baker, Baker* (for the applicant) ; *James Brodie & Co.* (for the respondent debtor) ; *Solicitor, India Office* (for the High Commissioner of India).

[Reported by D. ARMSTEAD FAIRWEATHER, Esq., Barrister-at-Law.]

G *Re* CATMULL. *Re* INHERITANCE (FAMILY PROVISION) ACT, 1938. CATMULL v. WATTS.

[CHANCERY DIVISION (Uthwatt, J.), June 1, 1943.]

H *Wills—Family provision—Provision for widow—Wife only entitled to life interest in goods worth £15—Value of estate approximately £600—Right to pension on husband's death—Inheritance (Family Provision) Act, 1938 (c. 45), ss. 1 (3), (4).*

The testator, by his will, gave his wife a life interest in his household and personal belongings and directed that after her death these articles should be sold and the proceeds divided amongst all his children. The residue was to be held upon trust for sale for all his children in equal shares. A solicitor was appointed his executor and trustee and there was a direction that the executor should be entitled to charge his profit costs. The net value of the estate was approximately £600 and the goods in which the

wife was to have a life interest were worth £15. An application under the Inheritance (Family Provision) Act, 1938, was made by the widow asking that reasonable provision for her maintenance should be made for her out of the testator's estate :—

HELD : (i) the words "testator's dependants" in sect. 1 (3) of the Act means dependants generally and not those who bring forward and succeed in a claim.

(ii) in a case where the testator leaves dependants and gives them two-thirds or more of the income, or where he leaves a spouse and no dependant children more than one-half or more of the income, there is still jurisdiction, subject to the proviso of sect. 1 (1), to make provision for an excluded dependant or one who is not properly provided for.

(iii) under sect. 1 (4), when a capital payment is ordered, the amount of income which can be made applicable to the dependant under sect. 1 (3) must first be ascertained and then the capital sum must be assessed by reference to that income payment.

(iv) in the circumstances, the testator had made reasonable provision for his wife and she was not entitled to any order under the Act.

[EDITORIAL NOTE.] This case considers certain points of construction of the Inheritance (Family Provision) Act, 1938. Sect. 1 (3) of the Act places a limit on the amount of income of the estate which dependants may enjoy by virtue both of provisions in the will and orders made by the court. The first question is whether "dependants" here means all the dependants of the testator or only those who make a successful claim under the Act. Since the subsection speaks only of the amount to which the dependants will be entitled under the testator's will as varied by any order or orders, it was suggested that it could only refer to those who made a successful claim; but it is decided that the word "dependants" in this subsection has a wider meaning and includes all the dependants. It was then suggested that, if the testator has given up to the prescribed limit to some dependants, there was no jurisdiction to make an order in respect of an excluded dependant or a dependant improperly provided for. This contention is rejected. Finally, the question of the amount of a capital provision which may be made for a dependant is discussed. The Act provides for the application of two-thirds of the income of the estate (or, in certain cases, of one-half) for the benefit of dependants. It had been suggested that where in small estates advantage is taken of the provisions of sect. 1 (4) to make a capital payment, this latter payment should also be two-thirds or one-half. This view is rejected and it is held that, where a capital amount is given to any dependant, the amount must first be fixed on an income basis and then the income payment must be capitalised.

AS TO PROTECTION OF TESTATOR'S FAMILY, see HALSBURY, Halsham Edn., Vol. 34, pp. 439-445, paras. 486-505; and FOR CASES, see DIGEST SUPP., Vol. 44, Nos. 11,163a-11,163f.]

Case referred to :

**(1) Re Lidington, Lidington v. Thomas, [1940] Ch. 927; [1940] 3 All E.R. 600; Digest Supp.; 109 L.J.Ch. 421; 163 L.T. 280.*

APPLICATION under the Inheritance (Family Provision) Act, 1938, by the testator's widow for reasonable provision for maintenance out of the estate of her deceased husband, the testator. The facts are fully set out in the judgment.

C. D. Myles for the applicant.

H. Lightman for the executor.

H. J. Astell Burt for the daughters.

T. J. Sophian for the son.

UTHWATT, J. : By his will dated Aug. 2, 1935, the testator, W. R. Catmull, a tram conductor, appointed J. C. Watts, a solicitor, his executor and trustee, and gave to his wife, Florence Maud Catmull, a life interest in his household goods and personal belongings and directed that after her death these articles should be sold and the proceeds divided amongst all his children. He then gave the residue of his estate upon trust for sale and division between all his children in equal shares and declared that J. C. Watts should be entitled to charge and be paid all professional charges for any business done by him or his firm in relation to the estate.

The testator died at the age of 60 on Aug. 14, 1940, and his will was proved by the executor on Jan. 23, 1941. The net personal estate was sworn at £725 14s. 4d., but it is estimated that after payment of the testamentary expenses and costs of administration the value of the estate will be about £600. The articles in which the widow was given a life interest are worth £15.

The testator was married twice. By the first marriage there were six children, of whom five, all daughters, survived the testator. Of these, one was married at the date of the testator's death, and four were unmarried, of whom one has since married. The unmarried daughters are all over the age of 30. The testator's first wife died in 1917, and in the year 1919 the testator married Florence, who was the sister of his first wife. By the second marriage there was one child, Stanley, who attained the age of 21 on Aug. 10, 1942.

A On July 1, 1941, the testator's widow took out this summons under the Inheritance (Family Provision) Act, 1938, asking that reasonable provision for her maintenance should be made out of the testator's estate. The respondents to that summons are the executor, the son Stanley, and the daughter Rose.

It will be observed that, neglecting the legacy given to the executor in the shape of the right to charge profit costs, slightly more than five-sixths of the net estate is given to persons who were dependants within the meaning of the Act. The total amount receivable in respect of the right to charge profit costs can only be guessed at. It is reasonable to assume, and I propose to assume, that the amount will not be such as to reduce the total amount of the net estate given to dependants to less than two-thirds of the net estate.

B Upon the facts of the case I came to the conclusion at the original hearing that the conduct of the widow during her married life has not been such as to render her claim under the Act untenable. I then expressed some views upon the construction of sect. 1 (3) of the Act. The parties then agreed to compromise the matter, but, as a result of circumstances which it is unnecessary to detail, the compromise has fallen through and the matter has been re-argued. As a result of that re-argument, I have come to the conclusion that one of the views upon the construction of the Act which I then stated is wrong. I propose, therefore, now to deal with the whole case.

C D Two connected questions of construction were raised upon sect. 1 (3) and (4). Subject. (3) runs as follows :

The amount of the annual income which may be made applicable for the maintenance of a testator's dependants by an order or orders to be in force at any one time shall in no case be such as to render them entitled under the testator's will as varied by the order or orders to more than the following fraction of the annual income of his net estate, that is to say (a) if the testator leaves both a wife or husband and one or more other dependants, two-thirds ; or (b) if the testator does not leave a wife or husband, or leaves a wife or husband and no other dependant, one-half.

E The first question is whether the phrase "testator's dependants" in the opening part of subject. (3) means such of the testator's dependants as bring forward and succeed in a claim made under the Act, or means dependants generally. The meaning attributed to the phrase must also be attributed to the word "them" in the succeeding phrase "such as to render them entitled," etc. In my opinion, the phrase means dependants generally. The argument in favour of the former construction comes to this : the subsection limits the amount which may be made applicable for the maintenance of dependants by an order or orders ; an order can be made only on an application by a dependant ; therefore, the dependants referred to must be dependants who apply and succeed. I think that this construction of the subsection is too narrow. In my view, subject. (3) states a general principle and is directed to defining the area within which any possible order authorised by sect. 1 (1) may operate. The object of the Act was to interfere with the complete freedom of testamentary disposition theretofore possessed by testators. The subsection defines what may be the subject-matter of orders, and, by inference, how much must remain at the free disposal of testators.

G H The second question is whether in a case where the testator has made provision for certain or all of his dependants, giving them, in a case where he leaves a spouse and dependant children, two-thirds or more of the income, and in a case where he leaves a spouse but does not leave dependant children, more than a half of the income, there is jurisdiction to order maintenance in favour of an excluded dependant or a dependant who is not properly provided for. Subject to the operation of the proviso to sect. 1 (1), I think there is jurisdiction. Under sect. 1 (1) any dependant may, subject to the operation of this proviso, make an application and require his case to be considered. The effect of subject. (3) is only that, where an order is made, the order must not be such as to produce the

forbidden result. It follows that, in the cases supposed, the effect of subsect. (3) is that any provision made by an order for a dependant must be made out of that income which is given to dependants by the will, and must not deal with more than two-thirds or one-half of the income as the case may be. It is true that in the ultimate event the dependants between them remain entitled to more than two-thirds or one-half of the income. That, however, does not result from the order but from the terms of the will. The views which I have expressed are in agreement with the judgment of FARWELL, J., in *Re Lidington* (1). A

The remaining question argued arises on subsect. (4), which runs as follows :

Where the value of a testator's net estate does not exceed two thousand pounds, the court shall have power to make an order providing for maintenance, in whole or in part, by way of a payment of capital, so, however, that the court, in determining the amount of the provision, shall give effect to the principle of the last preceding subsection.

It was argued that, upon the construction of that subsection, there was given to the court, in the case of estates not exceeding £2,000, jurisdiction to order payment up to two-thirds or one-half of the capital, as the case might be, to dependants. In my opinion, this is not the effect of the subsection. The direction is to give effect to the principle of subsect. (3) in determining the amount of the provision. Under subsect. (2) no order may provide for payment of income for a period which will last longer than the life of a dependant, and the principle involved in subsect. (3) is to fix, for the purposes of such an order, the maximum amounts of income which may be ordered to be applied. The principle of the maximum stated in subsect. (3) embraces the purpose, the creation of interests not exceeding life interests, for which the maximum is to be used. If this be so, one does not give effect to the principle of subsect. (3) by applying the fractions two-thirds or one-half to the capital of the estate. In my view, the point of subsect. (4) is not to increase the total amount which might be made applicable for dependants by an order, but only to enable capital instead of income to be made so applicable. It is only an altered method of payment that is provided. This view of the section does not involve any practical difficulties. The court, deciding to exercise the power given by subsect. (4), can determine the amount of income which would, on an exercise of the jurisdiction under subsect. (2), be allotted to the claiming dependant and the period for which payment of that income should continue and capitalise the sum. B C D E

I may add that the view contrary to that which I have expressed would involve the capricious result of a large increase in the sum applicable at the court's discretion, where an estate was £2,000 or less in net value, over the sum so applicable where the estate was very slightly in excess of that sum, and would also be impossible to fit in with any principle which may be extracted from the proviso to sect. 1 (1), which (whether the estate be more or less than £2,000 in value) precludes, in the circumstances there set out, a surviving spouse entitled under a will to two-thirds of the income of the net estate—as well as other persons—from making any application at all. F

The result of my views upon the construction of the Act is that in this case there is jurisdiction to make provision for the widow amounting to not more than two-thirds of the income of the net estate during widowhood or the capital value of that sum, and that the burden of any such provision must operate in diminution of the interests of the other dependants—a class which has, I think, to be ascertained at the testator's death. G

Turning now to the particular facts of the case, and taking the net estate at £600 and as likely to earn interest at $3\frac{1}{2}$ per cent., you get a resulting income of £19 10s. attributable to the estate. The resulting sum, two-thirds of £19 10s., is £13, and income of that amount is the maximum sum in respect of which, in accordance with my view as to the effect of the Act, an order may be made. H

If the jurisdiction is exercised under subsect. (3), the maximum sum is that amount of income to the widow during her widowhood ; and, if it was a case where subsect. (4) was brought into play, the capital sum would be assessed by reference to the widow's age and the sum of £13.

The question I have to decide in this case is whether in all the circumstances any provision ought to be made for the testator's widow under the Act. In this case it cannot be said that the testator made an unreasonable will. For some reason he gave his widow only a life interest in the furniture—why

he did not give it to her absolutely I do not know—which was worth £15; and apart from that he gave the whole of the estate to his children. The net result of the disposition is that the children get about £100 each and no more. As a result of the testator's situation in life and the compulsory contributions he made under the various Acts dealing with pensions and the like, his widow at his death became entitled to 10s. a week. In addition, on attaining the age of 60, under recent legislation that can be increased, by way of supplementation, to a sum, as I understand the matter, not exceeding 22s. 6d. a week, but that supplementary grant is only made in case of need. The children are all working people and I see no reason why they should not, out of their own resources, be able to support themselves without the aid of anything derived from the testator. Equally, I see no reason why the widow should not support herself without the aid of anything derived from the testator. She is also in receipt of that amount which the state has thought proper to provide for the widows of working men.

The court, of course, has a discretion in this class of case, and a judicial discretion. In exercising any judicial discretion the court is bound so far as possible to get rid of its personal views, and to give effect to an informed impersonal outlook on the problem presented to it by the Act and the facts of the case. That is the ideal which one seeks to achieve, but, unfortunately, no person can see any problem except through his own spectacles and it is difficult—and to my mind impossible—for a judge in exercising a discretion to get rid of his personal views in these matters, and perhaps equally difficult to state the way in which the varying considerations have influenced his decision. However, in this case I am able, I think, to give explicitly the reason for the judgment that I am now giving in not awarding anything at all to the widow. My reason is this. As a result of the testator's death, the widow received by way of widow's pension from the state such an amount—it is not sufficient, I quite agree, to support her—as having regard to the amount of the testator's estate left him free, and properly free, in my view, consistently with the object of the Act, to dispose of the whole of that estate by his will by dividing it among his children. I see no reason, therefore, for making any order in this case in favour of the widow.

Application dismissed.

Solicitors: *Avery, Son & Fairbairn* (for the applicant); *J. C. Clifford Watts* (for the executors); *R. Struthers & Co.* (for the dependants).

[*Reported by* HUBERT B. FIGG, Esq., *Barrister-at-Law.*]

IMPERIAL TOBACCO CO. (OF GREAT BRITAIN AND IRELAND), LTD. v. KELLY. IMPERIAL TOBACCO CO. (OF GREAT BRITAIN AND IRELAND), LTD. v. COMMISSIONERS OF INLAND REVENUE.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.),
June 8, 1943.]

Income Tax—Profits from trade and trade receipts—Compulsory sale of surplus dollars—Surplus realised at a profit—Income Tax Act, 1918 (c. 40), Sched. D, case 1.

The appellants are tobacco manufacturers who were in the habit of purchasing large quantities of tobacco leaf for cash in the United States of America. As a result of the Treasury's request on Sept. 9, 1939, that the appellants should stop all further purchases of tobacco leaf, they had in hand a large surplus of dollars which they had bought to pay for these purchases. On Sept. 30, 1939, they were required under the Defence (Finance) Regulations, to sell the surplus dollars to the Treasury. The appellants contended that the profit arising from this sale should not be included in the computation of the profits of their trade since it did not arise from the carrying on of their trade:—

HELD: the profit made by the appellants on the compulsory sale of their surplus dollars to the Treasury was a revenue profit and must be included in their profits for the purpose of assessment to income tax.

Decision of MACNAGHTEN, J. ([1943] 1 All E.R. 431), *affirmed.*

[**EDITORIAL NOTE.** There is authority for saying that a profit made on a speculation in foreign currency by a company where that speculation has no connection with

the business of the company is not a trading profit. In the present case, the dollars were purchased to be used in the business of the company but, on account of government regulations, they could not be so used and were compulsorily sold to the Treasury at a profit. The Court of Appeal have decided, however, that these matters do not alter the original nature of the transaction, which was a purchase on revenue account, and there is nothing which could make the proceeds of sale on the purchase by the Treasury a capital sum.

AS TO COMPUTATION OF TRADING PROFITS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 147, 148, paras. 306, 307; and FOR CASES, see DIGEST, Vol. 28, pp. 37-39, Nos. 199-204.]

Cases referred to:

- * (1) *Thompson (George) & Co., Ltd. v. Inland Revenue Comrs., Inland Revenue Comrs. v. Thompson (George) & Co., Ltd.* (1927), 12 Tax Cas. 1091; Digest Supp.
- (2) *Stott v. Hoddinott* (1916), 7 Tax Cas. 85; 28 Digest 47, 241.
- (3) *Curtis v. Oldfield (J. & G.), Ltd.* (1925), 94 L.J.K.B. 655; 28 Digest 49, 254; 133 L.T. 229; 9 Tax Cas. 319.
- (4) *Landes Bros. v. Simpson* (1934), 19 Tax Cas. 62; Digest Supp.
- * (5) *McKinlay v. Jenkins (H.T.) & Son, Ltd.* (1926), 10 Tax Cas. 372; Digest Supp.
- (6) *Inland Revenue Comrs. v. Newcastle Breweries, Ltd.* (1927), 12 Tax Cas. 927; Digest Supp.

APPEAL of the taxpayer from an order of MACNAGHTEN, J., dated Jan. 25, 1943, reported [1943] 1 All E.R. 431, where the facts are fully stated. The second appeal had reference to National Defence contribution and the decision covers both appeals.

J. Millard Tucker, K.C., and *F. Heyworth Talbot* for the appellants.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), and *Reginald P. Hills* for the respondents.

Tucker, K.C.: The question is not whether the profit arose to the appellants in the course of carrying on a trade, but whether it was in fact a profit arising from the carrying on of a trade. The appellants do not buy dollars for resale but for the purpose of purchasing tobacco leaf in the United States. There is no common law principle that if a company happens to make a profit, it must pay tax upon it. The tax is imposed by statute upon the annual profits or gains accruing from the carrying on of a trade. The converse question arises in the case of a loss. It is not every loss which the taxpayer can deduct even if that loss is intimately connected with the carrying on of a trade. It must be a loss which is truly incurred in the carrying on of the trade. In principle, *McKinlay v. Jenkins* (5) is indistinguishable from the present case. MACNAGHTEN, J., compared the present case to one in which a company's stock of goods was commandeered by the Government and he relied upon the *Newcastle Breweries* case (6) in support of that view. That case, however, is quite unlike the present case unless it can be said that dollars are part of the stock-in-trade of the appellants. [Counsel referred to *Stott v. Hoddinott* (2), *Landes Bros. v. Simpson* (4), *Curtis v. Oldfield (J. & G.), Ltd.* (3) and *Thompson (George) & Co., Ltd. v. Inland Revenue Comrs.* (1).]

Talbot followed on the same side.

Counsel for the respondents were not called upon.

LORD GREENE, M.R.: This is a perfectly clear case. The facts may be put concisely in this way. A manufacturer in this country purchased the raw material of his manufacturing business in the United States of America. With a view to the buying season he provided himself in advance with dollar currency, with which he proposed to pay for the raw material which he was going to buy. He does not carry on the business of speculation in dollar currency; but the whole of his purchases of dollars are made in contemplation of the purchases of raw material which he is proposing to make, and not otherwise. Having furnished himself in a particular year with a quantity of dollars, the buying transactions which he contemplated making for the season were suspended by reason of certain governmental instructions given shortly after the outbreak of war, which prohibited or firmly requested—I do not know which—the manufacturer not to make any more purchases of that raw material. The result of that was that he had left upon his hands a very large quantity of dollars which were no longer required for the contemplated purchases, for the simple reason that those contemplated purchases were not going to take place.

A few days later the Treasury requisitioned the dollars and—dollars in the

meantime having appreciated in terms of sterling—the price paid by the Treasury represented a profit over and above the original purchase price which the manufacturer had paid for the dollars. The question is whether, in those circumstances, the profit made was a profit derived from the manufacturing business which the manufacturer carried on. MACNAGHTEN, J., held that it was ; and, in my opinion, he was perfectly right.

A It is said that the purchase of dollars ought to be regarded as in some sense a colourless transaction, by reason of the fact that the appellant company—I will now go to the actual facts of this case—might have changed its mind and used the dollars for building a factory, or for buying some capital asset in the United States ; or it might have decided that it would not go on with the purchases and reconverted the dollars into sterling. I do not see how speculations as to those possibilities really assist the question.

B We have here a finding of fact as to the purpose for which the dollars were bought. The purchase of the dollars was the first step in carrying out an intended commercial transaction, namely, the purchase of tobacco leaf. The dollars were bought in contemplation of that and nothing else. The purchase, on the facts found, was, as I say, a first step in the carrying out of a commercial transaction, which would be completed by the purchase and delivery of the leaf and payment of the dollar purchase price for it. We must decide this case having regard to the facts as found. In the light of those facts, the acquisition of these dollars cannot be regarded as colourless. They were an essential part of a contemplated commercial operation.

C That being so, what is the true analysis of the position ? A manufacturer has provided himself with a commodity, namely, dollars. I call dollars a commodity not for the reason that they are not currency in this country, but because they have a characteristic which is common to other commodities, and is not shared by sterling, namely, that their value from day to day varies in terms of sterling, just in the same way as coal, or bricks, or anything else may do. The appellant company having provided themselves with this particular commodity, which they proposed to exchange for leaf tobacco, their contemplated transactions became impossible of performance, or were not in fact performed. They then realised the commodity which had become surplus to their requirements. When I say “surplus to their requirements,” I mean surplus to their requirements for the purpose and the only purpose for which the dollars were acquired. In these circumstances, they sold this surplus stock of dollars : and it seems to me quite impossible to say that the dollars had lost the revenue characteristic which attached to them when they were originally bought, and in some mysterious way had acquired a capital character. In my opinion, it does not make any difference that the contemplated purchases were stopped by the operation of Treasury or governmental orders, if that were the case ; nor is the case affected by the fact that the purchase was under a Treasury requisition and was not a voluntary one. It would be a fantastic result, supposing the company had been able voluntarily, at its own free will, to sell those surplus dollars, if in that case the resulting profit should be regarded as income, whereas if the sale were a compulsory one the resulting profit would be capital. That is a distinction which, in my opinion, cannot possibly be made.

G To reduce the matter to its simplest elements, the appellant company has sold a surplus stock of dollars which it had acquired for the purpose of effecting a transaction on revenue account. If the transaction is regarded in that light, it seems to me it is precisely on all fours with the case of any trader who, having acquired commodities for the purpose of carrying out a contract, which falls under the head of revenue for the purpose of assessment under Sched. D, case I, then finds that he has bought more than he ultimately needs and proceeds to sell the surplus. In that case it could not be suggested that the profit so made was anything but income. It had an income character impressed upon it from the very first. If authority be required for that proposition, it is to be found in the case of *Thompson (George) & Co., Ltd. v. Inland Revenue Comrs.* (1). That was a case where a company which had acquired a stock of coal for its normal operations found, for reasons which are not material, that it no longer required that stock, and, accordingly, it sold it. ROWLATT, J., held, affirming the decision of the commissioners, that the transaction of selling the coal which was no longer required was a transaction on revenue account. It seems to me,

if I may say so, that that decision was manifestly right.

In the present case it is truly said that it was no part of the company's business to buy and sell dollars. But in each case the commodity (in the one case the coal and in the other case the dollars) was acquired for the purpose of transactions on revenue account and nothing else. In each case there was a surplus which was not needed for the purposes of those transactions. In each case the surplus was realised at a profit. It seems to me that *Thompson's* case (1) is a very strong authority in favour of my view of the present case.

We were referred to several other cases. With regard to three of them, *Stott v. Hoddinott* (2), *Curtis v. J. & G. Oldfield, Ltd.* (3) and *Landes Bros. v. Simpson* (4), I need say no more than that they were very different from the present case; and I get no assistance from them.

The only case which might be thought to give some colour to the argument for the appellants is the case of *McKinlay v. Jenkins (H.T.) & Son, Ltd.* (5). That was a case in which a company of marble merchants were contracting to sell marble to a contractor. One of the terms of the contract was that a sum of £20,000, part of the purchase price, should be paid in advance. The company accordingly acquired that £20,000. At a date later in the year, it would be necessary for them to purchase in Italy the marble required for carrying out the contract; and they invested the £20,000 in the purchase of lire at a favourable rate. At a later date in the year, some time before the purchase of the marble in Italy was due to take place, the lira had risen as against sterling and they took the opportunity—I say “they,” but they did not do it themselves, as a matter of fact it was done by nominees, though I do not think that affects the matter—to make a quick profit by selling the lire which they had bought. When the time drew near to buy the marble and pay for it, they again purchased lire, but at a price which was higher than before, that is to say, they paid more for the lire than they did when they originally bought them for £20,000, but they paid less than the sum at which they sold the lire when they took their exchange profit. They claimed (and ROWLATT, J., held) that the profit which they made when they sold the original amount of lire at more than they paid for it, was not a revenue profit, but a capital profit. The view of ROWLATT, J., himself on his decision in that case, and the grounds of it, are referred to by him in *Thompson's* case (1). In *Thompson's* case (1), ROWLATT, J., said that *McKinlay's* case (5), was decided by him on the footing that the original purchase of the lire had been “a speculation.” It is, perhaps, fair to say that the case stated in *McKinlay's* case (5), does not appear to contain any basis for a finding that the original purchase was a speculation. It does not appear that that was the intention of the original purchase, so far as the case stated shows. But, however that may be, that was the view of ROWLATT, J., and on that basis, in my opinion, no criticism could be made of the decision in *McKinlay's* case (5). Leaving that on one side, and taking *McKinlay's* case (5) by itself, I call attention to the fact that the circumstances there were very different from the circumstances in the present case. In the present case the intention with which the dollars were bought was as I have stated; and that intention persisted. In *McKinlay's* case (5) the company took the opportunity to use its lire as a speculation. Even if that had not been their intention in the first instance, what they did was this. They took advantage of the turn in the exchange market to make a quick profit on the exchange, intending to provide the lire that they would ultimately need at a later date in the hope and on the speculation that in the meanwhile the price of lire would go down, as in fact it did. That is what they were doing. Whether or not *McKinlay's* case (5) is one which was rightly decided is a matter which I feel it quite unnecessary to discuss, because the circumstances of that case were different, in the respect which I have mentioned, from the circumstances of the present case. I, therefore, do not find anything in *McKinlay's* case (5), which helps me one way or the other, and the present case, in my opinion, must be decided upon its own particular facts. The result is, as I have stated, that this profit was a revenue profit, and the assessment was correct. In the result, both appeals must be dismissed, for they both turn upon the same point.

MACKINNON, L.J. : I agree; and I do not think I can usefully add anything to the judgment of LORD GREENE, M.R.

DU PARCQ, L.J. : I also agree.

Appeal dismissed with costs.

Solicitors : *Trower, Still & Keeling*, agents for *T. Murray Sowerby*, Bedminster. Bristol (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).
[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

A ATTORNEY-GENERAL v. BARCLAYS BANK, LTD. AND OTHERS.

[COURT OF APPEAL (SCOTT, MacKINCH and LUXMOORE, L.J.J.), May 6, 7, June 10, 1943.]

B *Estate Duty—Property passing on death—Policies of assurance—Policies transferred to trustees—Separate fund provided for payment of premiums—Appointment—Death of assured—Whether policies kept up for donee's benefit—Customs and Inland Revenue Act, 1881 (c. 12), s. 38—Customs and Inland Revenue Act, 1889 (c. 7), s. 11—Finance Act, 1894 (c. 30), s. 2 (1) (c).*

C A settlor transferred to trustees two assurance policies on his own life and certain shares. The trustees were to use the income of the shares and any accumulation thereof to pay the premiums on the policies and to hold the balance, whether capital or interest, and including the policy moneys, as he should by deed or will appoint. An appointment was made by deed dated May 15, 1930, under which the investments were divided into two categories. Those in the first category, which formed the absolute fund, were to be held in trust for the settlor's elder son absolutely, but were liable to be resorted to, if necessary, for the payment of the premiums. The investments in the second category were to be resorted to in the first place for payment of the premiums and subject to this the income of these investments, called the retained fund, was to be paid to the elder son during his life, and then to his issue and in default of issue to the younger son, Mark. On the same day the elder son assigned his newly created absolute interest and his life interest to the trustees. Subject to the premiums on the two policies, those interests were then settled on the elder son for life, to provide an annuity not exceeding £1,500 and subject thereto on the elder son, his wife and issue and certain other relatives. The settlor was not given any beneficial interest of any description in the trust property. The settlor died on Sept. 5, 1934, and on his death £78,675 was paid to the trustees in respect of the policies of assurance. The Crown contended that estate duty was payable in respect of this sum under the Finance Act, 1894, s. 2 (1) (c) by reference to the Customs and Inland Revenue Act, 1889, s. 11, by which duty is payable on all property passing on death, including policies wholly kept up by the insured for the benefit of a donee. The trustees contended that the policies were not wholly kept up by the settlor for the benefit of a donee :—

G HELD [LUXMOORE, L.J., dissenting] : since the settlor had assigned to the trustees, together with the policies on his own life, investments of which the income was sufficient to pay the premiums, and which income was thereafter in fact used by the trustees for that purpose, the policies had been "kept up" by the settlor after May 15, 1930, for the benefit of a donee within the meaning of the Finance Act, 1894, s. 2 (1) (c).

Decision of WROTTESELEY, J. ([1943] 1 All E.R. 181) affirmed.

H [EDITORIAL NOTE. The Court of Appeal have by a majority affirmed the decision of WROTTESELEY, J., holding that the setting aside of a fund out of which the premiums were to be paid was equivalent to the payment of those premiums by the deceased. LUXMOORE, L.J., in a dissenting judgment, has adopted the strict view that, since, after the funds had been vested in the trustees, the deceased had no control over or interest in them, he cannot in law be said to have paid the premiums. The distinction is a fine one and there is the further point that the Act does not directly require that the deceased should have paid the premiums. It is only by drawing an inference from the whole of the passage that any such requirement can be said to arise and a policy may be "kept up" by providing once and for all for all the premiums which will be become payable in respect of it.

AS TO POLICIES KEPT UP FOR A DONEE, see HALSBURY, Hailsham Edn., Vol. 13, pp. 241, 242, para. 232; and FOR CASES, see DIGEST, Vol. 21, pp. 15, 16, Nos. 73-80.]

Cases referred to:

- (1) *Gould v. Curtis*, [1913] 3 K.B. 84; 28 Digest 93, 549; 82 L.J.K.B. 802; 108 L.T. 779.
- (2) *Inland Revenue Comrs. v. Scott's Trustees*, [1918] S.C. 720; 21 Digest 7, *e*.
- (3) *Re Goodson's Settlement*, *Goodson v. Goodson*, [1943] Ch. 101; [1943] 1 All E.R. 201; Digest Supp.
- (4) *Smith v. Anderson* (1880), 15 Ch.D. 247; 9 Digest 72, 255; 50 L.J.Ch. 39; 43 A L.T. 329.

APPEAL by the defendants from an order of WROTTESELEY, J., dated Nov. 10, 1942, reported [1943] 1 All E.R. 181. The facts are fully set out in the judgment of LUXMOORE, L.J.

Cyril King, K.C., and *Wilfred Hunt* for the appellants.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), and *J. H. Stamp* for the respondent. B

King, K.C.: The words of the Customs and Inland Revenue Act, 1889, s. 11, refer to policies kept up by payments by the deceased or cases where the deceased provided the means of payment. Such cases fall under the Finance Act, 1894, s. 2 (1) (d), and that section has nothing to do with whether or not a case falls within the 1889 Act, s. 11. In the present case, when the settlor paid over the funds, he had done all that it was necessary for him to do. *Inland Revenue Comrs. v. Scott's Trustees* (2) is not an authority in English law. The part of the judgment in that case in which the judge treated the trustees as managers for the settlor is not good in English law. [Counsel referred to *Re Goodson's Settlement*, *Goodson v. Goodson* (3) and *Smith v. Anderson* (4).] C

Hunt followed on the same side.

The Attorney-General: The relevant words of the Customs and Inland Revenue Act, 1889, s. 11, cover the present case according to their ordinary and natural construction. To adopt the opposite view would be to arrive at a result contrary to the intent of sect. 11 as is to be gathered from its terms. A comparison with or a reference to the words of the Finance Act, 1894, s. 2 (1) (d) assists my argument rather than the argument of the appellants. The language of the relevant sections requires one to consider whether the policies have been wholly kept up by the deceased. That question can only be decided when the settlor is dead. The words "kept up" are appropriate in relation to policies. A policy, unless it is a single premium policy, is one in respect of which payments are made year after year. In the present case, no *cestui que trust* gets any income unless the premiums are paid. D

Stamp followed on the same side.

King, K.C., in reply. E

Scott, L.J.: I agree with the conclusion arrived at by WROTTESELEY, J., but it is necessary to deal with the arguments of counsel for the appellants, and still more with the dissentient judgment of LUXMOORE, L.J., which I have had the advantage of considering. The facts are fully stated in those judgments and I need not repeat them. F

The issue in the case is whether the first Lord Devonport, who had previously kept up two policies on his own life by paying the premiums, still continued to keep them up after May 15, 1930, when he assigned the policies to trustees for his elder son and others, together with investments of which the income was sufficient to pay the premiums, and which was thereafter in fact used by the trustees for that purpose. G

The case depends upon the true interpretation of the last paragraph of the Customs and Inland Revenue Act, 1889, s. 11, as amended by the Finance Act, 1894, s. 2 (1) (c), of which WROTTESELEY, J., has, in his judgment, conveniently quoted *in extenso* the resultant wording. It is as follows: H

The charge under the said section shall extend to money received under a policy of assurance effected by any person dying on or after June 1, 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.

The question turns on the meaning of the phrase "kept up." In my opinion, that phrase covers what Lord Devonport in fact did and is unambiguous in

that sense ; but as LUXMOORE, L.J., differs and thinks it is limited to payment of premiums direct out of his own pocket as and when they fell due, I will assume that it is ambiguous and state my reasons for construing it in a wider sense, which includes causing to be kept up by payment of premiums as well as paying them directly.

A For this purpose it is relevant to follow the steps in the statutory development of death duties, beginning with the Customs and Inland Revenue Act, 1881, s. 38. There are various points in the relevant enactments which call for consideration :

(1) The duty was imposed by that Act primarily upon property "taken" under a probate or letters of administration, and was made payable by the personal representative who took the property. Estate duty was made similarly payable under the Finance Act, 1894, s. 6.

B (2) The scope of the charge was extended by the Customs and Inland Revenue Act, 1881, s. 38, so as to include (a) *donationes mortis causa*, and (b) gifts *inter vivos* purporting to operate as an immediate gift and made less than three months before the death (enlarged to twelve months by the Customs and Inland Revenue Act, 1889, s. 11, and to three years by the Finance (1909-1910) Act, 1910, s. 59).

C (3) By the first-paragraph of sect. 11 (1) of the 1889 Act, all gifts *whenever made*, i.e., however long before the death—were brought into charge, unless "*bona fide* possession and enjoyment" by the "donee" was "assumed immediately" by the donee.

D (4) The last paragraph of sect. 11 (1) of the 1889 Act enlarges the ambit of the charge to death duty so as to bring within its scope money received in respect of a life policy where it has been effected in the name of, or assigned to, a donee, the duty being made chargeable upon the whole of the money if the policy has been wholly "kept up" by the assured, but only on a proportionate part not so wholly kept up, e.g., if the donee had paid part of the premiums. It is to be noted that this liability is not, as in the case of other gifts *inter vivos*, made to depend upon the length of time before the death that the gift was made.

(5) In all these enlargements of the scope of death duties it is obvious that Parliament's intention was to forestall and prevent attempts by the living owner to save his estate from the tax-gatherer's net upon his death.

E In the Acts of 1881 and 1889, as in 1894, Parliament was concerned with the substantial question inherent in the problem of all death duties, viz., what property ought to be regarded from the fiscal angle as passing on the death of any deceased person. It was endeavouring to find reasonably just criteria for the purpose of preventing avoidance of tax liability. The case of gifts *mortis causa* was the most obvious instance of such avoidance. From that it was an easy extension to include a gift made very shortly before the death F without making intention to avoid in any sense the test ; hence the three months of the 1881 Act, extended to twelve months in 1889 and to three years in 1910.

However, for taxation purposes a life policy is a special kind of property and, where during its currency it has been made the subject of a gift, it gives rise to a special problem. As the surrender value during the life may in fact have been created partly by the donor and partly by the donee, so each of them may G fairly be regarded as having a proprietary share in its final value at the moment before the falling in of the insured life. Where that is the case, it is fair for the Inland Revenue to abstain from claiming death duty on that part of the value which has been created by the donee, and has already before the death, therefore, metaphorically "belonged to" the donee. The fairness of that abstention depends on the assumed fact that the donee has put his own money into "the investment" (as HAMILTON, J., called it in *Gould v. Curtis* (1)). In that event H it may truly be said that his investment does not pass on the death, but conversely, so far as the investment has not been made to any extent his own by his having put his money into it, the revenue ought not to lose the death duty on that part of the investment which is not so made his. If that be the fair dividing line between what passes and what does not pass, it cannot make any difference whether the deceased used direct or indirect means to maintain his part of the investment, i.e., "to keep up the policy." If, contrary to my opinion, "kept up" be ambiguous, these considerations may help to show what

was the meaning of "kept up" as used by Parliament.

The language used is popular and not technical—just as "popular" as is the basic provision of the Finance Act, 1894, about "property passing on the death." "Keeping up" is a phrase of the market-place, not of the law; and in its context in the subsection it may, I think, be paraphrased as "taking effective steps to prevent the policy lapsing," of which no doubt paying the premiums is an essential. Counsel for the appellants argued that any such popular interpretation of that phrase (the correctness of which apart from its context he did not dispute) is excluded by the later words "premiums paid by him," from which the phrase "kept up," he said, must take its colour. That the one phrase may colour the other I concede; but the wider phrase "kept up" is the key to the enactment. It expresses the dominant idea, and must, I think, in the context control and so colour the narrower word "paid" which appears only in the ancillary provision about apportionment between donor and donee. In addition, the reference to payment of premiums contained in the last two lines of the paragraph is machinery for assessing *quantum*, not for creating the charge, which has already been imposed in the earlier part of the paragraph. So construed the subsection propounds a plain test of chargeability, using language which will be understood by the plain man.

In my opinion, it is only if the person who on the death gets the policy money has really kept it up that it can in any real sense be said that it does not pass on the death. By freeing the policy from duty to the extent to which the donee has kept it up, and leaving the estate assessable in respect of the portion of the value contributed by the deceased, a fair apportionment is achieved.

The trust was the means by which Lord Devonport ensured that his purpose of keeping up the policy out of his own pocket for the benefit of the donee (i.e., all the beneficiaries) would be achieved. I can see no practical reason why it should matter whether the donor kept it up directly by himself paying the premium, or indirectly by the machinery of a trust. Had Parliament intended to treat an assignment of a policy as a mere gift and nothing else, I should have expected it to have expressly mentioned policies in the category of mere gifts. It would have been easy to do so, but Parliament dealt with a life policy differently.

The appeal, in my opinion, must be dismissed with costs.

MACKINNON, L.J.: Having read the judgment written by SCOTT, L.J., I was prepared to say that I agreed with it, and did not wish to add my own reasons for so doing, but as I have since read the judgment written by LUXMOORE, L.J., it is unhappily necessary for me to state my reasons shortly.

The question depends on the proper meaning of the words "kept up by him" in the section. Can it be said that these policies were "wholly kept up" by the first Viscount within that provision? "Kept up" is not a term of legal art; it is vague and popular language. In vague and popular language, who "kept up" these policies? Since it is popular language that question should perhaps be addressed to the man on the Clapham omnibus, and I feel sure that his answer would be: "The first Viscount kept them up," if he had understood that all the premiums were paid out of trust funds provided for that purpose by the first Viscount.

The contrary view of LUXMOORE, L.J., rests upon the light which he thinks is provided by the following words:

... or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him...

Since "partially kept up" is used with reference to "in proportion to the premiums paid by him," his view is that "keeping up" means "paying premiums for," and not any looser phrase such as "providing the premiums for." For myself, I do not see why the loose phrase "kept up" is to be explained or defined by the more exact term "paid," any more than the exact term "paid" is to be explained or enlarged by the earlier phrase "kept up." The dominant provision is "where the policy is wholly kept up": the subordinate provision, where the policy is not wholly but only partially kept up is "in proportion to the premiums paid by him."

Reading the whole sentence I think the later word "paid," in itself precise, ought to be reduced to the less precise meaning involved in the dominant provision "kept up." The draftsman could not very well use any form of the

phrase "keep up" in the passage beginning "in proportion to the premiums," but, having regard to his previous use of "kept up," I think "paid" may well be taken to mean no more than "provided." Alternatively, his purpose, as I interpret it, might have been achieved by the rather clumsy words "in proportion to the extent to which the policy was kept up by him."

For these reasons I agree with SCOTT, L.J., that the appeal fails.

LUXMOORE, L.J. [read by MACKINNON, L.J.]: I am unable to agree with the conclusion at which my brethren have arrived.

The question to be decided is whether estate duty is payable in respect of the whole or any and what interests in moneys secured by two policies of assurance effected at some date before Aug. 15, 1922, by the first Viscount Devonport on his own life.

Shortly before Aug. 15, 1922, these two policies were assigned to the persons who became the trustees of a voluntary settlement (hereinafter called the settlement) executed by the first Viscount Devonport on Aug. 15, 1922. At the same time as the assignment, certain shares, described in the first schedule to the voluntary settlement, were also transferred to the same persons by the first Viscount Devonport. By the settlement it was declared that the trustees might either allow the shares or any part thereof to remain as actually invested so long as they thought fit or might at any time at their discretion sell the same or any part thereof and invest the moneys produced thereby and the moneys which might be received by the trustees in respect of the policies in manner thereby authorised, with power at their discretion to vary or transpose the same; and it was thereby declared that the trustees should hold the shares and policy moneys and the investments for the time being representing the same (which together with any accumulations added thereto by virtue of the trusts thereby declared were thereafter and are hereinafter called the trust property) and the income thereof and any accumulations of such income upon trust out of the income thereof to pay the premiums from time to time payable in respect of the policies and any other moneys requisite to be paid for restoring or otherwise renewing the same, and subject thereto upon trust for all such one or more exclusively of the other or others of them the wife, children or remoter issue of the first Viscount Devonport or the Corporation of Cranleigh and Bramley Schools in such shares for such interest in such manner and with and subject to such trusts powers and provisions as the first Viscount Devonport might appoint by any deed or deeds revocable or irrevocable expressly referring to the settlement or by will or codicil so referring thereto, and until and subject to any and every appointment under the power mentioned upon the discretionary and other trusts therein declared for the primary benefit of the present Viscount Devonport a son of the first Viscount (hereinafter called the present Viscount, but then and therein called Gerald Chester Kearley) and after the death of the present Viscount upon the trusts therein declared for the benefit of his children or remoter issue with an ultimate trust in default of such issue which was displaced by an appointment by deed made by the first Viscount on May 15, 1930.

The appointment of May 15, 1930, contained recitals to the effect (as the facts were) that additional investments had from time to time been transferred to the trustees of the settlement by the first Viscount as an accretion to the trust fund thereby constituted. By it the first Viscount, in exercise of the powers conferred on him by the settlement, appointed that the investments and money mentioned in the first part of the schedule to the appointment being part of the trust property (hereinafter referred to as the absolutely appointed fund) and the accruing income and the income thenceforth to arise therefrom should be held in trust for the present Viscount absolutely, but subject to the trust contained in the settlement for payment of the premiums on the said policies out of the income of the trust premises so appointed, with a proviso that the said premiums and other moneys required for maintaining or renewing the said policies should be paid primarily out of the income (as far as the same extended) of the investment and policies mentioned in the second part of the schedule thereto and the investments for the time being representing the same (thereinafter and hereinafter called the retained fund including in that expression the investments for the time being representing the same) in exoneration of the income of the absolutely appointed fund, but so that the balance, if any, required

to provide for the said premiums and other moneys aforesaid should be payable out of the income of the absolutely appointed fund, and the first Viscount thereby further appointed that the settlement should thenceforth be read and have effect as regards the retained fund and the income thereof as if the clauses disposing of the income of the settled premises during the life of the present Viscount had been omitted therefrom and a clause to the following effect had been substituted therefor, namely, that, subject to the trusts for maintaining or restoring the said policies, the trustees should pay the income of the trust property to the second Viscount during his life and as if in lieu of the said ultimate trusts in default of issue of the second Viscount there had been declared an ultimate trust in favour of Mark Hudson Kearley, the brother of the second Viscount. A

By a settlement (hereinafter called the second settlement) dated May 15, 1930, and made between the present Viscount of the first part, the first Viscount of the second part and the trustees of the settlement of the third part, the present Viscount assigned to the trustees his absolute interest in the absolutely appointed fund, his life interest in the retained fund and certain contingent reversionary interests subject as to the absolutely appointed fund to the provisions for the maintenance of the said policies and as to all the assigned premises upon certain trusts for the present Viscount, his wife and issue and certain other relatives which it is not material to specify beyond stating that the first Viscount was not given any beneficial interest of any description in the trust property. B

The first Viscount died on Sept. 5, 1934, and after his death the trustees of the settlement and the second settlement received under and by virtue of the two policies of assurance the total sum of £78,675, being £70,000 under the first policy and £5,000 under the second policy, together with a bonus of £3,675 in respect of the last-mentioned sum. C

As I have already stated, there is no mention in any of the documents in evidence at the trial of the date when the two policies were respectively effected, but from the date of the settlement the whole of the premiums payable after that date, amounting to the annual sum of £3,720 4s. 2d., were paid out of the trust funds thereby settled until the date of the second settlement, and from the last-mentioned date such premiums were paid partly out of the income of the retained fund, but, since this was insufficient for the purpose, the balance was paid out of the income of the absolutely appointed fund. D

Claims were made after the death of the first Viscount for estate duty and succession duty in respect of the moneys received under the two policies and the corpus of the investments comprised in the settlement and the second settlement. These claims were disputed and were ultimately made the subject of an English information which came before WROTTESELEY, J., who decided that all of the claims were well-founded. The present trustees, who were defendants to the proceedings, have appealed from the decision of WROTTESELEY, J., so far as it declared that, on the death of the first Viscount, estate duty became payable under the provisions of the Finance Act, 1894, at the rate prescribed in respect of the moneys received under the policies of assurance settled by the settlement, and claim that, in lieu thereof, it should be declared that estate duty became payable upon the death of the first Viscount at the rate aforesaid only under the Finance Act, 1894, s. 2 (1) (d), and upon the life interest of the present Viscount in such moneys, and not upon the capital of such moneys. E

The claim of the Crown to estate duty on the capital of the policy moneys is based on the provisions of the Finance Act, 1894, s. 2 (1) (c), by which property passing on the death of the first Viscount shall be deemed to include : F

... property which would be required on the death of the deceased to be included in an account under the Customs and Inland Revenue Act, 1881, s. 38, as amended by the Customs and Inland Revenue Act, 1889, s. 11, if those sections were herein enacted and ... the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom. G H

The Customs and Inland Revenue Act, 1881, s. 38, as amended by the Customs and Inland Revenue Act, 1889, s. 11, making the omissions above referred to and treating it as re-enacted by the Finance Act, 1894, omitting all immaterial words, reads as follows :

The charge under the said section shall extend to money received under a policy of assurance effected by any person dying on or after June 1, 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or

assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.

The answer, therefore, to the question whether estate duty is payable on the whole of the policy moneys must depend on the meaning of the phrase "where the policy is wholly kept up by [the deceased] for the benefit of a donee." Does the phrase mean that, in order to incur liability to estate duty, the deceased must have paid the premiums himself, or is it sufficient that the deceased should have provided for the payment of the premiums, whether by the setting up of a trust fund for that purpose or by making an absolute gift to the donee of a sum sufficient to pay the premiums? The key to the solution appears to me to be found in the latter part of the clause :

... or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.

Here it seems to me that the phrase "partially kept up" is used by reference to the phrase "in proportion to the premiums paid by him" and is to be explained by it.

It is true that the deceased in the present case made a provision for the payment of future premiums by means of funds which he transferred to the trustees when the settlement was made but in which he retained no beneficial interest whatsoever. From the date of the settlement the funds became the property

of the beneficiaries, and, although overriding trusts were declared for payment of the premiums, there was no agreement to that effect enforceable by the first Viscount. What he did was to state the trusts which were to attach to the funds which he had already placed in the hands of the trustees. The funds were no longer the property of the first Viscount. They belonged in equity to the beneficiaries who alone could compel the trustees to carry out the trusts. The

payment by the trustees of the premiums was not made by them in any sense as agents for the first Viscount and cannot properly be described as being payments made on the first Viscount's behalf. It is true that the words "kept up by him" are not words of art, and it may be that, if the latter part of the clause to which I have referred were absent, they might be said in popular language to cover the case where the donor of a policy provided a fund to meet the premiums as and when they fell due, but the latter part of the clause refers to the payment of some of the premiums by the donor as constituting the partial keeping up of the policy. In other words, the clause itself explains the phrase "kept up" as synonymous with the payment of premiums. WROTTESELEY, J., seems to have treated the payments by the trustees of the premiums as resting in contract, or made by them as agents for the first Viscount, for he asks himself the question, at p. 184 :

... can it be said that [Lord Devonport] was at any time guilty of a breach of his contract? To any such claim his answer would be *qui facit per alium facit per se*.

and he continues by referring to a remark of the LORD PRESIDENT in the Court of Session in Scotland in the *Scott* case (2) at p. 725 :

It appears to me exactly the same as if he himself had paid out of his own funds during all those years all those premiums upon his four policies.

In that case the owner of the four policies settled them and at the same time settled a fund to meet the premiums as they fell due. At the time of that decision it was not appreciated that there was any substantial difference between sect. 2 (1) (d) of the Finance Act, 1894, and sect. 2 (1) (c), and it was thought that it was sufficient to attract estate duty on the whole of the policy moneys if it could be found that the deceased had provided the moneys for keeping up the policies.

I am unable to find any real ambiguity in the language to be considered. As I have already said, in my opinion, the key word of the charging clause is the word "paid." Under the clause the method of keeping up a policy is expressed to be by payment of the premiums. On the true construction of the clause, "partially kept up" by the deceased must be by payment of some of the premiums by him. The phrase "wholly kept up" in the earlier part of the clause cannot be construed differently. On this aspect of the case the question is not who provided the funds for keeping up the policies. As a matter of history, the funds out of whose income the premiums were paid belonged to the first Viscount. He parted with them when he made the settlement. On its execution

the funds became in law the property of the trustees, who were answerable to the beneficiaries, the owners in equity, who alone could call the trustees to account. The first Viscount was not a beneficiary and had no such right. There was not even a possible resulting trust in his favour.

Counsel on behalf of the appellants admitted that his clients were liable to estate duty under the Finance Act, 1894, s. 2 (1) (d) upon the life interest of the present Viscount under the settlement in the policy moneys but not upon the capital, and there is no necessity to deal with this aspect of the case.

For these reasons I would allow the appeal and direct the consequential alterations in the order of WROTTESELEY, J., to give effect to the appellants' notice of appeal.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: Waterhouse & Co. (for the appellants); Solicitor of Inland Revenue (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

R. v. TOMPSON. R. v. POTELIACHOW. R. v. HARRISON.

[COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., Humphreys and Lewis, J.J.) May 25, 1943.]

Gaming—Unlawful games—Card games not specifically stated by statute to be unlawful—Test of unlawfulness—Gaming Houses Act, 1854 (c. 38), s. 4.

Evidence—Fact for the jury—Whether game is game of skill is question for jury.

The appellants were convicted at the County of London Sessions for the following offences respectively: the first two appellants with having the management of certain premises and permitting them to be used for the purpose of unlawful gaming; the first appellant with being the owner of the said premises and permitting them to be used for the purpose of unlawful gaming; the second appellant with using the said premises for the purpose of unlawful gaming; and the third appellant with assisting in using the premises for unlawful gaming. The chairman held that whether the game was one of mere skill or an unlawful game under the statute was a question of law for him and refused to allow counsel to address the jury on these points. The appellants appealed on the grounds (i) that the chairman of the court had applied the wrong test in deciding that card games, not specifically mentioned in the Gaming Acts as unlawful, were unlawful unless they were games of mere skill as opposed to games in which skill predominated and, (ii) that the question of whether the games were of mere skill or not was a question for the jury and that the chairman was wrong in deciding this fact himself:—

HELD: (i) any card game which is not a game of mere skill is unlawful if played in a place kept for the purpose of playing it.

(ii) whether such a game is one of mere skill is a question of fact for the jury upon a proper direction by the judge, and, since this question was not left to the jury, the convictions must be quashed.

[EDITORIAL NOTE.] The effect of the statutory enactments is that all games of chance or chance and skill combined which cannot be called games of mere skill are unlawful if played in a place kept for playing at them. Whether a game is one of mere skill is a matter of evidence and it is for the jury to decide whether the evidence shows the game to be one of mere skill under a proper direction by the judge as to the law on the question of what is an unlawful game.

AS TO UNLAWFUL GAMES, see HALSBURY, Hailsham Edn., Vol. 15, pp. 501, 502, paras. 904, 905; and FOR CASES, see DIGEST, Vol. 25, pp. 423-425, Nos. 260-270.]

Cases referred to:

* (1) *Jenks v. Turpin* (1884), 13 Q.B.D. 505; 25 Digest 423, 260; 53 L.J.M.C. 161; 50 L.T. 808.

(2) *R. v. Hendrick* (1921), 37 T.L.R. 447; 25 Digest 423, 255; 15 Cr. App. Rep. 149.

(3) *Bracchi Bros. v. Rees* (1915), 84 L.J.K.B. 2022; 25 Digest 426, 277; 113 L.T. 871.

* (4) *R. v. Davies*, [1897] 2 Q.B. 199; 25 Digest 422, 254; 66 L.J.Q.B. 513; 76 L.T. 786.

(5) *Morris v. Godfrey* (1912), 106 L.T. 890; 25 Digest 424, 267.

(6) *R. v. Larkin* (1943), 29 Cr. App. Rep. 18.

- (7) *R. v. Kirby, Parker & Patrick* (1927), 20 Cr. App. Rep. 12; Digest Supp.
 (8) *R. v. O.K. Social & Whist Club, Ltd.* (1929), 45 T.L.R. 570; Digest Supp.; 21 Cr. App. Rep. 119.
 (9) *R. v. Brennand* (1930), 47 T.L.R. 22; Digest Supp.; 22 Cr. App. Rep. 95.
 (10) *R. v. Salisbury*, [1939] 1 All E.R. 250; Digest Supp.
 *(11) *Dalton v. Adelphi Club, Ltd.*, [1938] 4 All E.R. 556; Digest Supp.; 160 L.T. 14.
 *(12) *Fielding v. Turner*, [1903] 1 K.B. 867; 25 Digest 425, 271; 72 L.J.K.B. 542; 89 L.T. 273.
 A *(13) *Pessers, Moody, Wraith & Gurr, Ltd. v. Catt* (1913), 77 J.P. 429; 25 Digest 426, 276.
 (14) *Thompson v. Mason* (1904), 90 L.T. 649; 25 Digest 425, 272.

APPEAL from a decision of the County of London Sessions, dated Dec. 17, 1943, that poker was an unlawful game and that the question of whether it was a game of mere skill or not was a question of law for the court. The facts are fully set out in the judgment.

- B *Gilbert Beyfus, K.C.*, and *Christmas Humphreys* for the appellants.
John Maud and *H. J. Hamblen* for the prosecution.

LEWIS, J. [delivering the judgment of the court]: On Dec. 17, 1942, the three appellants stood their trial at the County of London Sessions on an indictment containing four counts. In the first count all three appellants, namely Charles Henry Oliver Tompson, Freda Poteliachow, and Phoebe Harrison were charged with being persons having the care and management of certain premises at 36, Finchley Road, N.W.8, and allowing those premises to be used for the purpose of unlawful gaming on Oct. 8 and other days between Oct. 8 and Oct. 15, 1942. In the second count Tompson was charged with being the owner of the said premises permitting those premises to be used by Poteliachow for unlawful gaming on the aforesaid dates. On the third count Poteliachow was charged with using the said premises for unlawful gaming on the aforesaid dates. In the fourth count Harrison was charged with assisting in conducting the business of those premises, such premises being used for unlawful gaming on the aforesaid dates. All these charges were brought under the Gaming Houses Act, 1854, s. 4, and to all of them the several appellants pleaded not guilty.

- D The Crown offered no evidence against Harrison on the first count and she was accordingly acquitted on that count on the direction of the chairman. On the other counts all the appellants were found guilty and were fined, with costs.
 E The appellants now appeal against their convictions.

The premises were in fact conducted as a club which had been carried on since Sept., 1939, the club having been first registered at other premises in 1933. At this club poker and bridge were played and the premises were used primarily as a poker and bridge club. The rules of poker as played at the club were proved and certain police officers who had visited the club proved that on the dates in question poker was being played in accordance with those rules, and they further proved the several parts played by the appellants at the club. In fact there was no dispute at all as to these matters.

- F Before this court two grounds of appeal were argued by counsel for the appellants: (1) that the chairman in considering whether unlawful gaming was being carried on on the premises applied the wrong test, and (2) that, in any event, he was wrong in withdrawing the case from the jury so that, as it was put by counsel, the verdict was not the verdict of the jury but the decision of the chairman. In other words, the contention was that the chairman was wrong in telling the jury that the question as to whether the game of poker as played in the club was an unlawful game was for him and for him alone, and that they must decide the case on the footing that the game was unlawful in the circumstances in which it was being played in the premises.

- G It seems to us that logically the second of these two contentions should be dealt with first and involves this question: Is it solely for the judge to decide whether a game that is being played is an unlawful game, or is it for the jury to decide this as a question of fact?
 H

What happened in this case was that the chairman, after argument and a consideration of some of the authorities, held that the question whether the game of poker as played on the premises was a lawful or unlawful game was for him and not for the jury, and refused to allow the jury to consider the question at all, or to allow counsel to address the jury upon it, though he allowed evidence to be called by the appellants to show that skill predominated over

chance, which counsel maintained in the circumstances of this case was the test as to whether or not the game was lawful. Such evidence was allowed by the chairman for the following reason, to quote his own words: "You may call experts with a view to influencing my mind but I shall not allow you to address the jury on the question." After four expert witnesses had been called and cross-examined (their evidence being that the game of poker as played in this club was a game in which skill largely predominated over chance) the chairman said: "I am quite satisfied that poker is not a game of mere skill and it is an unlawful game within the meaning of the Statute and it follows from that that these premises were being used for unlawful gaming. I am also satisfied these are questions of law for me and I so direct the jury." He then summed up, and told the jury that the question as to whether poker as played in the club was an unlawful game or not, was for him, and it was for him to decide whether the premises were used for unlawful gaming. The only question he left to the jury was one about which he quite rightly said there was no dispute, namely, the part each of the appellants played in the matter of managing the premises, permitting the premises to be used, or assisting in the conduct of the premises, respectively.

It is axiomatic that in a criminal trial all questions of law are for the judge and all questions of fact are for the jury, and for a judge to take upon himself to decide a question of fact, and having decided it to withdraw that question of fact from the consideration of the jury is not in accordance with the law of England and, in particular, that branch of it dealing with the right of every man to be tried by a jury. In times like the present national emergency it may be thought right for the safety of the realm to make regulations having the authority of law which curtail the right to trial by jury, but, for this reason, it is the more important that nothing should be allowed, except such enactments, to diminish in any way the right of the subject to trial by jury.

There has been a considerable number of cases from time to time before the courts of this country on the topic of unlawful gaming, and of the respective provinces of the judge and jury in such cases, and it is not at first sight easy to reconcile the decisions. Some test has to be applied before it can be ascertained whether premises are being used for unlawful gaming in the sense of gaming therein at unlawful games, and in *Jenks v. Turpin* (1), HAWKINS, J., at p. 516, said:

"... in using the words "*unlawful games*," it is clear that the legislature intended them to cover and include some games which being lawful in themselves were only made unlawful when played in particular places or by particular persons.

That judge pointed out in that case that since the Gaming Act of 1845, which repealed parts of the Act of 33 Henry VIII, c. 9, the only games unlawful *per se* were ace of hearts, faro, basset, hazard (Gaming Act, 1738), passage (see the Gaming Act, 1739), roulette (see the Gaming Act, 1744), every game of dice except backgammon (see the Gaming Act, 1739) and every game of cards which is not a game of mere skill.

The preamble to the Gaming Act, 1845, as far as is material, reads as follows:

Whereas the laws heretofore made in restraint of unlawful gaming have been found of no avail to prevent the mischiefs which may happen therefrom, and also apply to sundry games of skill from which the like mischiefs cannot arise, be it enacted . . . that so much of an Act passed in the thirty-third year of the reign of King Henry VIII intitled the Bill for maintaining artillery and the debarring of unlawful games, whereby any game of mere skill such as bowling, coytting, cloyshcayls, half bowl, tennis or the like, is declared an unlawful game or which enacts any penalty for playing at any such game of skill as aforesaid . . . shall be repealed.

Dicing table or carding which were included in the Act of Henry VIII as unlawful games were not specifically included in the repeal. It follows from this that anyone who keeps premises for playing cards for money, although the card game is not a game specifically mentioned in the statutes above referred to is guilty of unlawful gaming unless the game is one of mere skill.

The question whether or not a game is one of mere skill is, in our opinion, a question of fact, indeed, in the present case, by allowing witnesses to be called as to the amount of skill required to succeed at the game of poker the chairman treated it as a question of fact although the evidence of these witnesses was directed to show that in the game of poker as played on these premises skill

was the dominant factor and not that the game was one of mere skill in the sense of skill alone. Therefore, except in a case where the game in question is one that is made illegal by statute we think that before a judge can rule that a card game is unlawful a question of fact has to be decided by a jury, namely, is the game one of mere skill or not. The jury having found that the game is not one of mere skill on the evidence called before them then it is for the judge to say that the game is an unlawful game and if the game is being played on premises habitually used for such purpose those responsible for the conduct of those premises are guilty of unlawful gaming. The proper course in the opinion of the court is that a jury should be asked to give a general verdict of guilty or not guilty after the judge has directed them that the question for their consideration is whether or not on the evidence before them they are satisfied that the game is or is not one of mere skill. If they think that the game is one of mere skill then the defendants are entitled to be acquitted, as persons who use premises for the purpose of games of mere skill being played therein are not guilty of unlawful gaming. To adopt any other course would seem to be dictating the verdict of a jury instead of leaving the jury to find their own verdict on the facts, a course deprecated by the court in *R. v. Hendrick* (2). In *Bracchi v. Rees* (3), which was an automatic machine case, the question as to whether a game was a game of skill or chance was clearly stated to be a question of fact. LORD READING, L.C.J., in that case said, at p. 2024 :

In my view it must be a question of fact in all these cases whether a particular game is or is not a game of chance.

and RIDLEY, J., said, at p. 2024 :

To which class [i.e., whether skill or chance] a game belongs is a question of degree. Reliance was placed by counsel for the Crown on a passage in the judgment of LORD RUSSELL, L.C.J., in *R. v. Davies* (4), a passage frequently quoted in these cases. It is as follows, at p. 202 :

But, further, it appears that the jury were asked whether the house was used for unlawful gaming, and whether the game of "German bank," as played there, was an unlawful game. These questions, however, are questions of law for the judge and not of fact for the jury, who must apply the facts to the definition of the law given by the judge ; here there seems to have been no direction as to the law in the summing-up.

In that case the real contest was whether or not four friends who sat down in a private house (the house of one of them) on one occasion only, and, after playing whist, played a game of German bank, could be convicted of using the house or room for the purpose of unlawful gaming being carried on therein. LORD RUSSELL, L.C.J., emphatically stated that on that evidence, in his opinion, it was monstrous to say that the case fell at all within the mischief or within the provisions of the statute which was intended to prevent the user of the house as a gaming house. As was pointed out in *Jenks v. Turpin* (1) by HAWKINS, J., a person is not guilty of keeping a gaming house, i.e., using a house for unlawful gaming, unless the house is one to which persons are invited habitually for the purposes of gaming. The view expressed by LORD RUSSELL, C.J., on this point, in *R. v. Davies* (4) was sufficient to justify the quashing of the conviction, there being no evidence in that case that the premises were used for the purpose of unlawful gaming. The other passage quoted above from his judgment, a judgment concurred in by HAWKINS, GRANTHAM, WRIGHT and COLLINS, JJ., was not necessary for decision in that case. However that may be, in our view the concluding words of the passage above quoted make it clear that it is for the jury to find the facts on a proper direction on the law from the judge and that, if there are facts to find, before a jury can return a verdict it is for the jury and not for the judge to find those facts. In *R. v. Hendrick* (2), AVORY, J., in commenting on the case of *Morris v. Godfrey* (5), pointed out that the Divisional Court in that case upheld the decision of the magistrate (who was the judge of both law and fact) upon his finding of the facts ; the magistrate in that case had found that on the facts the game of progressive whist on the evidence before him was a game in which chance predominated over skill which was equivalent to saying it was not a game of mere skill and, therefore, in law was a game the playing of which in premises week by week, throughout the winter season, rendered the occupier of such premises guilty of unlawful gaming.

For a judge to take upon himself the duty of finding the facts, and, on the

facts so found by him, to direct the jury that they must convict is to dictate the verdict to the jury, instead of leaving the jury to find their own verdict on the facts as found by them after a proper direction on the law. In any criminal case the judge has, no doubt, a right and a duty to withdraw from a jury an issue upon which there is no evidence, but except in such a case every question of fact upon which there is evidence is within the province of the jury and it is for the jury to come to a conclusion upon it after a proper direction from the judge. Similarly, a judge has a right and a duty to point out to a jury that the evidence before them is all one way, and that they cannot find, if they accept the uncontradicted evidence, a particular verdict. The case of *R. v. Larkin* (6) is an example of this. OLIVER, J., on the evidence given, told the jury that they could not find a verdict of not guilty, but that it was a case of murder or manslaughter and, even if they accepted the prisoner's evidence to the full, the verdict must be one of manslaughter. In *R. v. Kirby and Others* (7) it was contended on an appeal from a conviction for unlawful gaming (in an automatic machine case) that the recorder had usurped the functions of the jury in telling them in effect that they must convict. In that case the facts were apparently not in dispute and the appeal failed and in the judgment of the court, delivered by LORD HEWART, L.C.J., there appears this passage, at p. 17 :

In the present case the facts were all one way. In our opinion, therefore . . . there was no evidence upon which the jury might not properly convict, nor is there any ground for saying that the learned Recorder failed adequately to explain the matter to the jury in his summing up, or usurped to himself the functions to be performed by the jury.

In that case evidence was called to show that the game was a game of chance and no evidence was called at the trial on behalf of the appellants. In *R. v. O.K. Social & Whist Club, Ltd.* (8), the appellants were convicted before the Recorder of Liverpool of keeping a common gaming house, the game in question being progressive whist, in which, as LORD HEWART, L.C.J., pointed out, the partners as well as the cards were shuffled. It was argued for the appellants that the recorder adopted a wrong method in telling the jury it was impossible for them to hold that whist as played in this club was a game of skill. All that the Court of Criminal Appeal decided in that case was, in effect, that the evidence being all one way, the game involving as it did at every turn the element of chance and the multiplication and confusion of the element of chance by the progression of the partners throughout the evening, the recorder was not guilty of an error in law when he told the jury that on the evidence before them it was impossible for them to hold that progressive whist as played in the club was a game of skill. In *R. v. Brennard* (9) the only evidence before the court was that the use of the automatic machine in question in that case, known as the Little Stockbroker, was a game of chance. As was said by AVORY, J., at p. 99 :

. . . the persons who used this machine dropped pennies into the machine and took their chance of something coming out ; and the description given to us seems to suggest that anyone, who wanted to make a certainty of winning, would have occupied the machine for a great part of the day to the exclusion of all other people.

In this case again the evidence was all one way, and the court held that there was no ground for the complaint that any question of fact which was left open was not left for the determination of the jury. Similarly, in the case of *R. v. Salisbury* (10), the court again held that where the evidence was all one way, no witness having been called for the appellants to controvert the evidence given by the prosecution that the game of fascination was one of chance, the chairman of the London Sessions was right in holding as a matter of law that the game was unlawful, the element which constituted the unlawfulness of the game, i.e., that the game in fact was a game of chance, not being disputed.

The court is, therefore, of opinion that although it is for the judge, and for the judge alone, to decide whether on given facts a game is unlawful, it is for the jury to find whether or not the elements which go to make that game unlawful are proved, that is to say, in the case of a card game whether or not the game is one of mere skill.

With regard to the other point raised by counsel for the appellants, namely, that the chairman applied the wrong test of unlawful gaming. We have already pointed out that although it is for the judge, as a matter of law, to define to the

jury what is an unlawful game, it is for the jury to find the facts and to draw the inferences of fact which when ascertained constitute a game unlawful when played in premises habitually used for that purpose.

In respect to a game of cards, the test was quite clearly laid down in the year 1884 by HAWKINS, J., in *Turpin's* case (1). We refer particularly to the following passage in the judgment in that case, at p. 524 :

- A Since that statute [the Gaming Act, 1845] the only games made unlawful by 33 Hen. 8, c. 9 are games of dice or cards, whether such games were known at the time of the passing of that statute or have been since invented. All such games, if they are games of chance, or games of chance and skill combined (which cannot be called games of mere skill), are in my opinion clearly within the meaning of the words unlawful games in the Gaming Houses Act, 1854. The language of the Gaming Act, 1845, s. 1, in referring to 33 Hen. 8, c. 9, and repealing only so much of it as applies to games of skill, is a strong indication of the intention of the legislature that all the other games mentioned in the statute of Hen. 8 were to continue to be treated as unlawful in the sense in and to the extent to which they were made unlawful by that statute, viz., unlawful if played in a house kept for playing at them. The *unlawful* games, then, now are, ace of hearts, pharaoh, basset, hazard, passage, roulette, every game of dice except backgammon, and every game of cards which is not a game of mere skill ; and, I incline to add, any other game of mere chance. Does baccarat come within this category ?
- B The description of the game given by Mr. Russell satisfies me that it does. It is a game of cards. It is a game of chance and though, as in most other things, experience and judgment may make one player or banker more successful than another, it would be a perversion of words to say it was in any sense a game of mere skill. It is therefore, in my opinion, an unlawful game within the meaning of the statute.
- C

That decision has never been questioned. That test was applied by the Divisional Court in 1938 in the case of *Dalton v. Adelphi Club, Ltd.* (11). LORD HEWART, L.C.J., in delivering the judgment of the court in that case, in which the question of the user of certain premises for the purpose of playing stud poker was under consideration on a case stated by a metropolitan magistrate, said, at p. 558 :

- D Whatever the degree of skill an experienced player at stud poker may acquire, that game as described in the case must always remain a game of chance, and, in the language of HAWKINS, J., with regard to baccarat, it would be a perversion of words to say that it was in any sense a game of mere skill.
- E He pointed out that, in any case, the magistrate had not been asked to find that the game was one of mere skill. "Any such finding," he says, "would have been obviously absurd." The magistrate having merely expressed the opinion that, upon the evidence, the game of stud poker was a game of skill, the case was sent back to the magistrate with a direction to find that the charges against the respondents were proved.

- F Bearing in mind that all games of cards are made unlawful by statute and that the Gaming Act, 1845, did not repeal specifically that part of the statute of 33 Hen. VIII which dealt with "carding", we are of opinion that the proper question for a jury, when dealing with a game of cards, is : Is this a game of skill, i.e., a game in which the element of chance is so slight as to render the game one which can properly be said to be a game of mere skill.

- G We were referred in argument to many of the decisions in the "automatic machine" cases. In the year 1903, in the case of *Fielding v. Turner* (12), the Divisional Court considered a case involving the use of an automatic machine. The working of this machine was thus described in the case—a person desiring to work the machine puts a penny in the slot, pulls down a spring by means of a knob and then lets the knob go suddenly and the spring flies up and the penny is thus sent on its journey and may go into one of seven compartments. If it goes into either of two compartments, the penny is returned to the sender ;
- H if it goes into one of four compartments, the penny is retained in the machine and the sender gets nothing for it. If the penny goes into the centre compartment—the bull's eye, as it is called—the sender receives from the machine a ticket entitling him to receive from the appellant some sweets or it may be cigarettes or cigars. It was proved that on the day in question a number of boys and some men put pennies into the machine with varying fortunes, sometimes winning and more often losing. In cross-examination some of the boys who gave evidence admitted that there was some skill in working the machine and that a person who was accustomed to the game won as often as he lost.

The appellant was convicted of unlawful gaming by the justices. On appeal, the court, consisting of LORD ALVERSTONE, L.C.J., and WILLS and CHANNELL, J.J., held that the conviction was right, and, in giving the judgment of the court, LORD ALVERSTONE, L.C.J., said, at p. 871 :

It was argued before us that the conviction was wrong on the ground that there was no evidence of unlawful gaming within the section. The first ground on which this contention was founded was that, if a game at all, the use of the automatic machine in question constituted a game of skill. We are clearly of opinion that this contention cannot be maintained. In the proper sense of the word, skill has no effect upon the act done by the person who puts the penny into the slot. No doubt continuous practice with the same machine might enable a person to acquire knowledge as to the strength of the particular spring, and thereby enable him to be more successful in making the penny fall into the centre compartment than in the case of a person who had not the same practice of the machine. On the first and probably on many occasions it is a pure question of chance into which compartment the penny will fall; no aim can be taken, and it is not unimportant to observe, in connection with another part of the case, that there are four compartments into which it can fall, with no return to the person inserting it, as against one into which, if the penny falls it will enable the person inserting it to receive a ticket of the nominal value of 2d.

From this it would appear that, although there might be a certain amount of skill acquired by practice, the game was one of chance and the court decided that that game was not a game of skill.

In *Pessers, Moody, Wraith & Gurr, Ltd. v. Catt* (13), the defendant sought to escape from his obligation to pay rent which he had agreed to pay to the plaintiffs for the hire of certain automatic machines, on the ground that he was induced to enter into the agreement by a representation and a warranty that the defendant might lawfully invite the public to use the machines, and that such user of the machines constituted a game of skill, and further, in the alternative, that the agreement was null and void in that the machines were let to him to be used in various places for the purpose of unlawful gaming and wagering. SCRUTTON, J., held the game was one of skill (a conclusion previously come to by EVE, J., on a motion for an interlocutory injunction) and gave judgment for the plaintiffs. That decision was upheld on appeal. VAUGHAN WILLIAMS, L.J., said, at p. 429 :

There is, I suppose, some skill in this game. Both EVE, J., and SCRUTTON, J., thought so. I think the amount of skill ought to be taken into consideration, even if it were what I should call a *scintilla* of skill, but in this case I think there was some skill, and I should say that there was more than a *scintilla* of skill. I shall not trouble myself with any definitions.

After referring to the cases of *Fielding v. Turner* (12) and *Thompson v. Mason* (14), KENNEDY, L.J., said, at p. 430 :

It seems to me that in this case there is what I may call a governing element of skill in the use of the cup which can, wherever the ball falls, skilfully used, catch that ball. Of course the degree of skill and therefore, the success, will depend to some extent upon practice, and with practice to a person with a good eye who is using the moveable bar to which the cup is attached, it would be perfectly possible, I should imagine, if he were a skilful person, to catch it every time. Therefore, the test as to success or failure seems to me in this case to be one of skill and not of chance. That is the dominant element, and, being so, I think the judgment which has been pronounced below, and is in accordance with that of EVE, J., was right, and that this appeal should be dismissed.

The lord justice applied the test of the dominant factor and not the test of mere skill. In subsequent automatic machine cases, the test there suggested by KENNEDY, L.J., has been adopted.

Since the year 1913 the courts, in automatic machine cases, have taken as a test, not whether the game is one of mere skill, but whether or not the proportion of skill to chance is such as to establish that skill is the dominant or governing factor in the game. That test has never been applied to games of cards, and in our opinion rightly so, because as was pointed out in *Turpin's* case (1) by HAWKINS, J., there is a distinction between card games which by statute are unlawful unless they are games of mere skill, and such games as those played with automatic machines which are not unlawful unless they are games of mere chance and become mere instruments of gaming.

It appears, therefore, that in the present case, the chairman applied the right test, namely, is this game a game of mere skill. He said :

I am quite satisfied that poker is not a game of mere skill and is unlawful. The error which he made was, in our opinion, in not leaving to the jury the

question as to whether on the evidence called, the game was a game of mere skill, and telling them that if they found it was, they should acquit, and if not, convict.

Upon that ground we think that this conviction must be quashed.

Appeal allowed.

Solicitors : *Claude Hornsby, Dodds & Co.* (for the appellants) ; *Solicitor for Metropolitan Police* (for the prosecution).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

HOLDMAN v. HAMLYN.

[COURT OF APPEAL (Scott, MacKinnon and du Parcq. L.J.J.). **June 10, 1943.**]

Master and Servant—Liability of master for negligence—Common employment—Volunteer—Child of ten invited to help with threshing—Injury by dangerous machine—Allurement.

The appellant, a farmer, entrusted the management of his farm to his son. The latter was operating a threshing machine by means of a tractor when a boy of ten years of age, the son of an employee of the appellant, came to fetch some milk to which his father was entitled. The appellant's son, thinking the boy would get into mischief if left to himself, invited him to go on the top of the stack of grain from which he was threshing and to pass down the sheaves with a fork. When sufficient grain had been threshed, the boy was told to come down and the appellant's son turned his back upon the boy and commenced to sweep the platform on which he had been standing. The boy, however, noticing a bundle which appeared to have been overlooked tried to put it in the threshing machine with the result that his leg was injured and had to be amputated above the knee. The appellant contended that he was absolved from liability by the doctrine of common employment :—

HELD : the law will not import an undertaking to bear the risks of a fellow servant's negligence where it is wholly inconsistent with the facts to do so, and a young volunteer like this boy, incapable of taking care of himself, cannot be held to have impliedly agreed to bear such risks. In the circumstances of this case, the defence of common employment was not available.

[**EDITORIAL NOTE.** The doctrine of common employment has met with much criticism in the past and its extension to volunteers is perhaps more assailable than its main application to the case of paid servants. It is here laid down that the result of the authorities is that a worker, paid or unpaid, who has agreed to serve a master is to be deemed to have undertaken the risk of the negligence of those working with him in that service, provided that neither (i) the terms of the express contract, nor (ii) the facts of the case, exclude the possibility of implying such an undertaking. In the present case, the facts clearly excluded such a possibility. It cannot be said that every person under 21 years of age is incapable of entering into such an undertaking but a child of tender years is obviously incapable of contracting on those terms. Even if this implication could be made, the defendant would have had the further difficulty of showing that the contract thus established was for the infant's benefit, which it was clearly not.]

AS TO COMMON EMPLOYMENT AND VOLUNTEERS, see HALSBURY, *Hailsham Edn.*, Vol. 22, p. 194, para. 328 ; and FOR CASES, see DIGEST, Vol. 34, pp. 215-217, Nos. 1782-1789.]

Cases referred to :

(1) *United Zinc and Chemical Co. v. Britt* (1922), 258 U.S. 268.

(2) *Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K.B. 101 ; Digest Supp. ; 103 L.J.K.B. 527 ; 151 L.T. 202.

(3) *Johnson v. Lindsay & Co.*, [1891] A.C. 371 ; 34 Digest 215, 1773 ; 61 L.J.Q.B. 90 ; 65 L.T. 97.

* (4) *Radcliffe v. Ribble Motor Services, Ltd.*, [1939] A.C. 215 ; [1939] 1 All E.R. 637 ; Digest Supp. ; 108 L.J.K.B. 320 ; 160 L.T. 420.

* (5) *Degg v. Midland Ry. Co.* (1857), 1 H. & N. 773 ; 34 Digest 215, 1782 ; 26 L.J.Ex. 171 ; 28 L.T.O.S. 357.

(6) *Potter v. Faulkner* (1861) 1 B. & S. 800 ; 34 Digest 216, 1783 ; 31 L.J.Q.B. 30 ; 5 L.T. 455.

- * (7) *Hayward v. Drury Lane Theatre, Ltd.*, [1917] 2 K.B. 899; 34 Digest 216, 1787; 87 L.J.K.B. 18; 117 L.T. 523.
- (8) *Bass v. Hendon U.D.C.* (1912), 28 T.L.R. 317; 34 Digest 210, 1732.
- (9) *Heasmer v. Pickfords, Ltd.* (1920), 36 T.L.R. 818; 34 Digest 217, 1789.
- (10) *Bromiley v. Collins*, [1936] 2 All E.R. 1061; Digest Supp.
- (11) *Cribb v. Kynoch, Ltd.*, [1907] 2 K.B. 548; 34 Digest 211, 1742; 76 L.J.K.B. 948; 97 L.T. 181.
- (12) *Young v. Hoffman Manufacturing Co., Ltd.*, [1907] 2 K.B. 646; 34 Digest 210, 1731; 76 L.J.K.B. 993; 97 L.T. 230.

APPEAL by the defendant from a judgment of CROOM-JOHNSON, J., giving the plaintiff £2,000 damages for personal injuries caused to the infant plaintiff, a boy of 10 years of age at the time of the accident. The facts are fully set out in the judgment of SCOTT, L.J.

E. Kathleen Lane for the appellant.

L. S. Fletcher for the respondent.

SCOTT, L.J.: The defendant was a farmer near Sevenoaks, Kent; and his son, aged 22, to whom I shall refer as Francis, acted in effect as manager of the farm, with full authority on his behalf in such matters as we are concerned with in this case. At the time in question Francis had a tractor outside a barn in position to operate a threshing machine inside the barn in connection with a stack of grain which was also inside the barn. The plaintiff's father was in the employ of the defendant; and the young plaintiff arrived on Nov. 20, 1940, to fetch milk from the farm to which his father was entitled under his contract of employment. Francis was about to thresh a couple of sackfuls of grain from the stack, and, thinking that the boy was likely to get into mischief in connection with the machinery if left to himself, invited him to go up the ladder alongside the stack on to the top of the stack, and from there with a fork, which was supplied to him, to hand down the sheaves of corn which he, Francis, would put into the threshing machine from the platform on the top of the machine through a hopper for feeding the unthreshed straw into the machine. At the time the top of the stack was slightly above the level of the platform where Francis was going to stand to receive the sheaves from the plaintiff. The threshing proceeded for a certain time in this way, until Francis thought he had threshed enough grain for feeding the stock for which he wanted it. He thereupon decided to discontinue the process. The machinery was still running—"just idling over," as Francis put it in his evidence—and would continue running until he went down to turn off the tractor engine. At this time the removal of sheaves from the top of the stack had progressed far enough to bring the top down to a point level with the platform which contained the hopper for feeding the machine. Francis told the plaintiff to go down from the stack, not liking to leave him where he was until he, Francis, had gone down and stopped the running of the machine by turning off the tractor engine. Having told the young boy to go down, he assumed, without looking, that he had gone down, presumably by the ladder by which he had come up; and himself started sweeping the platform, preparatory to going down himself. Whilst performing this operation, he had his back to the hopper through which he had been feeding the sheaves into the machine. Whilst he was thus sweeping with his back turned, the boy stepped off the top of the stack on to the platform, behind Francis' back, without Francis noticing him. The boy saw that a single sheaf (which no doubt he had handed down with his fork) was still lying on the platform, not having been fed into the machine. He picked it up and threw it into the opening; but it would not go in, so he "kicked it," as he said in evidence. When he "kicked it," presumably pushing it with his foot, the revolving machinery inside the opening drew the sheaf in, and with it the boy's foot. His leg in consequence had to be amputated above the knee. A writ was issued by the father, as next friend, claiming damages against the defendant for negligence.

The statement of claim alleged that Francis:

... negligently invited and/or allowed the plaintiff to assist him in the threshing. The following particulars of negligence were given:

(1) Inviting and/or allowing the plaintiff to assist him when he knew or should have known that the said threshing machine was dangerous, particularly to a child of that age; (2) allowing the plaintiff to have anything to do with the operation in progress

or to come near the said threshing machine, and in not warning him to keep away or taking other reasonable steps to prevent him coming near the said threshing machine. (3) not taking any or any reasonable steps to guard the plaintiff from the danger constituted by the said threshing machine.

The defence admitted that Francis had allowed the plaintiff voluntarily to assist him "in certain threshing operations that were then taking place on the defendant's farm." Negligence was denied. Alternatively, contributory

A negligence was pleaded. In the further alternative, common employment was pleaded. CROOM-JOHNSON, J., awarded the plaintiff £2,000 damages, holding that the defences failed. He delivered a reserved, but not a written judgment, at some length, in which he dealt with the facts fully and carefully and considered the questions of law which had been discussed before him. He found as a fact that when Francis decided that he had threshed enough grain, he told the plaintiff to get down, but himself remained on the platform for the purpose

B of sweeping up; that no warning had ever been given to the plaintiff "about the machine or its danger," nor had he been told "not to approach it"; and that the plaintiff, who at the time of the trial was 12 years old and reasonably intelligent, at the time of the accident in fact knew nothing of the danger of the machine, and was not then of such an age as to appreciate the danger, even if it had been pointed out to him. In regard to the defence of common employment, he was satisfied that the plaintiff was not of such years of discretion

C as to be able to understand that by assisting in the operation "he was making any contract or involving himself in any responsibility whatsoever." He also found that the plaintiff passed from the stack to the platform unseen by Francis, who was not observing, having his back to him at the time; that, so far as the stack was concerned, the plaintiff was an invitee and not a trespasser; but that he had not been invited to go upon the threshing machine itself, and,

D therefore, that the boy was not injured at the place where he volunteered to work and where he was invited to be. He decided, unhesitatingly, on the facts of this case, that the plaintiff had not arrived at years of discretion sufficient to appreciate the danger which he was facing on the platform of the machine. He held that the doctrine of common employment had no application; and that, although the work which he had volunteered to perform, that is, throwing the sheaves from the top of the stack to the platform of the threshing machine,

E did not extend to the place where he was injured, he was drawn from the place where he had been invited to be by the allurements of this temptation to put the one sheaf which was left lying on the platform inside the opening where he had seen Francis put the others. He accordingly held that the defendant was liable because Francis as his manager had not taken sufficient care to see that the young plaintiff did not come to harm.

F Counsel for the appellant in a forcible and clear argument, submitted: (i) that Francis had only invited the plaintiff to come on to the top of the stack; and that, having, at the end of the threshing operation, told him to go down, he was entitled to assume that the boy was obeying that direction and would not come on to the platform; (ii) that there was in the circumstances no failure by Francis to realise that when, having given that order, he himself turned to sweep up the platform, the boy was likely to be allured by the temptation

G of going to the opening in the machine through which the sheaves were passed into the machine; and, lastly, that, the plaintiff having no right to be where he was when he was injured, had become a trespasser and was no longer an invitee. Counsel accordingly contended that the defendant owed him no duty and that Francis was no longer under a duty to anticipate the likelihood of danger to him. I think this argument rests on too narrow and, indeed, an erroneous view of the facts. Francis admitted in his evidence that he knew

H the boy was prone to get into mischief and for that very reason thought it was safer to tell him to go on to the top of the stack rather than be running about on the ground near the machine, where he would be out of sight. For the same reason he deliberately abstained from getting down to the ground himself whilst the plaintiff was still on the stack. He was evidently afraid to leave the boy there by himself. I do not think it possible to limit the duty of care resting on Francis to the precise area of the top of the stack, especially at a time when, the stack having been worked down to the level of the platform, there was nothing to prevent the boy stepping straight across on to the plat-

form; for he knew that the machine was still running and was likely to allure the boy into something that might be dangerous. In my opinion, the judge was fully justified in coming to the conclusion that Francis ought to have made quite certain that the boy went down when ordered and, before he started sweeping up, ought to have looked round to see that his orders had been obeyed. No doubt his error was in one sense slight—a mere failure to notice that the boy had not gone down: but there was a terrible allurements there to tempt the boy. . . . Nearly all boys today are mechanically minded. The presence of possible danger—not too obvious to frighten—is of itself an exciting attraction. For half-an-hour the boy had been watching the performance by Francis of what to him must have seemed a perfectly delightful grown-up task—the pushing of the sheaves one by one into the mouth of the machine whose hidden mechanism duly sucked them in and devoured them. With one sheaf still lying on the platform and actually behind the back of Francis, who was busy sweeping and, therefore, looking the other way, there was to almost any modern boy of ten a perfectly irresistible temptation to push that sheaf into the machine, as I am quite sure Francis would have realised if he had thought for a moment, especially as he knew the boy's adventurous propensity quite well.

The judge referred to the judgment of OLIVER WENDELL HOLMES, J., in *United Zinc and Chemical Co. v. Britt* (1), quoted by SCRUTTON, L.J., in *Liddle v. North Riding of Yorkshire County Council* (2). What that great master of English common law there said, at p. 275 is very relevant to this aspect of the present case:

... the duty of one who invites another upon his land not to lead him into a trap is well settled, and while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them has the legal effect of an invitation to them although not to an adult. But the principle if accepted must be very cautiously applied.

I do not think that in the circumstances of this case there is any defence. It is impossible to say that the boy was a trespasser; for such a conclusion ignores his natural childish propensity to stray beyond the stack-top. It is equally impossible to state the doctrine of common employment in terms which do not contradict the primary duty of Francis to take reasonable care of him. The breach of that duty was the direct cause of the accident. I have abstained from discussing the authorities as I knew that DU PARCQ, L.J., was going to do so. I have now read his judgment and agree with his analysis of the cases; but would add a confession that, little as I like the defence of common employment as applied to adults, it seems to be fundamentally inapplicable to the case of young volunteers such as the infant plaintiff in the present case. There was no real argument before us about the amount of the damages. The appeal must be dismissed with costs.

MACKINNON, L.J.: I have read the judgment which has just been delivered by SCOTT, L.J., and I have also read the judgment about to be read by DU PARCQ, L.J., I agree with their conclusions; and in view of the elaborate discussion by them of the case, and in particular the examination by DU PARCQ, L.J., of the rule as to common employment with regard to this case, I do not think that I need repeat what they have said so sufficiently.

DU PARCQ, L.J.: The facts found by CROOM-JOHNSON, J., in this case have already been fully stated and I will not restate them. I desire, however, to emphasise two findings which seem to me to be particularly important. First, he found that the defendant's son:

... always controlled the threshing machine, and that, on the day in question, he was, with his father's permission, not only in control of the operations but ... was entitled to make use of any labour which he found necessary.

The last part of this finding is, as the judge said, an inference from the facts. The inference seems to me to have been justified. In his examination in chief the son said that his father, a man of 72, let him take a great deal of responsibility on the farm; and it was no part of the defendant's case, either at the trial or before us, that the son had not his father's implied authority to enlist the aid of voluntary workers. Secondly, the judge, who saw and heard the evidence of the infant plaintiff, and described him as "reasonably intelligent," was satisfied that at the time of the accident this boy of ten "knew nothing of the

danger of the machine," and, as he says in another part of his judgment, was not "of sufficient years to appreciate the danger."

The first question for us is whether the finding that the defendant's son was negligent can be supported. The finding of negligence is summarised in the following sentence from the judgment :

He [the plaintiff] was injured because, without any warning or any safeguard, he was allured away from that work [the work which he had volunteered to do] to a place close at hand which was dangerous.

In other words, the defendant's son, having invited this boy to work close to a threshing machine, did not take sufficient precaution to guard against the risk that the boy might be tempted to meddle with the machine with disastrous consequences. If that risk ought to have been apparent, as a real difficulty, to a reasonable man in the position of the defendant's son, then his disregard of it was negligence. The question is one of fact : and I would wish to follow the wise course taken by the judge, who did not lay down any general rule about boys of ten, but dealt with the case of the particular boy before him in the light of the circumstances of this particular case. The judge was able, as we are not, to form his own estimate of the boy's intelligence. The defendant's son knew the boy, and very frankly agreed with cross-examining counsel that he realised "that it was a very dangerous thing for this child of ten to come anywhere near that machine." Unfortunately, he did not take quite enough care to prevent the danger which he did not wholly fail to foresee. The negligence itself was slight, though its consequences have been so serious. I find it impossible to say, however, that the judge was wrong in finding that the allegation of negligence was proved.

It was argued that there was contributory negligence on the part of the infant plaintiff. This is, in my opinion, a hopeless contention. The defendant's son was negligent because knowing, as he did, that the boy could not be trusted to look after himself, he came under a duty to take care of him, and failed in that duty. It would be absurd, in such circumstances, to say that the boy cannot recover damages because he did not in fact take proper care for his own safety : he took as much, or as little, care as he might reasonably be expected to take.

Negligence having been established against the defendant's son, who was in control of the work and had authority to invite the boy to assist him, it follows that the defendant is liable for that negligence, unless the defendant is entitled to rely on the doctrine of common employment. That doctrine, it is now clear, is based upon an implied undertaking by the workman. "It can never be applicable when there is no relation between the parties from which such an undertaking can be implied" : see *Johnson v. Lindsay* (3), per LORD HERSCHELL, at p. 378 and *Radcliffe v. Ribble Motor Services, Ltd.* (4), especially per LORD ATKIN, at p. 227 ([1939] 1 All E.R., at p. 643), and per LORD WRIGHT, at p. 247 ([1939] 1 All E.R. at p. 657). *Degg v. Midland Ry. Co.* (5), upon which the defendant's counsel relied, has been much discussed. It was approved by the Exchequer Chamber in *Potter v. Faulkner* (6), and is binding upon us. These decisions must, however, be read in the light of the judgments delivered in this court in *Hayward v. Drury Lane Theatre, Ltd.* (7). They cannot be held to rest on the doctrine of common employment, since in neither of them was there any contractual relation between the parties. The same must be said, I think, of *Bass v. Hendon U.D.C.* (8), decided in this court in 1912. The true ground of all these decisions seems to be that the volunteer was a trespasser in the sense that he officiously and illegally meddled with what was no concern of his : see the judgments of SCRUTTON, L.J., and NEVILLE, J., in *Hayward v. Drury Lane Theatre, Ltd.* (7), at pp. 915 and 917. This at any rate is "a ground upon which both cases can be supported" : per NEVILLE, J., at p. 917. The late Sir Frederick Pollock regarded them as illustrations of the principle *volenti non fit injuria* : POLLOCK ON TORTS, 13th Edn., at p. 109. Professor Winfield suggests that cases of this class may be explained on the ground that the servant who invites the help of a volunteer is usually acting outside the course of his employment when he does so : LAW OF TORTS, 2nd Edn., at p. 147. It will depend upon the particular facts of each case as it arises whether all or any of these grounds of defence can be pleaded successfully. None of them, in my opinion, gives support to the case of the present defendant. It was indeed

argued that the infant plaintiff was a trespasser. The truth is, however, that he was an invitee, at any rate down to the moment when the threshing machine proved an irresistible temptation. If the boy strayed beyond the strict limit imposed by the terms of the invitation, it was because of the failure of the defendant's agent to guard him against a dangerous allurements; and if he can properly be called a trespasser at all, the trespass was a natural and probable result of the negligence of the defendant's agent. A defendant who has lured an invitee into a forbidden area cannot thereafter treat him as a trespasser. I am of opinion therefore, that the decision in *Degg v. Midland Ry. Co.* (5), and the cases in which it has been followed give no assistance to the defendant. A

It has been said, however, that in all cases of this kind the plaintiff is in a dilemma. If he was engaged, or requested to help, upon the authority of the master, then he becomes a fellow-servant with the other servants of the master. If, on the other hand, he was engaged to help without any authority at all from the master, then he is, in legal strictness, a trespasser: see the judgments of McCARDIE, J., in *Heasmer v. Pickfords Ltd.* (9), and of ATKINSON, J., in *Bromiley v. Collins* (10). In many cases, and probably in most cases of this kind, the plaintiff can find no escape from this dilemma: but in the case before us the plaintiff is, in my opinion, in no such difficulty. It is, I think, true to say that there was here a contractual relation between the infant plaintiff and the defendant, whose son had the defendant's authority to invite him to work. In *Degg's* case (5), BRAMWELL, B., delivering the judgment of the court, met the argument that there could be no undertaking by the volunteer, because there was no agreement, with the proposition that [p. 780]: C

... it is as competent for a man to agree, and as reasonable to hold that he does agree, that if allowed to assist in the work, though not paid, he will take care of himself from the negligence of fellow-workmen, as it would be if he were paid for his services. The criticisms in *Hayward's* case (7) of this *ratio decidendi* leave it untouched as a statement of the general principle to be applied when the volunteer has been invited to work by, or with the authority of, the master. That general principle is, however, subject to an important qualification. The true rule is that a worker, paid or unpaid, who has agreed to serve a master is to be deemed to have undertaken the risk of the negligence of those working with him in that service, provided that neither (i) the terms of the express contract nor (ii) the facts of the case, exclude the possibility of implying such an undertaking. As LORD WRIGHT said in *Radcliffe v. Ribble Motor Services, Ltd.* (4), at p. 249 ([1939] 1 All E.R. at p. 658): D

It is easy to generalise and ignore limits which arise on the facts of the case. It is difficult sometimes to fit a factual qualification on a fictitious contract. E

It follows, I think, from the principles enunciated in the House of Lords in *Radcliffe's* case, (4) and particularly from what was said by LORD WRIGHT, that the law will not import a fictitious undertaking into the contract unless the fiction can be fitted into the framework of the facts. It is true that the House of Lords was dealing with a case in which the fictitious undertaking was only qualified by the facts, and not excluded as being wholly inconsistent with them: but on principle it seems to me to be plain that since the fictitious undertaking must, where necessary, be so moulded as to fit the facts, it must be wholly excluded in a case where it cannot by any process of adaptation be made to fit the facts at all. In the present case, then, the question is whether the infant plaintiff, a child who was incapable of taking care of himself and in need of protection against the dangers attendant upon his own childish propensities, can be taken to have agreed that, if he were allowed to work for the defendant, he would, in the phrase used by BRAMWELL, B., "take care of himself from the negligence of fellow workmen"; or, as it is sometimes put, bear the risks arising from such negligence. There is, as it seems to me, only one possible answer to this question: and the absurdity of the suggestion that such an undertaking can be implied is the more apparent when it is seen that the negligence complained of is an omission to guard the boy against a tempting danger. The facts exclude the possibility of such a term in the agreement. The fiction cannot be reconciled with the facts. F

Counsel for the appellant rightly called our attention to *Cribb v. Kynoch, Ltd.* (11), a decision of a divisional court which was approved by this court in *Young v. Hoffman Manufacturing Co., Ltd.* (12). Those cases decided that, G H

under the doctrine of common employment, an infant workman is, or may be, in no better position than an adult; and that a master who has delegated to a competent servant the duty of instructing an inexperienced workman in the use of machinery is not responsible for that servant's negligence. It may well be right to say that the mere fact that a workman is under 21 years of age is insufficient to deprive the employer of the defence of common employment. The position of a child of tender years who, to the knowledge of the defendant's servant and agent, could not safely be trusted near dangerous machinery at all, is in a different category from that of a young workman, capable of using intelligence and skill. In *Young v. Hoffman Manufacturing Co., Ltd.* (12), LORD COZENS-HARDY, M.R., said, at p. 651 :

There can be no legal difficulty in implying as one of the terms of the contract a stipulation which, if the contract were expressed in writing, would be free from objection.

In the present case, if the contract between the parties had been written out at length, any attempt to embody in it the defence of common employment would have revealed the incongruity of that undertaking with the context and with the facts.

It must be added that, even if the necessary undertaking could have been implied in the contract, the defendant's difficulties would not be at an end. As MACKINNON, L.J., pointed out during the argument, it would have been necessary to consider whether the contract as a whole was for the infant's benefit. In *Young v. Hoffman Manufacturing Co., Ltd.* (12), the court had no difficulty in deciding that an ordinary contract of service, in which the undertaking was to be implied was beneficial to the infant : see the judgment of LORD COZENS-HARDY, M.R., at pp. 650, 651. This is a very different case, and it would be difficult, and I think impossible, to maintain the proposition that a contract by which a child of ten, working without reward, agreed to bear the risks of a fellow worker's negligence, was beneficial to the child.

For these reasons, I am of opinion that the defence of common employment is not available to the defendant. CROOM-JOHNSON, J., arrived at the same conclusion, mainly on the ground that at the moment of time when the defendant's son was guilty of negligence, he and the infant plaintiff had ceased to be fellow servants. I find some difficulty in accepting this view. It is true that before the happening of the accident the work of threshing had been stopped for the time being and that the defendant's son had told the infant plaintiff to get down : but I doubt whether it can be said that the boy's engagement as a voluntary worker terminated immediately upon the giving of that order and before he had obeyed the order and reached the level of the ground. I am glad to be able to found my judgment on broader considerations rather than on so nice a distinction. In my opinion the appeal should be dismissed.

Appeal dismissed.

Solicitors : Routh, Stacey, Hancock & Willis, agents for Knocker & Foskett, Sevenoaks (for the appellant) ; S. Thornhill Tracey, agent for F. B. Jevons & Riley, Tonbridge (for the respondent).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

Re LEVERHULME, COOPER v. LEVERHULME AND OTHERS.
[CHANCERY DIVISION (Morton J.), May 28, June 1, 2, 1943.]

Charities—Education—Gift for benefit of staff training college—College in effect a department of commercial company.

The testator by his will gave certain shares to be held by his trustees in trust for the benefit of the Staff Training College of Lever Bros., Ltd., of Port Sunlight, in such manner as the trustees should think fit. The Staff Training College was carried on in a building belonging to the company for the purpose of educating employees of the company only and attendance at the college was compulsory upon all employees within certain age limits and was during ordinary working hours. The college was at one time staffed by officials of the company, but later 3 whole time professional teachers were engaged by the company. Besides improving the education of the staff, the college rendered service to the company through its records

and advice in placing its young employees in positions suitable to their abilities :—

HELD : the gift was not a charitable one. It could not be construed as a gift to the company and, therefore, fell into residue.

[EDITORIAL NOTE.] The provision of education is a well-recognised form of charitable purpose, but there were many features of the trust here considered which were hardly compatible with a holding that it was charitable. The persons entitled to benefit under the trust were the employees of a commercial company. They received the education provided in their ordinary working hours and, it may be said, as a part of their employment. Indeed, it seems that the classes were more or less adapted to the training of the more skilled of the company's employees and provided for the commercial advantage of the company. These matters are clearly beyond anything which has hitherto been held to be charitable.

AS TO EDUCATIONAL CHARITIES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 116-118, paras. 153, 154; and FOR CASES, see DIGEST, Vol. 8, pp. 245-248, Nos. 51-73.]

Cases referred to :

- (1) *Hoare v. Hoare* (1886), 56 L.T. 147; 8 Digest 264, 262.
- (2) *Clark v. Taylor* (1853), 1 Drew. 642; 8 Digest 311, 922; 1 Eq. Rep. 435; 21 L.T.O.S. 287.
- (3) *Re Rayner, Cloutman v. Regnart* (1920), 89 L.J.Ch. 369; Digest Supp.; 122 L.T. 577.
- (4) *Re Bowes*, [1896] 1 Ch. 507; 44 Digest 972, 8255; 65 L.J.Ch. 298; 74 L.T. 16.
- (5) *Re Ogden*, [1933] Ch.D. 678; Digest Supp.; 102 L.J.Ch. 226; 149 L.T. 162.

ADJOURNED SUMMONS to determine whether on the proper construction of the testator's will a gift for the benefit of a staff training college was a charitable gift. The facts are fully set out in the judgment.

J. Neville Gray, K.C., and *L. M. Jopling* for the plaintiff.

R. F. Roxburgh, K.C., and *J. H. Stamp* for the present Lord Leverhulme.

J. Norman Daynes, K.C., and *R. R. Formoy* for Ernest Bisiker.

Hon. Charles Romer, K.C., and *Cecil Turner* for the companies.

H. O. Danckwerts for the Attorney-General.

C. Harman, K.C., and *A. P. Vanneck* for the remaining defendants.

MORTON, J. : The gift is in the following terms :

On the date of distribution all the said shares comprised in this clause shall (subject as aforesaid) be held in trust . . . as to 20 per cent. thereof to apply the same for the benefit of the Staff Training College of Lever Bros., Ltd., Port Sunlight, in such manner as my trustees may think fit and so that my trustees may transfer the said 20 per cent. or any part thereof to the trustees or managers for the time being of the said Staff Training College for the purpose of being applied by them in such manner as they shall think fit for the benefit of the said College.

As I have already pointed out, that is a gift which will not come into operation for a very considerable period. At first I felt grave doubt whether I should decide the matter to-day. I have, however, been pressed to decide it, and I have come to the conclusion that I may properly do so.

There is considerable evidence filed in regard to this point and I may say at the outset, that there were not, at the date of the death of the testator, and there are not to-day, any trustees or managers of the Staff Training College of Lever Bros., Ltd., Port Sunlight.

It is contended by counsel on behalf of the present Lord Leverhulme, that it is a gift for the benefit of an institution which is not a charitable institution. He describes the Staff Training College of Lever Bros., Ltd., Port Sunlight, as being, in effect, in the nature of a department of the company's business. I should say that it is common ground amongst all the counsel who have addressed me that the relevant date at which this matter must be considered is the date of the testator's death.

In considering whether this was a gift for the benefit of a charity in the legal sense of that word, I have regard, first of all, to the terms of the gift which is a trust to apply the property in question for the benefit of the Staff Training College of Lever Bros., Ltd., Port Sunlight. The emphasis there is that the Staff Training College is regarded as something which is under the control, or it may be in the ownership, of Lever Bros., Ltd., Port Sunlight. In the second place, at the death of the testator, the enterprise which was then known by the name of the Staff Training College, was carried on in a building, then the property of Lever Bros., Ltd., which was known as the Lyceum, but had come to be

known commonly as the Staff Training College. Thus the building in which the enterprise was carried on at the date of the testator's death was a private building in no sense dedicated to charity. Subsequently, in 1936, the classes previously held at the Staff Training College were discontinued and on Dec. 31, 1937, the building was actually sold to a new company, the defendants, Lever Bros. (Port Sunlight), Ltd., together with certain other property belonging to Lever Bros. and Unilevers, Ltd. In the third place, there is the fact that only employees of Lever Bros., Ltd. (whom I shall hereafter call the company) were educated in the Staff Training College. Fourthly, there is the nature of the education which was by no means wholly technical, but was partly technical, and I think there is no doubt that one of the excellent objects which the late Lord Leverhulme had in view when he formulated this scheme was to make the employees of Lever Bros., Ltd., better fitted to discharge their duties, although no doubt he may have had in mind their general education from other aspects as well.

In the next place, it is to be observed that attendance at the Staff Training College was compulsory upon all employees within certain age limits. The teaching was always within working hours in respect of which employees were receiving their ordinary wages. So that the persons undergoing this instruction were undergoing it in their working hours, and they were in effect being paid for attending the classes. As regards the method of staffing the college, it was proved that in the early years of the Staff Training College the teachers with the exception of the principal, were officials and employees of the company having the necessary qualifications who, for this work, were allowed time from their ordinary duties and received a small honorarium. Later, 3 whole time professional teachers were engaged for the Staff Training College by the company. Besides improving the general educational standard of the company's staff, the Staff Training College rendered service to the company through its records and advice which enabled the company to place its young employees in positions suitable to their abilities. The college was conducted as a department of the company.

It is not easy to reconcile all the cases on each side of the line which severs a charitable institution from an institution which is not charitable; but I have come to the conclusion that, in the present case, having regard to all the circumstances, to some of which I have alluded, this is not a gift for the benefit of a charitable institution.

I was referred, by counsel for the present Lord Leverhulme, to *Hoare v. Hoare* (1). I think that, in certain aspects, that case does bear some resemblance to the present case. There CHITTY, J., found that there was, to quote his words, "no general intention of a public character." Counsel for the Attorney-General referred me to *Clark v. Taylor* (2), in which there was a gift:

... to the treasurer for the time being of the Female Orphan School in Greenwich aforesaid, patronised by Mrs. Enderby, the sum of £50 for the benefit of that charity.

SIR ROBERT KINDERSLEY, V.-C., arrived at the conclusion that the gift failed, the school in question being simply a school voluntarily kept up by a Mrs. Enderby at her own expense; and I think it must have been his view that this institution was not a charity otherwise, as it was still in existence at the death of the testator, the gift would not have been held to fail. As regards *Re Rayner* (3), also cited by counsel for the Attorney-General, that was not a gift to an existing institution, but was a gift of certain shares for the purpose of setting up an educational charity.

Counsel for Lord Leverhulme also relied upon the contention that the court would be quite unable to administer the institution in question as it was carried on in a building belonging to the company and that there was no obligation on the company to carry on the college or to pay a single penny towards its maintenance or to keep the staff on the premises which belonged to them. I am not, however, much impressed by that argument as the gift is a gift to the testator's trustees, and I think that the court could control the administration of the fund by controlling the trustees. However, in all the circumstances of the case I have arrived at the conclusion that this is not a charitable gift.

It is next contended by counsel on behalf of the last two defendants, the two companies, that, if the gift is not a charitable one, it is a gift to an enterprise

which was entirely in the hands of the company for the benefit of their employees and indirectly for the benefit of the company, and that the legal effect of the gift, although it may not have been the intention of the testator, is to give that 20 per cent. of the shares in question to the company absolutely. In support of that contention he cites *Re Bowes* (4). I cannot give effect to that contention. I think that, throughout the gift which I have already read, there was no intention whatsoever of giving these shares to the company beneficially, and that this case can be distinguished from *Re Bowes* (4), where money was bequeathed for the purpose of planting trees on an estate and NORTH, J., said, at p. 511:

I think the fund is devoted to improving the estate, and improving the estate for the benefit of the persons who are absolutely entitled to it . . . Here it is to be planted, not as part of a public trust, but for the benefit of the owners of the estate . . . I consider it was for the benefit of the estate, and the persons who, for the time being, are entitled to the estate, that that direction was given.

It appears to me that NORTH, J., arrived at that conclusion on the wording of the will before him. I can find no intention here that these moneys should be devoted to the benefit of the company, and I must reject that contention.

There being, therefore, in my view, no gift to charity, but an intention to benefit a particular Staff Training College which was in existence at the death of the testator, and is not a charitable object, what is the result? In my view, the result must be that the gift fails. It is a gift for the benefit of a body, not a charity, which is not known to the law. There is no such legal entity as the Staff Training College. This is not a case in which there are a number of individuals who can use the money as they think fit; it is not a case in which the gift can be upheld as an absolute gift as, for instance, in *Re Ogden* (5). The result is that the gift fails and the shares in question fall into residue, there being a residuary gift in the will to the present Lord Leverhulme.

Declaration accordingly.

Solicitors: *Field, Roscoe & Co.* (for the plaintiff); *Simpson, North, Harley & Co.* (for the present Lord Leverhulme); *Denton, Hall & Burgin* (for Ernest Bisiker); *Treasury Solicitor* (for the Attorney-General).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

MAY v. MAY AND LEHMANN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pilcher, J.), June 4, 1943.]

Conflict of laws—Domicil—Alien—Refugee—Permission to land on condition that he would emigrate on completion of training—Internment—4 years' residence in England.

In 1938 the petitioner, a German Jew domiciled and resident in Germany was thrown into a concentration camp in Germany. Being desirous of leaving that country, he succeeded in obtaining from the American Consul-General in Stuttgart an immigration visa for the United States of America and on Mar. 6, 1939, he was permitted to land in the United Kingdom as a trainee and on condition that he would emigrate from the United Kingdom on the completion of his training. He obtained employment as a trainee and some months later his wife and child also came to England. In June, 1940, he took steps to have his immigration visa to America transferred from the Stuttgart to the London register with priority as from the date of its issue in Stuttgart. The petitioner was interned in this country from July, 1940, until January, 1941, and on his release he returned to his former employment. On Jan. 17, 1942, he filed a petition for divorce on the ground of his wife's adultery with the co-respondent. The co-respondent contended that the petitioner was not domiciled in this country:—

Held: there was evidence of an *animus manendi* which, coupled with the fact of nearly 4 years' residence, was sufficient to establish the petitioner's domicil in England. Where the intention to reside is established, the fact that the petitioner as an alien is liable to be deported at any time, does not prevent the acquisition of a domicil of choice.

[EDITORIAL NOTE. While the question of domicil is always largely a question of fact, the position of the petitioner here may be taken to be typical of a large number of persons in England at the present time, and the careful review of the position will be of general importance.]

AS TO DETERMINATION OF DOMICIL, see HALSBURY, Hailsham Edn., Vol. 6, pp. 200-205, paras. 243-247; and FOR CASES, see DIGEST, Vol. 11, pp. 314-321, Nos. 50-96.]

Case referred to:

*⁽¹⁾ *Boldrini v. Boldrini and Martini*, [1932] P. 9; Digest Supp.; 101 L.J.P. 4; 146 L.T. 121.

ISSUE as to domicile of petitioner for divorce. The facts are fully stated in the judgment of PILCHER, J.

A *D. Armstead Fairweather* for the petitioner.

M. Morgan Gibbon for the co-respondent.

PILCHER, J.: This matter came before me on an issue as to the domicile of the petitioner at the material date, namely, Jan. 17, 1942, when the petitioner, Heinrich Hermann May, filed his petition against his wife, Anna Maria Julie May, the respondent, alleging that she had committed adultery with Herbert B Lehmann, the co-respondent. No appearance was entered by the respondent, but the co-respondent entered an unconditional appearance on Feb. 18, 1942. The co-respondent was later permitted to withdraw this unconditional appearance and to enter a conditional appearance, and he now alleges that the petitioner is not domiciled in this country. It is this issue which now falls to be determined.

C The petitioner is a German Jew; his parents are also German Jews, and the family prior to the war resided at Stuttgart. The petitioner's mother had a small butcher's business in Stuttgart. The petitioner helped her with this business and, no doubt, in the fulness of time, the business would have become his if he had not been forced to leave Germany.

D It seems that after the murder of von Rath, in 1938, the petitioner and other German Jews were thrown into concentration camps in Germany. The petitioner's sister and brother-in-law, a Mr. and Mrs. Morgenstern, were in this country at the time, and Morgenstern took what steps he could with the German-Jewish Aid Committee in this country on the petitioner's behalf. It was well-known at this time that German Jews could sometimes secure release from concentration camps in Germany if they could procure visas which would permit them to enter some other country. The petitioner's mother accordingly made application to the appropriate authorities in Stuttgart and procured

E for the petitioner an immigration visa from the American Consul-General in that city. It was hoped that, armed with this visa, the British authorities would permit the petitioner to enter this country in transit to the United States of America. The German-Jewish Aid Committee in this country, who had interested themselves in the petitioner, were unable to procure the consent of the Home Office to his coming to this country as the quota number of the visa which he had secured was too high and would, in the ordinary reckoning,

F not have permitted him to sail for the United States of America for several years. The German-Jewish Aid Committee in this country, however, suggested that it might be possible to induce the Home Office to allow the petitioner to land in this country as a trainee. The Home Office eventually agreed to this course being adopted, and the petitioner was released from his concentration camp and permitted to leave Germany *en route* for this country. On arrival

G in this country he was granted leave to land on the following conditions which were indorsed on a number of official documents with which he was supplied: "Leave to land granted at Harwich this day, on the condition that the holder will emigrate from the United Kingdom on the completion of his training." The petitioner landed in this country subject to this condition on March 6, 1939. He soon found work with Frohwein, another German Jew who carried on a sausage-making business in London. The petitioner was H presumably "trained" in the sausage-making trade by Frohwein, he proved a satisfactory workman, and in due course his wife and child followed him to England some months later.

The petitioner continued to work for Frohwein until the outbreak of war. He was classed "C" by the Home Office (Enemy Aliens) Tribunal which investigated his case; that is to say, he was regarded by the Home Office as a refugee from Nazi oppression. He continued to work for Frohwein until July, 1940, when, in company with a large number of other male enemy aliens who had been classed "C," he was interned. In June, 1940, shortly before the

petitioner's internment, it had become apparent to Morgenstern, who was in close touch with the petitioner, and who seems to have acted as his adviser throughout, that the position of German-Jewish refugees in this country might be attended with some danger to themselves. Accordingly, with the petitioner's consent and approval, he took steps to have the immigration visa for the United States of America, which had been procured by the petitioner in Stuttgart, transferred to the British register, with priority as from the date when it had been originally granted in Stuttgart. I am satisfied that the petitioner was well aware that this action was being taken by Morgenstern on his behalf and approved of it. The petitioner remained in internment until January, 1941, when he was released and went back to work for Frohwein; and since that date he has continued to work for Frohwein. It was only after his release from internment that he became fully aware of the facts upon which his petition against his wife was founded. Eventually, on Jan. 17, 1942, he filed his petition for divorce.

The material point for consideration on the issue which I have to determine is whether the petitioner had in January, 1942, formed a fixed intention to settle in this country. His domicile of origin was German. There is no question that he had taken up residence in this country, and the only point for consideration is whether he had, at the date when he filed his petition, formed a fixed intention to settle permanently in England.

The petitioner is a slow-witted man, and a man who did not really do himself justice in the witness-box; he was nervous of answering questions which he thought might contain some hidden trap, and evidently desired to convey the impression that he had determined, at the time when he left Germany, or very shortly thereafter, to settle permanently in this country. I am satisfied that this was not the case. I think that, when he left Germany, he intended to use England merely as a stepping-stone on his journey to the United States. I am not satisfied that before the outbreak of war he ever formed any fixed intention as to his future movements. It is true that he had got his wife and child to this country, but I think that when war broke out he was still at least undecided as to whether he and his family would not eventually go to the United States. I am further satisfied that in June, 1940, when France had fallen and the invasion of this country seemed probable, if not imminent, the petitioner would have gone to the United States if he could have managed it. That that was so is made quite clear by the fact that he was at least a party to the steps which were then taken on his behalf, and which resulted in the transfer of his American immigration visa from the Stuttgart to the London register. I think it unlikely that between July, 1940, and January, 1941, whilst he was interned, he formed any concluded intention to make his permanent home in this country. There is, moreover, some authority for saying that a domicile of choice cannot be acquired whilst the individual concerned is under physical restraint.

When the petitioner was released in January, 1941, he went back to work for Frohwein, and before I can find that he has acquired a domicile of choice in this country, I must be satisfied that during the year 1941 the petitioner made up his mind to make his permanent home here. His life and work during this period seem to have been uneventful. He said that he was contented, and was emphatic that in no circumstances whatever would he contemplate returning to Germany. His experiences in that country had, he said, been of such a nature that he was determined never to return there to live, even if the Nazi government were overthrown. In saying this, he impressed me as speaking the truth.

The point upon which I have felt considerable doubt was whether, since his release from internment, he has ever formed a definite intention to settle down here, or whether, on the contrary, he continued to harbour the intention of going to the United States of America when opportunity offered. In this connection it is relevant to note that in a letter from the American Consul-General to the petitioner, dated Oct. 31, 1940, the following passage occurs: "If you abandon your intention to emigrate to the United States, kindly notify this office accordingly." The petitioner did not, apparently, see this letter until some time after his release from internment, and he has never informed the American Consul-General that he does not intend to emigrate to the United States. I bear in mind, however, that the petitioner has not a very

extensive knowledge of the English language, and is, moreover, a man of little education. I am not, therefore, inclined to attach much weight to the fact that he did not, during the course of the year 1941, inform the American Consul-General that he had decided not to make use of his visa when the time came.

A The state of a man's mind at any given time is, of course, a question of fact, and one which it is often difficult to determine. After paying attention to the evidence and giving the matter careful consideration, I have come to the conclusion that, during the year 1941 and before he filed his petition in January 1942, the petitioner, who had relatives and friends in this country, had become more settled in mind. He says that he had experienced kindness and consideration in this country, he had regular employment with which he was content, and the idea of going to the United States had, in my judgment, faded from his mind. I am satisfied that he was determined never to return to Germany. B Whilst it is probable that he had never put to himself the question, "Have I made up my mind to settle in England," I am satisfied that he had come to regard England as his home. It is true that his sojourn in England had not been a long one. His ties with his native land were, however, broken. He had been resident here nearly 4 years at the material date, and I have come to the conclusion that by this date he had the *animus manendi* which, coupled with the C fact of residence, is sufficient to establish domicile.

D There is one further point which I must mention. It was submitted on behalf of the co-respondent that an alien in the position of the petitioner whose stay in this country is, by virtue of the Aliens Restriction (Amendment) Act, 1919, and the orders made thereunder, liable to be terminated at the pleasure of the Home Secretary, cannot acquire a legal domicile in England. This argument was unsuccessfully advanced in *Boldrini v. Boldrini and Martini* (1). In that case LORD MERRIVALE, P., decided that the petitioner, an Italian waiter, had, in the particular circumstances, acquired a domicile of choice in this country. The petitioner, as an alien, was admittedly liable to be deported against his will. The matter came before the Court of Appeal, and LORD HANWORTH, M.R., dealing with this point, said, at p 15:

E It is beside the point, therefore, that the petitioner is an alien subject to the restrictions imposed by the Aliens Order, 1920, and that does not prevent his acquisition of an English domicile. The possible danger of being deported if he misbehaves himself does not militate against the acquisition of a domicile of choice *animo et facto*. It is impossible, therefore, to hold that, though subject to the restrictions imposed by the Aliens Order, the petitioner could not comply with the court's requirements as to acquiring a new domicile. He can still be master of his own destiny, and it may even be that he will become naturalized.

F It was sought to distinguish this case from *Boldrini's* case (1) on the facts. Counsel for the co-respondent pointed out that in the present case the petitioner was originally allowed to land in this country on the condition that he emigrated on completion of his training, whereas Boldrini had been allowed to land subject to no such condition. Whilst appreciating that the facts of the two cases are very different, I am unable to see any distinction in principle. The two requirements necessary to the acquisition of a domicile of choice are actual residence and the intention to settle permanently in the new country of residence. No doubt G the knowledge that residence in the new country may be cut short at any moment by the Home Secretary under the powers conferred upon him by the Aliens Restrictions (Amendment) Act, 1919, and the orders made thereunder, may influence the mind of the alien concerned in forming the intention which is necessary before domicile can be acquired, but, once the court is satisfied that the intention has been formed, all the elements necessary to the acquisition H of a domicile of choice are present and the domicile is acquired.

I, therefore, find that on Jan. 17, 1942, the petitioner was domiciled in this country.

Declaration accordingly.

Solicitors: *Fink, Proudfoot & Waters* (for the petitioner); *N. B. Colt* (for the co-respondent).

[Reported by D. ARMSTEAD FAIRWEATHER, ESQ., Barrister-at-Law.]

Re MULDER, WESTMINSTER BANK, LTD. *v.* MULDER
AND OTHERS.

[COURT OF APPEAL (Lord Greene, M.R., Luxmoore and Goddard, L.J.J.),
May 21, 24, June 10, 1943.]

Wills—Construction—Dispositions inapplicable to subject-matter possessed by testator—Bequest of business to trustees—Half share only owned by testator—Direction to trustees to offer whole business at half value to person actually an equal partner with the testator. A

The testator had carried on business in partnership with his stepson and their shares in the capital and profits of the partnership were equal. The testator, however, framed his will on the assumption that the whole business was his and that the position of his stepson was that of a salaried manager. He bequeathed the business to his trustees and empowered them to carry it on and generally to act as if they were beneficially entitled to it. The will conferred an option to purchase the business on the stepson at a sum certified by an accountant as representing one moiety of the aggregate value of the whole business. If the option to purchase was exercised, the purchase money was to be divided between residue and the testator's son. In the event of the stepson's failure to exercise his option, the business was to be sold and the proceeds divided in the same manner. The stepson declined to exercise the option. The question before the court was whether it was possible to treat the language used by the testator, which in its natural meaning applied only to the whole business, as being applicable to the half share which the testator in fact possessed :—

HELD [LUXMOORE, L.J., *dissenting*] : the interpretation of the expression "the business" as meaning the testator's share in the business would destroy the clear intention of the testator to confer a benefit on his stepson. The expression must, therefore, be interpreted as meaning the whole business and both the original bequest of the business to the trustees and also the beneficial dispositions were inoperative. D

[EDITORIAL NOTE. The testator here has framed his will upon the footing that he owned the whole interest in his business when in fact he possessed only a half share. Had he given his business to a beneficiary, it would clearly have been possible to construe the will by making the references to the whole business references to the half share which he in fact possessed. The testator, however, made a complicated disposition of his business which, in the view of the majority of the Court of Appeal was only applicable to the position where the testator was the absolute owner of the whole business at the date of his death. In these circumstances it is held that the gift is quite inoperative. E

AS TO INACCURACY OF DESCRIPTION, see HALSBURY, *Hailsham Edn.*, Vol. 34, pp. 227-235, paras. 284-290 ; and FOR CASES, see DIGEST, Vol. 44, pp. 681-683, Nos. 5218-5240 and pp. 904-908, Nos. 7649-7677.] F

Case referred to :

(1) *Re Jameson, King v. Winn*, [1908] 2 Ch. 111 ; 44 Digest 687, 5284 ; 77 L.J.Ch. 729 ; 98 L.T. 745.

APPEAL by the testator's son from an order of UTHWATT, J., dated Jan. 21, 1943. The facts are fully set out in the judgment of LORD GREENE, M.R.

R. F. Roxburgh, K.C., and *H. A. Rose* for the appellant.

C. E. Harman, K.C., and *H. E. Salt* for the residuary legatees.

Lindsay M. Jopling for infants, also interested in residue.

Wilfrid M. Hunt for the respondent trustees. G

LORD GREENE, M.R. : For some years before his death the testator had carried on business in partnership with his stepson, H. P. Maskell. Their shares in the capital and profits of the partnership were equal. These facts were found by UTHWATT, J., and his finding is not impeached. The testator, however, when he made his will, was under the mistaken belief that the whole business was his and that the position of his stepson was that of a salaried manager. The provisions of his will with regard to the business are all based on the assumption that this belief was well-founded. The subject-matter with which he purports to deal in these dispositions is the whole business, its capital and undrawn profits. The question which we have to decide is whether or not they can be treated as applicable to the only subject-matter which he in fact possessed, namely, a half share in the partnership. H

The question whether a particular subject-matter, which a testator in fact possessed, is sufficiently described by the language which he uses is, in the last resort, a question of construction. If there exists a subject-matter which falls naturally within the language used, no question arises. If the language describes an existing subject-matter with sufficient accuracy and then proceeds to add to the description something which cannot accurately apply to it, the addition may be rejected as *falsa demonstratio*. If, however, the language of the will in its natural meaning does not describe with accuracy any existing subject-matter, but there is a subject-matter which, on such evidence as is admissible (for example, the history of the subject-matter) it appears likely that the testator had in mind, the question arises whether or not, without placing an undue strain upon the language which he uses, that language can fairly be interpreted as applying to it. The courts have in many cases approached this question in a spirit of benevolence and have considered it legitimate to do some violence to the language of the will in order to avoid what they have felt would be an injustice and to effect what they have been convinced must have been the intention of the testator. As is said in JARMAN, 7th Edn., Vol. II, p. 1242 :

The natural tendency of the courts is to disregard mistakes of this kind, if the identity of the property is clear and the testator's mistake only relates to the nature of his interest in it. Such are the cases where a testator's interest in the proceeds of sale of land is held to pass by a devise of that land. And there are cases in which this tendency has led to a construction which puts a considerable strain on the words of the will.

A good example of this tendency is to be found in *Re Jameson* (1), which was relied on by the appellants.

Nevertheless, there are limits which it is not proper to exceed. The language must not be stretched and strained upon a bed of Procrustes in order to make it fit a state of circumstances to which on no possible construction it can apply.

The present case is not one of *falsa demonstratio*: see JARMAN, at p. 1241. It is not a case of a description of an existing subject-matter with an additional but inaccurate description added. The rule is "*falsa demonstratio non nocet cum de corpore constat*." Here the question is as to the corpus—there is no certain description of it as there is in cases of *falsa demonstratio*. The question is whether it is possible, without doing undue violence to the language, to interpret the will which, in its natural meaning, applies and applies only to the whole business so as to make it apply to the half share which the testator in fact possessed. If the testator had merely bequeathed the business to a beneficiary, describing it as his own, I do not suppose that it would be disputed that the expression "my business of X" as used in such a bequest could legitimately be interpreted as "my share in the business of X." A devise of "my estate Whiteacre" may well be interpreted as meaning "my share in the estate Whiteacre" if that is all that the testator owned. The difference in such cases is a mere difference in *quantum*, and a gift of the whole may properly be interpreted as applying to the part.

The present case is of an entirely different character as is manifest from an examination of the relevant provisions of the will. They are contained in four elaborately drawn clauses numbered 6, 7, 8 and 9. Only the first three of these require attention. In cl. 6, after reciting that, for many years past, he had carried on business under the style of K. J. Mulder & Co., the testator bequeathed to his trustees "the goodwill of my said business" and the stock-in-trade, machinery, plant and effects, the lease of the business premises, the benefit of all contracts and all books and the debts and moneys due to him in respect of the business and standing to his business account at his bankers. He empowered his trustees to carry on the business and to advance additional capital out of his residuary estate, to employ a manager and generally to act as if they were beneficially entitled to the business.

Cl. 7 sets out the beneficial trusts applicable to the business. They fall into two parts, namely, first, an option to Maskell to purchase the business with a provision for the division of the purchase money between residue and the testator's son Albert; and, secondly, if the option is not exercised, a direction to sell the business and divide the proceeds between residue and his son Albert. Maskell in fact declined to exercise the option and the trust in his favour

accordingly failed to take effect; but it is not legitimate on this account to disregard the provisions relating to the option which are of vital importance in construing the will. I will, therefore, examine first those provisions in order to see whether, on any permissible construction of the language, it is possible to make them applicable to the testator's half share in the partnership.

By cl. 7 the trustees are to stand possessed of "the said business" (a) upon trust to offer "the same" to Maskell at such sum as an accountant :

... shall certify to be the proper price thereof calculated in accordance with the provisions of cl. 8 (d). A

By that subclause the accountant is to cause a valuation to be made "of all the other assets of the said business" (which means the assets other than goodwill) including the various items there particularly mentioned among which were bank balances. To this valuation he is to add the value of the goodwill as mentioned in subcl. (c), which directed the ascertainment of the value of the goodwill of "the said business" on the basis of 3 years' net profits estimated without making any allowance for :

... any payment made out of the business to my said stepson Henry in respect of salary commission or otherwise ... B

other than his legitimate expenses. The accountant is then to certify what sum represents one moiety of the aggregate amount so arrived at. The subclause concludes as follows : C

The sum so certified together with any debt calculated to be due to the business in manner aforesaid shall be the purchase price at which my trustees shall offer the business to my said stepson as hereinbefore directed.

The explanation of this reference to a debt is to be found in subcl. (b) which contains a direction that any sum by which "the salary of my said stepson Henry as manager of the said business" since Jan. 1, 1926 exceeds one-half of the net profits of the said business is to be : D

... treated as a debt due from my said stepson to the business.

It is clear—and, indeed, it was not disputed—that these directions for ascertaining the value of the business cannot by any stretch of language be made to work with regard to anything but the business as a whole. The language cannot be twisted so as to convert them into directions for valuing the testator's half interest. The sum certified as representing one moiety of the aggregate valuation is, therefore, a sum equal to one moiety of the value of the whole business. This moiety is the price at which "the business" is to be offered by the trustees. If in this direction to offer "the business" that phrase is to be interpreted as meaning the testator's share in the business, which is all that the trustees have to offer, the option will be of no value. The stepson will have the right to acquire a half interest in the business for a price equal to one-half of the value of the business as a whole. To this it is said : so much the worse for the stepson, but the difficulty cannot be thus brushed aside. The testator clearly intended to confer a benefit on his stepson equal to half the value of the business. The interpretation for which the appellants contend would entirely destroy this intention and give no benefit to the stepson whatsoever. E

I now proceed to examine the trusts of the purchase price in the event of the option being exercised. They are contained in para. 7 (b). Such part of the purchase price as the accountant shall certify to be equal : F

... to the amount of my undrawn profits and capital calculated in accordance with the terms of cl. 8 (b) ... G

is to go to residue.

The balance thereof consisting of goodwill (together with any appreciation or less any depreciation as the case may be in the capital assets) ... H

is to go to the testator's son Albert. Cl. 8 (b) contains directions for ascertaining :

What sum shall be due to me from the said business as representing the net profits of the same which shall have been allowed to remain undrawn by me [during the period commencing Jan. 1, 1926, and] what sum shall be due to me in respect of my capital therein.

The testator then directs that, in ascertaining "the net profits" the accountant is to allow as an expense the salary paid to his stepson as manager or a sum equal

to one-half of the net profits before charging such salary, whichever shall be the less. The argument for the appellants is that in cl. 8 (b) the phrase "net profits of the same" in head (i) is to be construed as meaning "my share in the net profits of the same." But in the direction that in ascertaining "the net profits" the salary of the stepson is to be deducted, the expression "the net profits" admittedly cannot mean anything but the net profits of the business as a whole, since if it meant the testator's share of net profits the direction to deduct the stepson's salary—or rather, his half-share of profits—would either be meaningless or would swallow up a great part, if not the whole, of the testator's share. In my opinion, it is not legitimate to construe the phrase "net profits" in this subclause, used as it obviously is in both places to describe the same subject-matter, as referring to two different subject-matters.

The beneficial trusts of the purchase price to be paid by Maskell which are contained in cl. 7 (b) are of a very special character. A part of the purchase price "equal to the amount of my undrawn profits and capital" calculated in accordance with cl. 8 (b) is to go to residue, the balance is to go to the testator's son, Albert. The purchase price under the option is one-half the certified value of the whole business, whereas residue gets a part of it equal to the whole of the testator's undrawn profits and capital, which, in the view of the testator, would be the whole of the undrawn profits and capital of the business. If the testator's view of the situation had been correct and if, for the sake of argument, the value of the business as a whole had been £60,000 and the undrawn profits and capital had amounted to £30,000, the whole of the purchase price paid by the stepson would have gone to residue and the son Albert would have got nothing. If, however, the option is to be construed as relating to the testator's half share and if the amount which is to go to residue is to be construed as a sum equal to the testator's half share in undrawn profits and capital, the result in the example given would be that out of the purchase price of £30,000, residue would get £15,000 and the son Albert would get £15,000, a result quite different from what the testator evidently intended. This result would, of course, be due to the fact that the purchase price remains at £30,000, whereas the share of residue in the purchase price is reduced to one-half what it would have been if the testator had owned the whole business.

Cl. 7 (c) provides for the event of the stepson failing to exercise his option. The business is to be sold and the proceeds divided in the same manner as is provided in the case of the proceeds of a sale under the option. If the directions in the will had consisted only of a bequest of the business to the trustees with a direction to sell it and divide the proceeds in specified proportions between residue and the son Albert, I should not have found much difficulty in construing the will as applying to the half share which the testator in fact possessed; but, in view of the other provisions which I have discussed, I should not be justified in doing so.

These considerations, in my opinion, make it quite impossible to treat the language used by the testator as applicable to the subject-matter which he in fact possessed. When his dispositions are analysed it is apparent that the difference between what he described and what he possessed cannot be regarded as a mere difference in *quantum*. It is a qualitative difference which makes the testator's expressed wishes and directions quite incapable of fulfilment if it is attempted to apply them to a half share only in the business. The result is that, in my opinion, the expression "the business" must throughout be interpreted as meaning the whole business and nothing else, and both the original bequest of the business to the trustees and the beneficial dispositions are inoperative.

For the reasons which I have given I agree with the conclusion reached by UTHWATT, J., and, in my opinion, this appeal should be dismissed.

LUXMOORE, L.J.: This appeal raises questions which arise mainly out of the fact that the testator framed his will on the expressed assumption that he was at its date the absolute owner of a business established in London under the style or firm name of K. J. Mulder & Co. After his death the testator's executors instituted proceedings by originating summons to determine a number of questions arising in the administration of the testator's estate and certain questions of construction arising under cll. 7, 8 and 9 of the testator's will.

The first question raised by the originating summons asked the court in substance to determine whether the claim by the testator's stepson, Henry Percy Maskell, that he was a partner with the testator in the said business with an equal share in the profits and in any surplus assets on dissolution and winding up ought to be accepted or contested. The proceedings came before UTHWATT, J., who decided that the claim by H. P. Maskell to be a partner with the testator on the basis mentioned ought to be accepted. He further decided that, in consequence of the fact that the testator was only interested to the extent of one-half share in the business and the assets thereof as a partner with H. P. Maskell, the bequests in cll. 7, 8 and 9 of the testator's will with reference to the business failed to take effect, and the whole of the testator's share and interest in the same had, as from the death of the testator, formed and still form part of his residuary estate. The ground of the decision of UTHWATT, J., is stated by him to be that it is impossible to treat :

... the testator as having directed his mind to the case of or as having intended to deal with the case where his interest in the business at the date of his death was that of a partner [and that] the whole thing is based upon the testator being the owner of the whole business.

He, therefore, declared that cll. 7, 8 and 9 were ineffective and inoperative, and should be wholly disregarded.

The testator's son, A. J. Mulder, has appealed to this court and claims by his notice of appeal to have the judgment reversed in so far as the declaration I have quoted is concerned and to have substituted therefor a declaration to the effect that the bequest to him did not fail to take effect, with certain consequential directions.

The material parts of the testator's will are to be found in cll. 6, 7, 8 and 9 thereof. I need not read them at length, for their substance has been stated by LORD GREENE, M.R.

In my judgment, the first question to be determined is on what basis should the will be construed. Should it be on the footing that there should be substituted in the clauses in question for the reference to the whole business a reference to that part of it which in fact belonged to the testator, or should these clauses be construed on the assumption that the whole business belonged to the testator in order to ascertain the scope of his testamentary dispositions in relation to the business, including the *quantum* of the beneficial interests given to the several beneficiaries.

It is, I think, common ground that this is not a case of *falsa demonstratio*, nor is it, in my opinion, a case of misdescription. For some reason that cannot now be ascertained the testator, when he made his will, deliberately framed it on the footing that he was sole owner of the business. There being no *falsa demonstratio* or misdescription which can be rectified by the substitution of the correct description, it seems to me that the testator's intentions fall to be ascertained from the will as it stands; for to substitute for the description of the whole business the share that the testator in fact had in it must, of necessity, result in the dispositions made being construed in a manner not contemplated by the testator. In my judgment, the testator's intentions can properly be ascertained only by construing the will as it stands, that is, on the basis that he was the sole owner of the business. No one suggests that, if he had in fact owned the business, there is any insurmountable difficulty in ascertaining the testator's meaning or defining the interests in it that he has given to his residuary estate and to his son, the appellant. With all respect to those who have come to a different conclusion, I am of opinion that the method of construction I have explained is correct.

After the meaning of the will has been ascertained, the next step is, I think, to ascertain if there is any interest in the business to which the testator's dispositions can be applied. The answer, to my mind, is necessarily in the affirmative, for the testator's actual interest, though less than that described by him, is available for the purpose.

Let me first consider cl. 7. This is divided into three sub-paragraphs. In sub-para. (a) the trustees are directed to offer the business for sale to H. P. Maskell. The price to be paid if the option is exercised is to be half of the amount to be ascertained by an accountant in accordance with the provisions of cl. 8 (d). There would seem to be but little difficulty in ascertaining this sum

on the basis that all the assets of the business enumerated in cl. 6 belonged to the testator. The option thus construed would or might confer a benefit upon H. P. Maskell, if in fact the testator's share of capital and undrawn profits substantially exceeded that of H. P. Maskell. For example, should the testator's share of capital and undrawn profits be £50,000 and H. P. Maskell's be £20,000, the benefit in this respect to H. P. Maskell, if he exercised the option, would be £15,000 (that is, half the difference between £50,000 and £20,000). Obviously, if H. P. Maskell desired to exercise the option he could do so only on the terms expressed in the clause and this would necessitate the recognition by him of the claim that the testator was the sole owner of the business. I can see no reason for holding that cl. 7 (a) conferring the option to purchase was incapable of being carried into effect and ought, therefore, to be treated as wholly inoperative.

Cl. 7 (b) contains directions for the division of the money payable by H. P. Maskell if he exercises the option. It is to be divided into two parts, one of which is to go to the residuary estate and the other to the appellant absolutely. The sum which is to go to the residuary estate is to be ascertained and certified by an accountant under the provisions of cl. 8 (b) and 9, and is to represent (i) the sum due to the testator from the business as representing :

... the net profits of the same which shall have been allowed to remain undrawn by him from Jan. 1, 1926 ...

and (ii) the capital in the business. There is a direction that certain allowances are to be made on the basis of H. P. Maskell's salary or of such a sum as shall be equal to one-half of the net profits of the business, whichever shall be the less. The method of ascertainment of the sum in question is purely arbitrary ; in my judgment, there can be no real difficulty for an accountant to ascertain this in accordance with the directions given in cl. 8 (b) and 9 of the testator's will. The sum bequeathed to A. J. Mulder absolutely is to be ascertained by deducting the sum to be ascertained in the manner stated from the purchase price to be paid by H. P. Maskell.

Cl. 7 (c) is directed to what is to happen in the event of H. P. Maskell refusing to exercise his option. In this event the testator's trustees are to sell and convert the business into money and are to hold the proceeds in trust as to such part thereof as should be equal to the sum directed by cl. 7 (b) to form part of his residuary estate, and as to the balance for his son Albert absolutely. Albert's share, if the testator owned the whole business, is to be the balance remaining after deducting a sum ascertainable by an accountant under cl. 8 (b) of the will. I do not think that cl. 7 (c) can be said to be wholly ineffective, for if the business is wound up residue will get what it would be entitled to on the basis that the testator was the owner of the whole business if the moneys ultimately obtained are sufficient to enable the payment to residue of the sum ascertained in the manner directed. If the moneys are insufficient, residue will take the whole. In no event can Albert Mulder get anything until residue has received the full amount due to it.

For these reasons I am constrained to differ from UTHWATT, J., and my brethren. I would allow the appeal and would substitute an appropriate declaration to give effect to the view before expressed for the declaration that cl. 7, 8 and 9 failed to take effect.

GODDARD, L.J. : I agree with LORD GREENE, M.R., that this appeal should be dismissed. In my opinion, the judgment of UTHWATT, J., was quite right, and I am content to adopt it. I have had an opportunity of reading the judgment of LORD GREENE, M.R., which confirms the opinion I have formed, and I do not wish to add anything to what he has said.

Appeal dismissed.

Solicitors : *Cameron, Kemm & Co.* (for the appellant) ; *Cardew-Smith & Ross*, agents for *J. R. Cardew-Smith*, Llandrindod Wells (for the various respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

R. v. CARR-BRAINT.

[COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., Humphreys and Lewis, JJ.), May 25, 1943.]

Criminal Law—Corruption—Presumption of guilt—“Unless the contrary is proved”—Prevention of Corruption Act, 1916 (c. 34), s. 2.

The appellant was charged with the offence of corruptly making a gift or loan to a person in the employ of the War Department as an inducement to show, or as a reward for showing, favour to him. The charge was laid under the Prevention of Corruption Act, 1906, and on such a charge the Prevention of Corruption Act, 1916, s. 2, provides that a consideration shall be deemed to be given corruptly unless the contrary is proved. The judge directed the jury that the onus of proving his innocence lay on the appellant and that the burden of proof resting on him to negative corruption was as heavy as that ordinarily resting on the prosecution, that is to say, he had to prove his innocence beyond a reasonable doubt:—

HELD: the onus on the appellant was only to satisfy the jury of the probability of that which he was called upon to establish and, if he satisfied the jury that the probability was that the gift was made innocently, the statutory presumption was rebutted and he was entitled to be acquitted.

[EDITORIAL NOTE.] In a criminal case there is in the ordinary way a presumption of the innocence of the accused. The Prevention of Corruption Act, 1916, s. 2, provided in certain cases a presumption of guilt. It was contended that, in short, this reversed the positions of the prosecution and the defence and that the accused had to prove his innocence beyond any reasonable doubt, which is the measure of the burden ordinarily laid upon the prosecution in proving the guilt of an accused person. The court has, however, decided that the onus is less than that, and that the onus on the accused is only that on a party in civil proceedings and that the jury can acquit if they are satisfied of the probability of the innocence of the accused.

AS TO PRESUMPTIONS IN CORRUPTION CASES, see HALSBURY, Hailsham Edn., Vol. 9, p. 336, para. 535; and FOR CASES, see DIGEST, Vol. 14, p. 1014, Nos. 11397-11400.]

Cases referred to:

* (1) *R. v. Jenkins*, *R. v. Evan-Jones* (1923), 87 J.P. 115; 15 Digest 1014, 11400; 17 Cr. App. Rep. 121.

* (2) *R. v. Ward*, [1915] 3 K.B. 696; 15 Digest 960, 10729; 85 L.J.K.B. 433; 114 L.T. 192.

* (3) *Woolmington v. Director of Public Prosecutions*, [1933] A.C. 462; Digest Supp.; 104 L.J.K.B. 433; 153 L.T. 232; 25 Cr. App. Rep. 72.

* (4) *Sodeman v. R.*, [1936] 2 All E.R. 1133; Digest Supp.

(5) *R. v. Clark* [1921], 61 S.C.R. 608; 14 Digest 60 g; 2 W.W.R. 446.

(6) *The People v. Fennell*, [1940] I.R. 445.

(7) *Cooper v. Slade* (1858), 6 H.L. Cas. 746; 20 Digest 66, 464; 27 L.J.Q.B. 449; 31 L.T.O.S. 334.

(8) *Newis v. Lark* (1571), 2 Plowd. 408; 44 Digest 435, 2621.

APPEAL from a conviction at the Shrewsbury Assizes of an offence against the Prevention of Corruption Act, 1916. The facts are fully stated in the judgment.

W. H. Cartwright Sharp, K.C., *E. G. H. Beresford* and *R. Lachs* for the appellant.
J. F. Bourke for the Crown.

HUMPHREYS, J. [delivering the judgment of the court]: The charge against the appellant was that, being an agent for Pye Brothers (Hereford), Ltd., who held a contract from the War Department, he corruptly gave to Sidney John Baldock, a person in the employment of the War Department, £60 by way of gift or loan as an inducement or reward for showing favour to Pye Brothers (Hereford), Ltd., in the affairs of the War Department.

The main facts were not in dispute. The appellant was a director of the company, Pye Brothers (Hereford), Ltd., which on Aug. 23, 1940, entered into a contract with the Royal Engineers Branch of the War Department for artificers' work, the contract to run from Sept. 1, 1940. From time to time works orders were issued under that contract. The contractor would be entitled to interim payments in respect of work done by him under the contract and such payments would only be made upon the certificate of the garrison engineer that the work had been satisfactorily performed and the money was due. The garrison engineer in respect of the contract in question was Sidney John Baldock, a Government employee. On Sept. 5, 1940, the appellant gave or lent to Baldock

a sum of £60 to pay for a second-hand motor car which Baldock had agreed to buy from a motor engineer in Shrewsbury. By the terms of the Prevention of Corruption Act, 1916, s. 2, the onus of proving that the payment made under these circumstances was not corruptly made as an inducement or reward contrary to the Act of 1906 is placed upon the defendant.

A The appellant contended that the judge misdirected the jury as to the extent of the burden of proof placed upon an accused person by the terms of the Prevention of Corruption Act, 1916, s. 2. That section provides, *inter alia*, that, where, in any proceedings against a person for an offence under the Prevention of Corruption Act, 1906, it is proved that any consideration has been given to a person in the employment of a Government department by the agent of a person holding a contract from a Government department, the consideration shall be deemed to have been given corruptly as such inducement or reward as is mentioned in the Act, unless the contrary is proved. The judge directed
B the jury on this point as follows :

What has the accused to do ? He has not only to discharge the burden of proof to the contrary of corruption, he has not only to prove that he gave it without a corrupt motive, but he has to do so beyond all reasonable doubt. Indeed, it has been held that, if the jury are left in doubt by the evidence given on behalf of the accused, they must convict him. That is the law by which I am bound and by which you and every subject of this country are bound . . . Are you satisfied beyond all reasonable doubt ?
C If you are not satisfied, find him guilty. If you have any doubt about it, find him guilty. Only if you are completely satisfied that in all these circumstances, having regard to the nature of Baldock, the man, the time when the loan was made—only if you are completely satisfied that it was given innocently, simply as an act of extraordinary friendship, will you find him not guilty. Otherwise you will find him guilty. That is to say, the judge laid down the proposition of law that the onus of proving his innocence lay on the accused and that the burden of proof resting
D on him to negative corruption was as heavy as that resting in a normal case upon the prosecution.

Counsel for the Crown relied in support of that proposition upon *R. v. Jenkins*, *R. v. Evan-Jones* (1). In that case, decided in 1923, the court upheld a direction to the effect that, if after hearing the defence the jury had any doubt, then the jury must find the accused guilty. In the report such expressions as “the defendant must show that the payments were not corrupt,” “if they had any doubt on that they must convict,” and “the explanation required is an explanation which satisfies the jury” were treated as interchangeable. The question whether the onus upon the accused under the section was the same as that resting in the first place on the prosecution was not discussed. Moreover, SHEARMAN, J., appears to liken the onus placed upon the accused by sect. 16 to that in a defence of insanity. There can, however, be no doubt that the
E onus on the accused in a defence of insanity is far different from that normally resting on the prosecution.

In the course of the argument in *Evan-Jones v. Jenkins* (1), reference was made to *R. v. Ward* (2). The court considered it as throwing no light upon the case under discussion. In our view, however, that case is by no means unimportant, having regard to the principle contended for in the present case. The appellant had been convicted of the offence created by the Larceny Act, 1861, s. 58 (now the Larceny Act, 1916, s. 28) having been found by night in possession of implements of housebreaking “without lawful excuse the proof
G of which shall lie on such person.” The implements were such as would form part of the outfit of a bricklayer and the appellant was a bricklayer by trade. The court quashed the conviction on the ground of misdirection, the trial judge having told the jury that the appellant had to satisfy the jury that he was rightly in possession of the tools at the time and had no unlawful intention.
H LORD READING, L.C.J., in giving the judgment of the court, observed, at p. 697 :

“ . . . it was for the appellant to satisfy the jury that, in the words of sect. 58, he had a “lawful excuse” . . . the tools being admittedly bricklayers’ tools ; the appellant had established *prima facie* that he had a lawful excuse for being in possession of the tools and the onus was shifted on to the prosecution to prove to the satisfaction of the jury, if they could, that the appellant was not in possession of the tools for an innocent purpose but for the purpose of housebreaking.

That authority is, in our opinion, inconsistent with the notion that words throwing the onus of proof of certain matters upon the accused involve placing

the accused in the same position as the prosecution in a normal case, so as to require of him that he should prove his case beyond any reasonable doubt. Moreover, it seems to us to be in accord with the principle of our law expressed in the well-known passage in the judgment of VISCOUNT SANKEY, L.C., in *Woolmington v. Director of Public Prosecutions* (3), at p. 481 :

No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

We see no reason why the rebuttable presumption created by this section and the words "unless the contrary is proved" should not be construed in the same manner as similar words in other statutes, or similar presumptions at common law, for instance, the presumption of sanity in the case of an accused person who is setting up the defence of insanity. We agree with and adopt for the purpose of this judgment the language of LORD HAILSHAM, L.C., in delivering the judgment of the Privy Council in *Sodeman v. R.* (4). LORD HAILSHAM, L.C., observed as follows, at p. 1140 :

... the suggestion made by the petitioner was that the jury might have been misled by the judge's language into the impression that the burden of proof resting on the accused to prove the insanity was as heavy as the burden of proof resting upon the prosecution to prove the facts which they had to establish. In fact there is no doubt that the burden of proof for the defence is not so onerous . . . it is certainly plain that the burden in cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings. That this is the law is not challenged.

In so holding LORD HAILSHAM, L.C., was in agreement with the decision of the majority of the Supreme Court of Canada in *R. v. Clark* (5), where DUFF, J., in the course of his judgment, expressed the view that the necessity for excluding doubt contained in the rule as to the onus upon the prosecution in criminal cases might be regarded as an exception founded upon considerations of public policy. There can be no consideration of public policy calling for similar stringency in the case of an accused person endeavouring to displace a rebuttable presumption.

Sodeman v. R. (4) has been considered by the Irish Court of Criminal Appeal in *The People v. Fennell* (6). The judgment of the court, delivered by SULLIVAN, C.J., does not purport to differ from the conclusion arrived at by the Privy Council ; indeed, the reference to the decision in *Sodeman's* case (4) concludes with the words "That seems a sound test to apply." The judgment, however, in *Fennell's* case (6), as reported, so far as it relates to *Sodeman's* case (4), is so inaccurate as to be misleading. It contains the following sentence :

The trial judge in that case (which was from Australia) had directed the jury "that the burden of proof of insanity that lay upon the prisoner was as strict and onerous as the burden of proof that lay on the Crown with regard to the facts which the prosecution had to establish."

In point of fact, the trial judge had given no such direction. What SULLIVAN, C.J., is purporting to quote as the direction of the trial judge was merely the argument of counsel for the appellant as to the effect of that direction, an argument not accepted by the Privy Council. *Fennell's* case (6) cannot, we think, be regarded as any authority upon this point.

What is the burden resting upon a plaintiff or defendant in civil proceedings can, we think, best be stated in the words of the classic pronouncement upon the subject by WILLES, J., in *Cooper v. Slade* (7). That learned judge referred to an ancient authority in support of what he termed "the elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict." The authority in question was the judgment of DYER, C.J., and a majority of the judges of the Common Pleas in *Newis v. Lark* (8), decided in the reign of Queen Elizabeth. The report contains this passage :

Where the matter is so far gone that the parties are at issue so that the jury is to give a verdict one way or other, there, if the matter is doubtful, they may found their verdict upon that which appears the most probable, and by the same reason that which is most probable shall be good evidence.

In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person "unless the contrary is proved," the jury should be directed that it is for them to decide whether the contrary

is proved; that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt: and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.

Appeal allowed and conviction quashed on a ground other than that which is reported.

Solicitors: J. C. H. Bowdler & Sons, Shrewsbury (for the appellant);

A B. D. J. Hayes, Shrewsbury (for the prosecution).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

In the Estate of HALL, deceased.

B [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **May 11, 1943.**]

Executors—Probate—Exclusion of offensive matter—Scandalous and defamatory statements in will—No dispositive effect Statements forming part of reasons for disposition of property.

A person named in a codicil to a will applied for a motion to strike out certain words which he alleged were scandalous and defamatory and injurious to his reputation. The words complained of did not affect the disposition of the deceased's property but they explained why she had made a codicil and revoked certain provisions in her will:—

C HELD: a testator has the right to explain why he has disposed of his property in a certain way although he is not entitled to use his will as a vehicle of slander. In this case it was permitted to exclude from probate the four words "for the family honour" which were the only words which might be interpreted as defamatory of the applicant.

D [EDITORIAL NOTE. The power of the court to strike out passages or even to omit them from the probate of a will is one to be exercised with great moderation and the court will not strike out words unless they are clearly defamatory of the applicant. In any case, the testator is entitled to give reasonable explanations of the dispositions contained in his will and, where these amount to reasons why some person has received nothing or much less than might be expected, they are quite likely to be distasteful to that person. That, however, is no sufficient reason for their omission.]

E AS TO OFFENSIVE PASSAGES, see HALSBURY, Hailsham Edn., Vol. 14, p. 210, para. 350; and FOR CASES, see DIGEST, Vol. 23, pp. 137, 138, Nos. 1367-1372.]

Case referred to:

*(1) *In the Estate of White*, [1914] P. 153; 23 Digest 137, 1367; 111 L.T. 413.

MOTION to exclude from probate certain words in a codicil on the ground that they were scandalous and defamatory. The facts are fully set out in the judgment.

F *Sir Norman Touche* for the applicant.
R. T. Barnard for the executors.

BUCKNILL, J.: This is a motion to strike out certain words in a codicil made by Louisa Eleanor Annie Hall, who died on Jan. 3, 1943, and the words complained of are not words which are on the face of them defamatory, neither are they put in, on the face of them, certainly, for the purpose of injuring the character or the reputation of the man named. They are put in by the testatrix to explain why she made a codicil and revoked certain provisions contained in her will. She says she has been advised to do that for those reasons, and it is the reasons which are complained of and which the court is asked to exclude from the probate.

G Certain portions of the said codicil, which in no way affect the disposition of the deceased's property, are complained of as scandalous, offensive and libellous.

H The words complained of are not words which are on the face of them defamatory, neither are they put in, on the face of them, certainly, for the purpose of injuring the character or the reputation of the man named. They are put in by the testatrix to explain why she made a codicil and revoked certain provisions contained in her will. She says she has been advised to do that for those reasons, and it is the reasons which are complained of and which the court is asked to exclude from the probate.

The matter is rather barren of authority. Only one case has been brought to my notice, *In the Estate of Robert White* (1), where BARGRAVE DEANE, J., who had at that time, I suppose, unrivalled experience in the probate work of this court, said, at p. 153:

There does not appear to be any principle laid down in any of the reported cases.

and in his judgment he said, at p. 154 :

There were only four cases reported on the point, and those were conflicting. His own view was that a will ought not to be made the medium of slanderous statements, and that where in a testamentary document words were inserted which in no sense had any testamentary value or effect and could serve no useful purpose if left in, they should be omitted from the document itself . . .

As I read the judgment of BARGRAVE DEANE, J., his own view is that, if the words are slanderous and have no testamentary value or effect and can serve no useful purpose, they should be omitted from the probate. TRISTRAM & COOTE'S PROBATE PRACTICE, 18th Edn., p. 40, says this :

The court may exclude from probate and from registration words of atrocious, offensive or libellous character; it will exclude words of a blasphemous character. The court excluded a blasphemous statement, the Registrar having refused to grant probate of a will until the court had decided whether such statement should be omitted from the probate; but it cannot exclude any words or sentences which do not come fully within such categories, except words objectionable to the family relating solely to the disposal of the body or funeral.

The words complained of in this case have nothing to do with the disposal of the body or funeral.

It seems to me that, *prima facie*, the probate ought to issue in the words of the will itself. I think that a testator not only has the right to dispose of his property, but he has the right also to give reasons why he has disposed of it in a certain way. On the other hand, he is not entitled to use his will as a means of libelling and unjustly injuring somebody against whom he has a spite; or, even if he has no spite, he has no right, I think, to libel anybody in his will by using words which have no direct bearing on the devolution of his property. Counsel for the applicant claims that he has been injured by the words used and has argued strenuously that I can cut out the words referred to because they are defamatory and because it cannot possibly do any good, and may do harm, to leave them in. Looking at the words, I cannot myself see that they are defamatory. There are, however, four words, "for the family honour," which might possibly suggest to anybody reading the probate that something has been done which was dishonourable. I think it is very far-fetched to read it even in that way, and I give permission to exclude those words from the probate, with considerable doubt as to whether I ought to do even that. So far I will go; I cannot go any farther. Therefore, I will give permission that those four words may be excluded from the probate.

Order accordingly. Leave to appeal to the Court of Appeal.

Solicitors: Ward, Bowie & Co. (for the applicant); Withers & Co. (for the executors).

[Reported by D. ARMSTEAD FAIRWEATHER, ESQ., Barrister-at-Law.]

WALKER v. HEMMANT.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Humphreys and Asquith, JJ.), May 21, 1943.]

Magistrates—Appeal—Appeal to quarter sessions—Limited right of appeal under special Act—General right of appeal under general Act—*Generalia specialibus non derogant*—Coal Mines Act, 1911 (c. 50), s. 104—Criminal Justice Administration Act, 1914 (c. 58), s. 37 (1).

The appellant was convicted by a court of summary jurisdiction of an offence under the Coal Mines Act, 1911, and fined 10s., which was less than half of the maximum fine which might have been imposed upon him for the offence. The Coal Mines Act, 1911, s. 104, gives a right of appeal to quarter sessions only where the fine imposed amounts to or exceeds one half the maximum fine. A general right of appeal to quarter sessions against a conviction by a court of summary jurisdiction is given by the Criminal Justice Administration Act, 1914, s. 37 (1) to persons who do not plead guilty or admit the truth of the information. The provisions of the Coal Mines Act, 1911, s. 104, are not repealed by the Criminal Justice Administration Act, 1914. It was contended that the general provisions under the general Act of 1914 did not, in the absence of any repeal, affect the

limitation on the right of appeal specifically enacted by the Coal Mines Act, 1911, s. 104, and that the appellant had no right of appeal in the circumstances of this case :—

HELD : the provisions of the Criminal Justice Administration Act, 1914, s. 37 (1), are not prevented by the principle of *generalia specialibus non derogant* from applying to the circumstances of this case, and those provisions extended the limited right of appeal given by the Coal Mines Act, 1911, s. 104, with the result that the appellant had a right of appeal in this case.

[EDITORIAL NOTE. The doctrine embodied in the maxim *generalia specialibus non derogant* has been applied to one or two statutory provisions recently and it was here sought to cut down a general right of appeal to quarter sessions by contending that the Act giving a general right did not without express reference repeal specific limitations placed upon a right of appeal by a special statute—in this case limited to the special circumstances of one particular industry. The terms of the Act of 1914 are, however, particularly wide and it is held that it gave a general right of appeal in all cases except those where the accused pleads guilty or admits the offence and is not restricted in its universality by earlier specific provisions.

AS TO RIGHT OF APPEAL TO QUARTER SESSIONS, see HALSBURY, Hailsham Edn., Vol. 21, p. 705, paras. 1225, 1226; and FOR CASES, see DIGEST, Vol. 33, pp. 390, 391, Nos. 1013-1019.]

Cases referred to :

- (1) *Blackpool Corp'n. v. Starr Estate Co., Ltd.*, [1922] 1 A.C. 27; 42 Digest 770, 1974; 91 L.J.K.B. 202; 126 L.T. 258.
- (2) *Seward v. Vera Cruz, The Vera Cruz* (1884), 10 App. Cas. 59; 42 Digest 769, 1959; 54 L.J.P. 9; 53 L.T. 474.

APPEAL by case stated from a decision of the justices of the peace for the county of Glamorgan dismissing an appeal by the defendant from a conviction by a court of summary jurisdiction for an offence under the Coal Mines Act, 1911, s. 74. The right of appeal given by the Coal Mines Act, 1911, is provided by sect. 104 as follows :

If any person feels aggrieved by any summary conviction under this Act by which imprisonment or a fine amounting to or exceeding one half the maximum fine, is adjudged, he may appeal therefrom to quarter sessions.

The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

Alfred J. Long, K.C., and *Morris Morgan* for the appellant.

W. Matabele Davies for the respondent.

VISCOUNT CALDECOTE, L.C.J. : The appellant on a case stated by the justices of the peace for the county of Glamorgan was convicted of an offence under the Coal Mines Act of 1911. He was fined 10s., which was in fact less than one half of the maximum fine which might have been imposed upon him. He wished to appeal, and he relies upon the provisions of the Criminal Justice Administration Act, 1914, s. 37 (1), which provides that :

Any person aggrieved by any conviction of a court of summary jurisdiction in respect of any offence, who did not plead guilty or admit the truth of the information may appeal from the conviction in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions.

The court of quarter sessions, when the appeal came to be heard by them, held that they had no jurisdiction, because the Coal Mines Act, 1911, s. 104, gives a limited right of appeal and, as I understand the argument, it was tantamount to a provision that, except in those cases specified, there is no right of appeal. The question is whether the magistrates were right in holding that, as sect. 104 had not been repealed, it limited the cases in which an appeal to quarter sessions was lawful, and the principle of *generalia specialibus non derogant* has been relied upon by the respondent.

That principle has been stated in a case which has been cited to us by counsel for the respondent, *Blackpool Corp'n. v. Starr Estate Co.* (1), where LORD HALDANE puts it in this way, at p. 34 :

It is that, wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that, if, in a subsequent statute the legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the legislature had before provided for individually, unless an intention to do so is specially declared.

In *Seward v. "Vera Cruz"* (2), LORD SELBORNE put it a little differently, at p. 68 :

Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.

It seems to me that it is not a question really of derogating from the special legislation, but it is a case where there has been an extension of the provision contained in the Coal Mines Act, 1911. That Act, it is true, limited the right of appeal to certain specific cases where the person aggrieved had been adjudged liable to pay a fine exceeding one half of the maximum fine. That was a provision which applied to cases whether the man had pleaded guilty or had pleaded not guilty. The Criminal Justice Administration Act, 1914, extended that right of appeal in words which are very wide and, it seems to me, can only by a most arbitrary construction be held not to be an extension of the right of appeal given by the Coal Mines Act or by any other Act dealing with appeals from magistrates on summary conviction. The words are general : "any person aggrieved by any conviction . . . in respect of any offence . . . may appeal from the conviction," but only on one condition, that he did not plead guilty or admit the truth of the information. That limitation, I may observe, does not appear in the Coal Mines Act, 1911.

I think that a reasonable and sensible application of the Act of 1914 cannot be arrived at if you suppose that it is restricted in its universality by the earlier provision in the Coal Mines Act, 1911 ; indeed, I should be prepared to go as far as to say that the thrice-repeated emphasis on the word "any" in the Criminal Justice Administration Act, 1914, s. 37, is an indication of a particular intention to give a right of appeal even though, under the Coal Mines Act, 1911, that appeal would not be open in a particular case.

I think that the magistrates arrived at a wrong decision in this case, and that the case should be sent back to them with an intimation of our opinion to them that they ought to hear the appeal.

HUMPHREYS, J. : I agree, and I have nothing to add except that I think this is a plain case.

ASQUITH, J. : I agree.

Appeal allowed. Case remitted to magistrates.

Solicitors : *Smith, Rundell, Dods and Bockett*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the appellant) ; *D. Roberts Rosser, Davies & Hopkins*, Pontypridd (for the respondent).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

R. v. NATIONAL ARBITRATION TRIBUNAL AND OTHERS,
Ex parte THE IMPERIAL TOBACCO CO., LTD. AND OTHERS.

R. v. SAME, *Ex parte* BRITISH AMERICAN TOBACCO CO., LTD.

R. v. SAME, *Ex parte* GODFREY PHILLIPS, LTD.

R. v. SAME, *Ex parte* ARDATH TOBACCO CO., LTD.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Humphreys and Asquith, JJ.), **May 18, 19, 20, 21, 1943.**]

Emergency Legislation—National Arbitration Tribunal—Jurisdiction—Whether limited to "trade disputes which cannot otherwise be determined"—Whether claims for rise in wages amounted to claims for minimum rates—Conditions of Employment and National Arbitration Order, 1940 (S.R. & O., 1940, No. 1305).

A War Emergency Committee was set up in the tobacco industry in 1941, and the workers' side of the committee asked for increases of rates of wages, which the employers' side refused. As they were unable to come to an agreement the Ministry of Labour and National Service, in answer to an application by the workers' side, made an order under the Conditions of Employment and National Arbitration Order, 1940, referring the dispute to the National Arbitration Tribunal, a body set up by the same order. The employers applied for orders of prohibition on the ground that the

tribunal had no jurisdiction to hear the dispute. They maintained that the Conditions of Employment and National Arbitration Order, 1940, art. 1, which provided that the tribunal should be constituted for "the purpose of settling trade disputes which cannot otherwise be determined" must be construed as "for the purpose of settling trade disputes for the determination of which no machinery exists," and that, as the workers' claims were in effect claims for minimum rates, the machinery of the Trade Board existed for the settlement of the disputes :—

HELD : the workers' claims were not for minimum rates of wages. The disputes arose out of claims for rises on actual rates of wages paid, and, consequently, the Trade Board had no jurisdiction to hear the present disputes. The Conditions of Employment and National Arbitration Order, 1940, has to be read as a whole and art. 1 does not limit the jurisdiction of the tribunal.

EDITORIAL NOTE. The principal purpose for which Trade Boards were constituted was the establishment of minimum rates of wages with a view to the abolition of sweating in certain industries. In the early days of the war, it became clear that the safety of the country would be seriously jeopardised by strikes or lock-outs and the National Arbitration Tribunal was established to render them impossible. Thus stated, the distinction between the functions of the Trade Boards on the one hand and the Tribunal on the other appears clear. In the present case, however, certain workers in the tobacco trade sought to obtain for all workers the rates of wages paid by the Imperial Tobacco Co., and it was contended that this was in effect an application for the fixing of a minimum wage for the industry. This contention, however, has been rejected for clearly it was not an application for the fixing of a wage applicable to the whole industry. The further application that youths and female workers doing the same work as that done previously by adult males should receive the same payment as an adult male had received is still more obviously unconnected with minimum rates of wages.

AS TO THE CONDITIONS OF EMPLOYMENT AND NATIONAL ARBITRATION ORDER, 1940, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 33, p. 734.]

Cases referred to :

- (1) *Bishop of Gloucester v. Cunningham*, [1943] 1 K.B. 101 ; [1943] 1 All E.R. 61.
- (2) *Seward v. The Vera Cruz* (1884), 10 App. Cas. 59 ; 1 Digest 34, 265 ; 54 L.J.P. 9 ; 52 L.T. 474.
- (3) *Ex p. Murray, Sons & Co., Ltd.*, unreported.
- (4) *Lacey v. H. Lacon & Co.*, [1899] A.C. 222 ; 30 Digest 37, 293 ; 68 L.J.Q.B. 480 ; 80 L.T. 473.

APPLICATIONS by certain tobacco companies for orders prohibiting, on grounds of want of jurisdiction, the National Arbitration Tribunal from hearing wages disputes which had arisen between the companies and their employees and which had been referred to the tribunal by the Minister of Labour and National Service. The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

G. J. Paull, K.C., and *G. R. Mitchison* for the first applicants, Imperial Tobacco Co., Ltd.

N. L. C. Macaskie, K.C., and *G. R. Mitchison* for the second applicants, British American Tobacco Co., Ltd.

Philip Vos, K.C., and *G. R. Mitchison* for the third applicants, Godfrey Phillips, Ltd.

Sir Walter Monckton, K.C., and *G. O. Slade* for the fourth applicants, Ardath Tobacco Co., Ltd.

G. J. Lynskey, K.C., and *M. R. Nicholas* for the trade unions.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.) and *W. Arthian Davies* for the Minister of Labour and National Service, and the National Arbitration Tribunal.

VISCOUNT CALDECOTE, L.C.J. : These are four applications for orders of prohibition. It is convenient, I think, that the four cases should be dealt with together, although the first case, the application of the Imperial Tobacco Co., was argued separately ; the other three cases were argued together. The orders are asked for against the National Arbitration Tribunal and a number of trade unions who have members in the tobacco industry. The Minister of Labour has referred disputes in the tobacco industry to the National Arbitration Tribunal. The applicants for the orders of prohibition are employers, and their wish is to prevent the hearing by the National Arbitration Tribunal of certain disputes

about wages.

The facts are a little elaborate, but, with the very great help which we have received from the counsel engaged in this case, I hope I can make clear the points which are involved in the claims by parties whose cases are, on some small points, not altogether the same.

The National Arbitration Tribunal was created under powers derived from the Defence (General) Regulations, reg. 58AA. It is not unimportant to remember that that regulation, like all the other Defence (General) Regulations, was made in pursuance of powers given by the Emergency Powers (Defence) Act, 1939, s. 1 (1), whereby His Majesty might by Order in Council :

... make such regulations . . . as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.

In the tobacco industry a War Emergency Committee was set up in April, 1941. In February, 1942, the workers' side asked for increases of rates of wages. The employers' side refused and, to use an expression which appears in a letter from the secretary of the workers' side to the Ministry of Labour of Feb. 13, "no satisfaction had been reached between the employers and themselves." Thereupon the conciliation officer wrote a letter to the Council of Tobacco Manufacturers, which represents tobacco manufacturers other than the Imperial Tobacco Co., and asked for information about the claim. That was on Feb. 24. Two other claims had in fact been made at the same time as the one which is now in question, and one of them eventually went to the Trade Board of the tobacco industry. The other claim was disposed of in a way which it is not material to state, and the claim that remained was a claim for the payment of the rates of wages received by an adult male to youths who were doing work which formerly or usually was done by an adult male.

On Mar. 13, the employers replied, in effect refusing the claim, and a few weeks later, on May 30, the workers asked for a reference of the dispute to the National Arbitration Tribunal. On June 3, the Minister of Labour wrote to the Council of Tobacco Manufacturers to this effect :

Failing a prompt settlement of the dispute, the Ministry is required by art. 2 (4) of the order [Conditions of Employment and National Arbitration Order] to refer the matter for settlement to the National Arbitration Tribunal within a period of 21 days. Before referring the matter, however, I am to ask if the employers' side of the committee desire to submit any observations.

On June 22 an order was made by the Minister of Labour saying that a report had been received of a dispute, and that, other means of settlement having failed, the Minister had referred the dispute in accordance with his statutory obligations to the National Arbitration Tribunal. I was not, myself, very sure that I knew under what powers the Minister was purporting to act in making that reference, but, after the matter had been explained and considered with reference to the letters that passed between the parties, I was satisfied that the Minister was exercising the power conferred upon him under art. 2 (4).

What I have detailed in my judgment so far are the facts relating to the claim of the workers against the Imperial Tobacco Co., and the dispute which arose from that claim. Similar steps were taken in respect of claims made against the other applicants in these proceedings, that is to say, the British American Tobacco Co., the Ardath Tobacco Co., and Godfrey Phillips & Co. The claims against them for wage increases were in substance the same in each of the three cases. The application in each case was that the rates in respect of the workers employed by those employers were to be raised to the level of the rates of wage paid by the Imperial Tobacco Co. In the case of the British American Tobacco Co. there was one further claim, and that was that any adjustments that might be made in the wage rates paid by the Imperial Tobacco Co. should be included in the revised rates for which the applicants were asking.

The employers say that the National Arbitration Tribunal has no jurisdiction to hear any of these claims. It is necessary, in the first instance, in order to answer that question, to look at the Defence (General) Regulations, reg. 58AA, and then to look at the Conditions of Employment and National Arbitration Order, 1940, which has been made under it. The margin.' note of reg. 58AA

is: "Avoidance of strikes and lock-outs." A marginal note is in no way operative, and it is not, of course, an enactment, but it echoes the note, which is sounded by the regulation itself, the object of the regulation being to avoid the interruption of work by trade disputes, and, as so often unhappily happens in trade disputes, by strikes and lock-outs. With that object, the Minister of Labour was empowered to make provision for establishing a tribunal for the settlement of trade disputes, and in pursuance of those powers he made the Conditions of Employment and National Arbitration Order, 1940. Pt. I of the Order is the only part material to these proceedings. It dealt with national arbitration, and it was the exercise of the Minister's power to establish a tribunal to prevent strikes. Trade disputes, as is well-known, are very often very intractable. The parties take up positions from which they are reluctant to withdraw, and the solution which has been reached, which is, if I may say so, a novel solution in labour legislation, is the establishment of an arbitration tribunal with compulsory powers. The opening words of art. 1 of this order have received a great deal of attention in the argument before us. The words are relied upon as defining the jurisdiction of the tribunal, and they have been construed as limiting the jurisdiction of the tribunal to trade disputes for the determination of which no machinery exists. The words which are thus construed are these:

For the purpose of settling trade disputes which cannot otherwise be determined there shall be constituted by the Minister a tribunal . . .

The next step, after reading the words as if they said "for the purpose of settling trade disputes for the determination of which no machinery exists," is to say that in this particular case machinery does exist and is to be found in the Trade Board code, and, therefore, this particular dispute is not one which the National Arbitration Tribunal has any jurisdiction to entertain. Let me examine this argument. It can scarcely be denied—I am not sure whether it was denied—that these disputes are trade disputes under the definition contained in the order. The definition is in art. 7 and is to this effect:

Trade dispute means any dispute or difference between employers and workmen. That is all I need read. If it is denied that this is a trade dispute, I am prepared to say, and I do say, that these are all trade disputes. Efforts to settle these disputes had failed. The conciliation officer and the Minister had approached the employers in each of the four cases with a view to knowing what they had to say upon the matters in question, and, in each case the employers had made it quite plain that, for reasons which were well worthy of consideration, they were not prepared to assent to the claims which had been made; in fact, the disputes could not be determined. It seems to me, using the words in their most natural and ordinary meaning, that these are trade disputes which cannot otherwise be determined. Even if the Trade Board had had jurisdiction to entertain these claims at all, it is quite clear that the Trade Board could not determine them. With what do the trade boards concern themselves? Their duty is to deal with minimum rates for everybody in the industry. They are under a duty to provide and fix minimum rates which when fixed apply to every worker in the industry, or to every class of worker, or to everybody in the area of the industry. The object of the fixing of minimum rates was to stop the "sweating" which at one time was prevalent in certain industries in the country, and the rate when fixed is enforceable by criminal process against every employer in the industry. That being so, it seems to me that it is very doubtful indeed whether the trade boards have any jurisdiction at all to entertain these disputes, which are not in form, or, as I think, are not in substance, claims for minimum rates. Before these claims could be fit for the Trade Board to entertain, if the Minister of Labour was inclined to leave them to the Trade Board, there would have to be substantial changes both in the form and in the substance of the claims which have been made. These are claims by workpeople of the largest firms in the tobacco industry. It is quite true that, if the claims were admitted, they might provoke or suggest claims by other workers employed by other persons in the industry, but, even if agreement was reached, the agreement would not bind anybody other than the immediate parties to the agreement, and thus would be something quite different from minimum rates fixed by trade boards which would bind everybody, even though they had never heard of the reference to the trade board at all. The scope of the jurisdiction, therefore, of the trade boards seems to me quite different from the jurisdiction of the

National Arbitration Tribunal.

When the words of the Conditions of Employment and National Arbitration Order, 1940, art. 2, are looked at, it will be seen that the article deals with trade disputes, that is, trade disputes within the meaning of the definition. The National Arbitration Tribunal does not deal only with minimum rates; it deals with claims which have been made for rates of wages which may be far in excess of the minimum rates fixed by the Trade Board. A claim to obtain, whether by agreement or by compulsory arbitration, rates above minimum rates for some workers seems to me wholly different from a claim for a minimum rate which would be applicable to all workers, especially when it is borne in mind, as is the case in these proceedings, that all the different employers in fact pay different rates which are all of them well above the minimum rates. I, therefore, think that these are trade disputes which cannot otherwise be determined either by the Trade Boards or by agreement. I further think that upon a proper review of this order, the jurisdiction of the National Arbitration Tribunal is not to be found in the introductory words of art. 1, but is to be ascertained from the order as a whole. If a trade dispute gets before the National Arbitration Tribunal regularly, it seems to me that jurisdiction to entertain the dispute in question follows as a matter of course. Let me look at art. 2 to see how the matter stands. Art. 2 (1) of the order provides in the widest terms, quite unqualified terms, that :

If any trade dispute exists or is apprehended, that dispute, if not otherwise determined, may be reported to the Minister . . .

Art. 2 (2) provides that the Minister shall—he must—refer the matter for settlement in accordance with any suitable means, suitable, that is, in his opinion, for settling the dispute, which are the result of agreement, but it is still true to say that that applies to any trade dispute. Art. 2 (3) says that failing suitable means, the Minister may refer the matter for settlement to the National Arbitration Tribunal, and art. 2 (4), under which I think the Minister was acting in this case, provides that when

. . . steps have not resulted in a prompt settlement of the dispute, the Minister shall refer the dispute for settlement to the National Arbitration Tribunal . . .

Those provisions seem to me quite plainly to give jurisdiction to the National Arbitration Tribunal to entertain a trade dispute which has been properly referred to it; otherwise it seems to me nonsense would be made of the articles to which I have referred, and I see no reason why any limitation of the right of the National Arbitration Tribunal should be supposed to exist, subject to this, that it must be a trade dispute, and it must be a trade dispute which has come before the Arbitration Tribunal in accordance with the provisions to which I have referred. I think it is a much safer way of construing these provisions which create the tribunal and create the jurisdiction of the tribunal to refer to the operative words of the article as a whole, than to pay attention solely to the introductory words of art. 1, where the purpose of the establishment of the National Arbitration Tribunal is stated.

An argument was submitted on this question by counsel for the fourth applicants. He asked us to look at the matter as if it was one to which the decision of the Court of Appeal in *Bishop of Gloucester v. Cunningham* (1) applied. That was a case in which it was held that a house of residence belonging to an ecclesiastical benefice was not a dwellinghouse to which the Rent and Mortgage Interest Restrictions Acts applied, and LORD GREENE, M.R., in giving the judgment of the Court of Appeal, said, at p. 103 ([1943] 1 All E.R. 62) :

The only question which arises is whether the Acts [the Rent and Mortgage Interest Restrictions Acts] are to be construed as being by implication inapplicable to a parsonage house on the principle *generalia specialibus non derogant*.

Then he cited the passage referred to by counsel for the third applicants from the opinion of LORD SELBORNE, L.C., in *Seward v. The Vera Cruz* (2), where he said, at p. 68 :

Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.

What is said in this particular case is that the trade board legislation is special legislation, and that the order is general legislation, and that just as LORD

GREENE, M.R., and the Court of Appeal held that a house of residence belonging to an ecclesiastical benefice was not dealt with by general legislation of the Rent and Mortgage Interest Restrictions Acts, so we should hold here that the provisions of the Trade Boards Act, 1918, ought not to be derogated from by anything found in the later legislation in the Defence (General) Regulations and the Order made under them. My view upon this argument is that it is really only a different way of putting the arguments with which I have already tried to deal.

A The two codes deal with quite different things. It is not a question of one including the whole and the other scheme including only a part of the whole. It is a question which I think can only be answered in the way I have just answered it, that the trade boards deal with one set of disputes or claims, and the National Arbitration Tribunal deals with another set of claims or disputes. I think that the principle invoked on the authority of *Bishop of Gloucester v. Cunningham* (1) is not one which has any real application to this case.

B There was one further small point raised by counsel for the second applicants and that was that as to one part of the claim there is no dispute capable of being referred to the Tribunal. The position is that, as originally made, the claim against the British American Tobacco Co., was that the rate of wages of all employees of the company should be raised to the standard rate of wages paid by the Imperial Tobacco Co. To that was added later, it was said, a claim that such wages should include any adjustments which had been made as the result of agreements between the trade unions and the Imperial Tobacco Co. When that claim was put forward it was said that the claim had never been made to the company, and, therefore, could not be the subject of dispute, but very sensibly, I think, a few weeks later the secretary of the company wrote to the regional industrial relations officer saying :

We are, however, prepared to accept this new claim as a claim made by the Tobacco Workers' Union.

D Then he goes on to say that the assumption that no meeting with the union was contemplated was correct, and from that it seems to me quite obvious that there was, after that letter at any rate, a trade dispute which is no different from any other of the disputes which have been referred to the National Arbitration Tribunal by the Minister.

E I think that on the whole this application must fail. It could only succeed if there was a threat by the National Arbitration Tribunal to usurp or use jurisdiction which it does not possess. I see no such threat. It is said to be an attempt to go behind the trade board code. I do not accept that it is going behind the trade board code at all, for the reason I have more than once mentioned, that the two codes seem to be wholly different in scope. One deals with claims for a minimum rate : the other with claims for a rate of wages which has nothing to do with a minimum rate at all, and are not universal in their operation like a minimum rate. Even if it was an attempt to go behind the Trade Boards, that would be the effect merely of the legislation as a whole, and it could not be a reason for holding that an order of prohibition ought to be made merely because the legislation permits parties to take a particular course. I dissent entirely from the suggestion that the Trade Boards are the proper bodies to settle rates of wages merely because every rate in a particular case when fixed or agreed to would become a minimum rate.

G Counsel for the first applicants suggested that this was in substance a request for a minimum rate because, notwithstanding the fact that the minimum would not be expressed in pounds, shillings and pence, it would be expressed in terms of existing rates according to variations in respect of different employers. The answer, on the whole, which I think should be made to the application for orders of prohibition in this case, is that these are not claims for a universal minimum ; they are claims out of which disputes arose for an increase upon actual rates paid.

H We have had read to us a judgment in *Ex p. Murray, Sons & Co.* (3), recently given by the Divisional Court in Northern Ireland in a reference to the National Arbitration Tribunal concerning the employees of Murray, Sons & Co., Ltd. So far as I am aware, the case is not reported, but we have had a transcript of the judgment of the Lord Chief Justice and, without reading the judgment, I may say that it seems to me, if I may respectfully say so, right, and the judgment which I have given is in accordance with the view taken by the Lord Chief Justice of

Northern Ireland. Even apart from the assistance which is to be derived from that judgment, I think, for the reasons which I have attempted to express, we are compelled to refuse these applications for orders of prohibition.

HUMPHREYS, J. : I agree with the judgment which has been delivered by my Lord and for the reasons expressed in that judgment. It is only out of deference to the arguments of the four eminent counsel which have been addressed to us in this case that I add some words of my own in order to state how the matter strikes me. A

It seems to me that there are two separate and distinct claims which have been referred by the Minister to the National Arbitration Tribunal, and that they may be dealt with as two separate claims. The first is stated in these words—I am reading from one of the documents in the case, a document in fact addressed to the Ardath Tobacco Co. :

The dispute arises out of a claim made by the union on behalf of its members as follows : That the rate of wages paid to those employees whose wages are below the standard rate of the Imperial Tobacco Co., Ltd., be adjusted to coincide with these rates. B

It seems to me that it is only necessary to read the terms of that trade dispute to see that it could not by any possibility be dealt with by a trade board. In terms it is stated to affect the persons to whom it is addressed, and it exempts from the proposed order what we are told is the largest employer in the tobacco trade in England, and that is the Imperial Tobacco Co. If there is one thing that is plain about the functions of a trade board, it seems to me to be this : that any order made by a trade board must be an order affecting the trade as a whole, as distinct from an order affecting the wages to be paid by a particular employer. The words at the end of sect. 3 (1) of the Trade Boards Act, 1918, relied upon by the applicants' counsel, do not alter that position, in my opinion, although it is true that the minimum rate of wage, the fixation of which is the sole function of a trade board under the Act may be fixed so as not to apply universally to the trade but only to apply either to some special process in the trade—that question does not arise here—or to a special area, which I understand to mean a geographical area—that does not apply here—or to any class of workers in the trade. In my opinion it would be absurd to argue, and it has not been argued, that the operatives employed by the first-named company, the Imperial Tobacco Co., form a class of workers in the trade. They obviously do not. In the result, therefore, in my opinion, that trade dispute is one which could not be submitted to a Trade Board, and the only objection which is made to it being referred to the National Arbitration Tribunal is that it could be submitted to a trade board. C D E

The second and only other matter which has been referred to is stated in these terms :

Where it can be established that a youth or a woman is performing work previously done by an adult male employee in the full sense payment shall be made at the full male adult rate for the job. F

It is true, as counsel for the trade unions has pointed out, that that does not affect, and does not purport to affect, the whole of the workers in the trade, but, we are told, that it would affect 98 per cent. of them. I am not prepared to say myself that that dispute could not be dealt with by a trade board, because I think that the youths and women mentioned in the claim which becomes the trade dispute might be described as forming a class of workers in the trade. However, for the reasons which have been given by my Lord—and I do not express them in my own language, in order to avoid vain repetition—I have come to the conclusion that the function in such a matter assigned to the Trade Board is a totally different function from that which has to be performed by the National Arbitration Tribunal. There is only one function, as I understand it, which can be performed by a trade board, and that is the fixing of a minimum rate of wage. Apart from that, they have no power to deal with a trade dispute at all, or to fix any rate of wages. As my Lord has pointed out, the *raison d'être* of a trade board is quite different from that which applies to the newly created body called the National Arbitration Tribunal. G H

For those reasons, therefore, I think that the application must fail. It is not sufficient to say that it is possible that a trade board might be able to deal with one of these trade disputes. What we are dealing with is the question

of prohibition, prohibition on the ground that there is no power in the Minister to refer this trade dispute—it clearly is a trade dispute, and I think I am right in saying that it was admitted in terms to be a trade dispute—to the National Arbitration Tribunal.

A It seems to me that what is asked for in the second of these two matters which have been referred to the National Arbitration Tribunal is not the fixing of a minimum wage for the trade. What is claimed is an order that youths and women who are doing men's work shall be paid men's wages, which is a totally different thing.

I turn next to the argument which has been addressed to us on the language of the Conditions of Employment and National Arbitration Order itself. It has been submitted that the first words of art. 1 govern the whole of Pt. I of the order, the words being :

B For the purposes of settling trade disputes which cannot otherwise be determined . . .

All I desire to say about that is that I am quite clearly of opinion, with my Lord, that whatever may be the effect of the introduction of these words, they cannot and do not limit the jurisdiction of the Minister or of the National Arbitration Tribunal.

C If that be right, what is there left in this case ? There is left an argument which has been employed by each of the four counsel for the applicants. It is put in different language, but the argument is the same argument. It was said by counsel for the first applicants, I think, that, in substance, what has been done here is to fix a minimum rate of wage. It was said by counsel for the fourth applicant that this is an effort to create a new minimum rate of wage, and I think counsel added "by a side wind." Counsel for the third applicant was particularly clear in putting it in this way, he said : "The effect of allowing

D the National Arbitration Tribunal to deal with these matters which have been referred to them by the Minister would be the creation of a new minimum rate of wage, and although that is not the form in which the application is made I invite the court to go behind the mere form and to go to the substance of the matter." In my opinion, those arguments, assuming they are correct—and I have already said I do not agree with them—and that it is true to say that the effect, or in substance the effect, of what has been done by the Minister here will

E be the same as that which might be done, if it had jurisdiction, by the Trade Board, will not justify an order of prohibition. If we were sitting as a court to decide which was the most appropriate tribunal to deal with these matters, the argument might be very cogent ; but we are sitting here dealing with a question of prohibition, prohibition on the only ground upon which prohibition can go, and that is that the Minister had no jurisdiction to do what he did ; or, putting it in another way, that the National Arbitration Tribunal has

F no jurisdiction to determine that which has been referred to it by the Minister. It is not the law of England that any tribunal set up by Parliament or by a statutory order can be prohibited from functioning, so long as it keeps within the terms of the statute or the order merely because there may be a different way, which that body cannot take, of arriving at the same result. I make that observation founded on the speeches in the House of Lords in a case to which

G I think reference ought to be made. It is quite true that the point which I am now developing has not been argued. It was not thought necessary, perhaps, to raise the point. Nevertheless it is one which I think cannot be lost sight of. If this case gets to the point where all that is left to the applicants is to say, and it is accepted that they are right in saying, that the effect of that which has been done by the Minister here will be the same as the effect would be if it were done by the Trade Board, I think *Lacey v. H. Lacey & Co., Ltd.* (4), in the

H House of Lords, and the opinions and references to the law upon this subject made by each of their Lordships are very worthy of consideration. The facts in that case were very much stronger for the applicants, who were asking for *certiorari* on the ground of want of jurisdiction, than they are in the present case. Lacey applied for and obtained an off-licence for his new shop, to sell intoxicating liquor. He had already an off-licence attached to another shop, and the justices, in hearing his application, asked him whether he would consent to surrender his present licence if they granted him the new licence, and Mr. Lacey said certainly he would do so ; and indeed it was in fact his intention to do so

because his lease of the old premises was just expiring. The owners of the old premises, as I have described them, were a firm of brewers, Lacon & Co. The licence was the licence of Laceby. Lacon & Co. opposed the application on the ground that it was in effect an application to remove the licence from the old premises to the new premises and that the statute under which the application for the new licence was made prohibited, by sect. 50, the removal of a licence from one set of premises to another without the consent of the owner of the premises from which the licence was to be removed. The licence was granted. Lacon & Co. then applied to a Divisional Court for a writ of *certiorari* for the purpose of quashing the order of the justices on the ground that the effect would be, although the form would not be, to remove their licence from their premises to the new premises, and their arguments found favour with the judges in the Divisional Court. Laceby appealed to the Court of Appeal, and the Court of Appeal upheld and agreed with the view of the Divisional Court. Laceby then took the matter to the House of Lords, and their Lordships were of opinion that he was perfectly right in his argument, which was, in short: "It does not matter whether the result of the new licence which has been granted to me on surrender of another licence has the effect of granting a removal or not. It is not a removal. That is the answer, and it is a sufficient answer." And the House of Lords said it was a sufficient answer. I do not propose to read the whole of the judgment of the EARL OF HALSBURY, L.C., because it deals to a great extent with the terms of the Licensing Act, and so forth, but his Lordship observes in the course of his judgment as follows, at p. 228:

... the question here is whether or not anything has been done which the justices were not at perfect liberty to do. It must be made out before any such order [that is the writ of *certiorari*] could be made and maintained as has been made by both the courts below that the magistrates acted without jurisdiction. Now, I quite follow what Mr. Lawson Walton and Mr. Foote have so ingeniously and earnestly pointed out, that the result arrived at may be the same as would have been arrived at by a "removal." Granted. But what then? The thing that the magistrates have done is not the thing which is contemplated by sect. 50 [of the Licensing Act, 1872,]; that is to say, not the same as regards the actual order. Whether it is the same thing in substance or not I will treat of in a moment, but it is not the thing. What they have done is, they have licensed premises, and that licence does not purport to be, and is not certainly upon the face of the instrument, the former licence which existed of the Five Ales [that was the name of the existing off-licence house] but it is an absolutely new licence.

At p. 229 his Lordship observed as follows:

It is all very well to say that it may come to the same thing; but where the magistrates are fettered by a statute which enables them only to act in a particular way, they must abide by that way. Here the magistrates on the affidavit laid before us say they were not asked to make an order for removal, and did not suppose they were making an order for removal; and when we look at the document itself there is no such thing as an order for removal to be found in the whole course of the proceedings, and yet your Lordships are asked to say that these proceedings are without jurisdiction; because, although everything that the magistrates did and everything that they intended to do was within their jurisdiction, it is said the effect produced is just the same as if they had made some other order which they never did make and never intended to make, and by this circuitous process of reasoning it is to be supposed the magistrates acted outside of their jurisdiction. My Lords, the observation immediately arises that where you are dealing with a subject-matter of this sort the form is part of the substance. It is a delusion to suppose that magistrates may do what may be equivalent to this, that, or the other. They are within the iron framework of a statute, and they have no jurisdiction to go beyond it. All that they did do, and all that they intended to do, was that they licensed a person to occupy new premises for the purposes contemplated by the statute.

At p. 230, LORD WATSON added these words:

I do not think it is enough to bring the case within the statutory requirement of the presence of the owner of the house that the proceedings of the justices shall be attended with precisely the same consequences as if they had been asked to make, and had in point of fact made, an order of removal. It is not enough to say, as some of the judges have said, that the two things are in substance the same. It is not enough to say that the result of either proceeding must be the same. The court must come to the conclusion, in order to bring the matter within the statutory prohibition, that what has been done is one of the things which the Legislature have prohibited.

If it is possible, LORD MORRIS was even more emphatic upon this subject. He said, at p. 231 :

... what is the objection to that licence which is good upon the face of it ? It is said that although it is a licence on the face of it as a grant for a new licence, yet it amounts to an order for a removal. Sometimes it is said "in substance," sometimes it is said "in effect," and sometimes it is said "the consequences are the same," but the argument is that it amounts to an order for a removal under s. 50 of the Licensing Act. As I have said, on the face of it it does not purport to be anything of the sort ; it purports to be what it is—a grant of a new licence.

Later LORD MORRIS observes that there are three different sets of notices provided by the statute. The first is a notice for a removal, the second is a notice for a grant of a new licence, and the third is an order for removal. Then he said, at p. 232 :

Why is it to be persevered in that he [Lacey] must be held to have applied for that which he did not apply for ? Why is it to be held as against the magistrates that they made an order, which they did not make, for a removal under sect. 50 because, forsooth, the consequences may be practically the same as if that proceeding had been taken ? That is a matter for legislation.

It seems to me that those opinions are not without value in considering the argument which has been addressed to us that in effect what has been done here might have been done by the Trade Board. Assuming, for the purpose of argument, that the Trade Board could have effected precisely the same result, in my opinion that would not be a ground for granting prohibition, inasmuch as it would still be said, and would have to be admitted, that in this case the Minister has made an order in a matter of a trade dispute. He has referred that trade dispute to a body constituted to deal with trade disputes, he has complied in every respect with the terms of the S.R. & O., 1940, No. 1305, under which he purported to have, and I think had, jurisdiction to refer the matter. *Prima facie*, it is not disputed that he had complete jurisdiction. I think he took the right view when he said he considered he not only had jurisdiction to make, but was under a statutory duty to make, a reference on the facts of this case.

For these reasons I agree with the judgment which has been propounded by my Lord, and I think these applications must fail.

ASQUITH, J. : I agree with the judgments delivered by my Lords, and I would add only a few sentences on a single point, that is on the construction of the words "which cannot otherwise be determined" in art. 1. It has been contended that those words mean "for the determination of which no other machinery, whether statutory or otherwise, exists." If they did mean that, in my view, that would not curtail the jurisdiction of the tribunal. But can they mean that ? The order must be read as a whole. Art 2 (2) provides that where suitable means of settling the dispute exist by virtue of an agreement, the Minister has to resort to those means, and do so unsuccessfully, before he can refer the dispute to the tribunal. The words in art. 1 are, in my view, no more than an anticipation, in language perhaps unnecessarily wide, of this later provision. Indeed, I am not sure that the language is even unnecessarily wide, for while the words "which cannot otherwise be determined" are capable of meaning "which cannot be determined by any other means," they are equally capable of meaning "which cannot be determined by certain specific other means," namely the means specified below in art. 2 (2), and this is, in my view, their true meaning.

There is nothing else I wish to add.

Applications dismissed with costs.

Solicitors : *Coward, Chance & Co.* (for the first applicants) ; *D. M. Oppenheim* (for the second applicants) ; *William Charles Crocker* (for the third applicants) ; *H. W. & S. Patey* (for the fourth applicants) ; *Pattinson & Brewer* (for the trade unions) ; *Solicitor for the Ministry of Labour and National Service* (for the Minister of Labour and National Service and the National Arbitration Tribunal).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

P. ROSEN AND COMPANY, LTD. v. DOWLEY AND SELBY.

[KING'S BENCH DIVISION (Atkinson, J.), May 31, 1943.]

Arbitration—Costs—Discretion of arbitrator—Existence of reasons for not giving successful party full costs—Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57), s. 5 (4), (5), (6).

The claimant was awarded compensation under the Civil Defence Act, 1939, for disturbance upon part of the premises let to him being utilised for an air-raid shelter. The claimant did not name any sum which he would be willing to accept nor did the respondent make any offer. The arbitrator gave the claimant £78 towards his costs. It was contended that this was a wrong exercise of the arbitrator's discretion :—

HELD : since the arbitrator may have taken the view that more evidence was called than was necessary or that more costs were incurred than was reasonable, it was impossible to say that there was no material on which he could exercise his discretion and this was not a case in which the court could interfere.

[EDITORIAL NOTE.] Costs are wholly in the discretion of a judge trying a case and, if it is possible, still more are they wholly in the discretion of an arbitrator. The court is, therefore, slow to interfere with the discretion of an arbitrator, especially where he is one of the official arbitrators dealing with matters well within his experience. The award of such arbitrator will not be interfered with although the court cannot, from the nature of the proceedings, say exactly why the arbitrator has not awarded the successful party his full costs.

AS TO COSTS UNDER THE ACQUISITION OF LAND (ASSESSMENT OF COMPENSATION) ACT, 1919, see HALSBURY, Hailsham Edn., Vol. 6, pp. 111, 112, para. 114; and FOR CASES, see DIGEST, Vol. 11, p. 293, No. 2211.]

Cases referred to :

- * (1) *Bradshaw v. Air Council*, [1926] Ch. 329; Digest Supp.; 95 L.J.Ch. 499; 135 L.T. 538.
- * (2) *Lloyd del Pacifico v. Board of Trade* (1930), 46 T.L.R. 476; Digest Supp.
- (3) *Donald Campbell & Co., Ltd. v. Pollak*, [1927] A.C. 732; Digest, Practice, 861, 4061; 96 L.J.K.B. 1093; 137 L.T. 656.
- * (4) *Ritter v. Godfrey*, [1920] 2 K.B. 47; Digest, Practice, 871, 4129; 89 L.J.K.B. 467; 122 L.T. 396.

MOTION to set aside so much of an award of an official arbitrator as dealt with costs. The facts are fully set out in the judgment.

A. S. Diamond for the appellant.

Harold B. Williams (for *G. D. Squibb*) for the respondent.

ATKINSON, J. : The claimant was entitled, under the Civil Defence Act, 1939, to compensation for disturbance of his business; and to a reduction of rent in consequence of part of the premises leased to him being utilised for an air-raid shelter. Under that Act the amount due must be determined by an official arbitrator in accordance with the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919. The parties failed to agree the amount of compensation payable and it had to be ascertained by an official arbitrator. The matter was dealt with at a hearing which took about a day and a half. The claimant was awarded a sum very little less than the amount claimed; but the arbitrator did not give him his costs. He merely awarded him £78 towards them. It is said that he had no grounds for depriving the claimant of the bulk of his costs; and that there had not been a judicial exercise of his discretion as to costs.

The sections as to costs are incorporated by reference from the Acquisition of Land (Assessment of Compensation) Act, 1919; and one has to refer to that Act to ascertain the powers of official arbitrators with regard to costs. Those powers are set out in sect. 5 (4), (5) and (6). In substance they say that the costs of the arbitration shall be in the discretion of the official arbitrator :

... who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and the official arbitrator may in any case disallow the cost of counsel.

By subsect. (5) he may himself tax the amount of costs ordered to be paid, or may direct in what manner they are to be taxed.

Those two subsections follow two rather long provisions, the substance of

which is this. If the claimant wants to put himself in a very strong position as to costs, he can make an unconditional offer in writing stating the sum he is prepared to accept, which may be something materially less than what he has claimed; and if he recovers more than that, he is entitled as of right to his costs. Similarly, the respondent can make an offer—the offers are sealed—and, if less is recovered than he has offered, he is entitled as of right to his costs in the absence of special circumstances.

A In this case neither of those things was done: the claimant did not put himself in that safe position; he had not said what he would take, or that he would take anything less than his claim; and the respondent had made no offer at all. Therefore, the arbitrator was not fettered at all by either of these provisions; and he was left with the discretion stated in the section.

B There are only three cases to which I need refer. The first in order of date is *Bradshaw v. Air Council* (1). That case was exactly like this case, in that it was an arbitration arising under the Acquisition of Land (Assessment of Compensation) Act, 1919, where the claimant had recovered more than the respondent had offered; and the official arbitrator awarded him £100 costs. It was there said that that was a bad exercise of his discretion because there were no grounds whatever for depriving him of the costs which he had incurred. ROMER, J., said this, at p. 336:

C In these circumstances the arbitrator, in my opinion, had an absolute discretion as to the costs, unfettered by any of the rules, written or unwritten, which govern judges of the High Court in exercising the discretion as to costs which is imposed on them. If, therefore, the arbitrator here had directed that in the circumstances there should be no costs of the arbitration I do not see how the court could have interfered.

D With the great respect which everybody must have for anything that LORD ROMER has ever said, I think that was rather over-stating the position of the arbitrator. It must be remembered that awards under this section which we are considering are almost precisely the same as those under the Arbitration Act, 1889. Indeed, the words in the Arbitration Act, 1889, are a little stronger, because they have the two words “and settle,” which look as if they were directed to awarding a lump sum for costs. In any event, the Arbitration Act, 1889, certainly is no weaker in language than the section of the Acquisition of Land (Assessment of Compensation) Act, 1919, to which I have referred. In *Lloyd del Pacifico v. Board of Trade* (2), WRIGHT, J., as he then was, was dealing with a similar application to this. I need not go into the facts; but WRIGHT, J., said this, on p. 477:

E The discretion of an arbitrator to deal with costs depended on the incorporation in the submission of the provisions of the Arbitration Act, 1889. Those provisions were identical with the provision in R.S.C., Ord. 65, r. 1, and the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 31 and 50, which regulated the discretion of a judge of the Supreme Court. The extent of a judge's discretion had been discussed in *Donald Campbell & Co., Ltd. v. Pollak* (3), and it was clear that that discretion could be exercised only judicially. He saw no reason why the duty of an arbitrator in exercising his discretion on the question of costs should in any way differ from the duty of a judge, and if in his award he stated reasons for which he had acted and the court could see from those reasons that he had not exercised his discretion judicially it ought to set the award aside.

G I prefer that statement of the law to that of ROMER, J., in *Bradshaw v. Air Council* (1). I think that an arbitrator must exercise his discretion judicially; but at the same time I see the very greatest difficulty in interfering with the exercise of an arbitrator's discretion, unless he has indicated reasons in his award which show that the discretion has not been exercised judicially. It is to be noted that it is only where the reasons appear on the face of the award that WRIGHT, J., considered that the court has power to interfere.

H There is one other passage which I think is helpful, and that is a quotation from the judgment of LORD STERNDALÉ, M.R., in *Ritter v. Godfrey* (4), which was quoted with approval by VISCOUNT CAVE, L.C., in *Donald Campbell & Co., Ltd. v. Pollak* (3), at p. 809. LORD STERNDALÉ was there dealing with the discretion of the judge, and he says this, at pp. 52, 53:

But there is such a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some

grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial, and this court cannot interfere with his discretion.

Bearing that in mind, I turn to another passage in the judgment of ROMER, J., in *Bradshaw v. Air Council* (1), on p. 337, with which I respectfully agree :

Then it is said that he had no material before him on which he could exercise his discretion inasmuch as he did not know the amount of the costs which had been incurred by the claimant. But in all these cases, where the arbitrator has to exercise his discretion as to the way in which the costs of the arbitration proceedings are to be borne, he is necessarily ignorant of the exact amount of the costs on either side. An arbitrator may direct one party to pay the costs of the other party without in the least knowing the exact amount of those costs, and if he does so his award cannot be interfered with merely upon that ground. On the other hand, it is reasonably obvious that an arbitrator under the Act is a person who must have a fairly shrewd idea as to the sort of sum to which the costs on either side will come. The arbitration proceedings take place before him, and, indeed, as already pointed out, he may himself tax the costs when the bills are delivered. He is therefore treated by the legislature as being a judge of the amount of the costs which ought reasonably to be incurred in connection with the proceedings before him.

If one compares that with the passage in the opinion of VISCOUNT CAVE, L.C., beginning two or three lines from the bottom of p. 811 in *Donald Campbell & Co., Ltd. v. Pollak* (3), where he says this :

... the court has an absolute and unfettered discretion to award or not to award [costs]. This discretion, like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case.

It is clear that ROMER, J., was stating just the same principle—"except for some reason connected with the case"—and saying that the arbitrator is in a very good position to form an opinion as to the costs which ought reasonably to be incurred in connection with the proceedings before him.

If I bear in mind what is there said, it seems to me quite impossible to say that this arbitrator had no material before him which could possibly justify an exercise of the discretion to which he gave effect by awarding the sum of £78 costs to the applicant here. It may be quite true that he did not know what costs had been incurred ; but he was in a very good position for forming an opinion as to the costs which ought reasonably to have been incurred. He may have exercised his discretion wrongly ; but that is not for me. If he had any grounds whatever on which he could exercise his discretion in the way he did, I have no power to interfere. Unless the court is satisfied beyond all doubt that there was no ground whatever for exercising the discretion in the way he did, it cannot be said affirmatively that the arbitrator was wrong in what he did.

One can well understand his view not to be an unreasonable one in this case. Here is an obligation imposed upon owners of premises to build shelters, not for their own benefit but for the benefit of the people who live in the buildings in question. They have to do it ; and in order to do it they have necessarily to interfere with the comfort of the tenant at the bottom and render his premises less valuable ; and they have to submit to a reduction in his rent and to pay compensation for any inconvenience caused. But, when all is said and done, there may not be any very good reason why they should pay all the costs of the arbitration any more than that the claimant should bear his share. It is a question between them. They have not been able to agree. The arbitrator may very well take the view, in cases of this kind, that the minimum expenditure is the reasonable expenditure. He may think that it is altogether wrong to saddle the owners with the cost of two counsel : he may think that one counsel is ample. He may think that there was an unnecessary amount of evidence called—I do not know. A number of witnesses were called ; their names are set out in the affidavit. He may have taken the view that one expert witness was enough ; or, at any rate, that the whole thing could have been done much more cheaply than it was. Anyhow, he formed the view that that particular sum was the amount of costs which ought reasonably to have been incurred in the circumstances ; and it seems to me it is quite impossible for the court to interfere.

I doubt whether it is for me to express any opinion on the subject ; but I must say that I think it is more convenient, if a judge or an arbitrator thinks

that costs have been unnecessarily incurred, to fix a proportion. He does not know what costs have been incurred. He does not know all the difficulties which may have arisen before the hearing. It may be it is wiser to give a proportion of the costs, if he thinks the case has been too extravagantly conducted. But official arbitrators know far more about what is the best way of dealing with these matters than I can know. I can only interfere when it is clear that they have done something which they have no power to do. I am not satisfied about that here; and, therefore, I must dismiss this application.

A *Motion dismissed with costs.*

Solicitors: *Herbert Baron & Co.* (for the appellant); *Geo. Brown, Son & Vardy* (for the respondent).

[*Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.*]

B MARSHALL OR WILKINSON v. WILKINSON.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Macmillan and Lord Clauson), **March 9, 11, 12, 1943.**]

Divorce—Scots law—Desertion—Adultery of pursuer before requisite statutory period of desertion elapsed—Whether a bar to relief—Divorce (Scotland) Act, 1938 (c. 50), s. 1 (1) (a).

C The appellant, who was married to the respondent in 1912, resided at Hawick, Scotland. In 1925 the respondent went to Canada, it being arranged that in due course he would send for the appellant and their children. In July, 1926, the respondent wrote to the appellant stating that he had uplifted the passage money previously deposited by him for the passage to Canada of the appellant and the children. Since that date the respondent had not evinced any intention to return to the appellant or to provide a common home and the only communication the appellant received from him was in reply to a letter written by the appellant to the respondent in September, 1929, in which she informed him that she was pregnant and to which the respondent replied in effect that he was going to have the appellant watched. The appellant brought an action concluding for divorce on the ground of desertion, admitting that she had committed a single act of adultery in June, 1929, and that she had given birth to an illegitimate child in February, 1930. In reply to a letter from the appellant's solicitors at the time of the service of process the respondent stated that he did not intend to defend the case. On behalf of the appellant it was contended that, since the Divorce (Scotland) Act, 1938, the adultery committed before the requisite statutory period of 3 years of desertion had elapsed did not preclude her from obtaining a divorce if the adultery did not influence the respondent's original or continued desertion:—

F HELD [VISCOUNT SIMON, L.C., and LORD ATKIN *dissenting*]: from the moment that the adultery was committed the appellant had lost her legal right to adherence by the respondent and the continuance thereafter of his non-adherence was not desertion within the meaning of the term in Scotland.

G [EDITORIAL NOTE. When the legislature uses a particular word in a statute it is assumed to have before it and in mind all that has been said as to the meaning of that word. This is more particularly the case where the word is a technical term of the law—a "word of art"—and has from time to time been considered in decided cases. When in the Act here considered Parliament decided to use the word "desertion," in the words of LORD CARMONT, that word "lay at hand encrusted with the case law of ages." The House has by a majority held that the word "desertion" in this Act must be construed subject to this incrustation. The decision is only binding as to the law of Scotland, but it has to be remembered that, when the English Act of 1937 was passed, the word desertion lay at hand encrusted, not perhaps with the law of ages, but with decisions extending over some 80 years and many of them particularly difficult to reconcile with the remainder. While it is unlikely that this decision will have any direct bearing upon problems of construction arising on the English Act, the opinions are important on a general question of the construction of statutes and on statutes dealing with divorce in particular.

H AS TO PETITIONER'S ADULTERY AS BAR TO RELIEF, see HALSBURY, Hailsham, Edn., Vol. 10, pp. 686-690, paras. 1018-1024; and FOR CASES, see DIGEST, Vol. 27, pp. 359-367, Nos. 3443-3529.]

Cases referred to:

- (1) *Bell v. Bell*, [1941] S.C. H.L. 5; *revsg.* [1940] S.C. (Ct. of Sess.) 229.
- (2) *Mackenzie v. Mackenzie*, [1895] A.C. 384; 27 Digest 322, 3008.
- * (3) *Herod v. Herod*, [1939] P. 11; [1938] 3 All E.R. 722; Digest Supp.; 108 L.J.P. 27; 159 L.T. 530.
- (4) *Watson v. Watson* (1890), 17 R. (Ct. of Sess.) 736.
- (5) *Hunter v. Hunter* (1900), 2 F. (Ct. of Sess.) 771.
- (6) *Auld v. Auld* (1884), 12 R. (Ct. of Sess.) 36.
- (7) *Wickins v. Wickins*, [1918] P. 265; 27 Digest 348, 3292; 119 L.T. 268.
- (8) *Yorkshire Insurance Co. v. Clayton* (1881), 8 Q.B.D. 421; 31 Digest 97, 2366; 51 L.J.Q.B. 82; 45 L.T. 697; *affg.*, 6 Q.B.D. 557.
- (9) *Re Cathcart, ex p. Campbell* (1870), 5 Ch. App. 703; 22 Digest 413, 4230; 23 L.T. 289.

APPEAL by the pursuer from a decision of the First Division of the Court of Session, LORD KEITH dissenting, dated June 26, 1942, dismissing her action concluding for divorce. The facts are fully stated in the opinion of VISCOUNT SIMON, L.C.

J. L. Clyde, K.C., and *Edward J. Keith* for the appellant.

The respondent was not represented on the appeal.

VISCOUNT SIMON, L.C.: My Lords, the pursuer, who resides at Hawick, has brought this action in the Scottish courts against her husband, whose address is in Toronto, for divorce on the ground of desertion, and the suit is undefended. For the purpose of deciding the important issue which now arises, the facts may be taken to be as follows.

The pursuer and defender were married in December, 1912, and made their home in Scotland. In 1925 the defender went to Canada, and it was at first arranged between the parties that when he had settled down there he would send for the pursuer and their children. Later on, he changed his mind about this and the LORD ORDINARY, LORD KEITH, was satisfied on the evidence that his desertion of his wife commenced in July, 1926. The pursuer's counsel accepts this date as correct. Since that date the defender has never evinced any intention to return to her or to provide a common home. The pursuer in her summons and in her evidence disclosed the fact that she had given birth to an illegitimate child in February, 1930, and she placed the act of adultery—according to her an isolated act—early in June, 1929. As the court is not competent to grant a decree of divorce for desertion unless the defender has persisted in such desertion for a period of not less than 3 years, the question arises whether this period of desertion is proved, having regard to the fact of the pursuer's adultery before the 3 years were up. In reply to a letter from the pursuer's solicitors at the time of the service of process upon him, the defender, who had already had notice from his wife of her misconduct, replied that he did not intend to defend the case in any manner or form. LORD KEITH's view, which he expressed when the case was referred by him to the First Division, was to the effect that the act of adultery had no effect on the attitude or state of mind of the deserting spouse, and produced no change in the willingness of the deserted spouse to resume cohabitation. If these considerations were material, the case would have to go back to the First Division to find the facts conclusively.

The other judges of the First Division (LORD PRESIDENT NORMAND, LORD MONCRIEFF and LORD CARMONT) have, however, taken the view that the adultery of the pursuer within the 3 years during which desertion must continue if a decree of divorce is to be founded upon it constitutes an absolute bar in all circumstances, and that it made no difference whether his wife's unfaithfulness affected the conduct and decision of the defender or not. This view is expounded by LORD PRESIDENT NORMAND as being based on the implication that a deserted spouse must be entitled to claim as of right the adherence and cohabitation of the deserting spouse during the 3 years, and has not by his or her own misconduct lost that right. LORD MONCRIEFF puts the same proposition in the following passage:

In order that there may be desertion in cases of separation, there must be one spouse who insists on the separation and one spouse who insists against it. There must be one spouse who declines to return to the consort of lives, and one who not only insists, but is qualified at law to insist, upon the return of the absentee. Taking for purposes of illustration the case in which the wife is the pursuer, there must of course be a deserting husband, but equally of course there must also be a deserted wife. When the

situation is that, after desertion by her husband, the deserted wife has taken a paramour with whom she has committed adultery, she has in my opinion ceased to be "deserted" by her husband, although he continue to live apart, as having lost her right to insist upon his return. There is still, no doubt, an absent husband; but, seeing that there is no longer a deserted wife, the absentee has ceased to be a deserter.

The contrary view of LORD KEITH is thus expressed :

A The commission of an act of adultery is, no doubt, a breach of conjugal duty, but adultery committed by a spouse suing for a decree of divorce for desertion does not in my opinion necessarily destroy the act of desertion upon which the action is based. It may break the continuity of the desertion if it can be thought that, but for the adultery, the deserter might have ceased from deserting, or possibly if it indicates acquiescence in the desertion on the part of the deserted spouse. But, on the other hand, it may be plain that the adultery brings into play no new operating cause in the relations of the parties, and in such case it should, in my opinion, be discarded as having no relevance to the question of the desertion. It could however be founded on for the purpose of a cross-action for divorce.

B My Lords, my own opinion would be in favour of the view expressed by LORD KEITH, and I must set out my reasons.

C Divorce for desertion was unknown to the common law of Scotland. In that country, as in this, dissolution of marriage on this ground derives entirely from statutory provisions, and the only statute now in operation in Scotland is the Divorce (Scotland) Act, 1938. The question, therefore, simply is whether, on the assumptions of fact above indicated, relief can be given to the pursuer under the existing statute.

D The original statute, the Scots Act, 1573, now repealed, permitted divorce for desertion to be granted after a period of 4 years only if elaborate preliminary procedure had been carried through. I gave a full account of this procedure in the course of my opinion in *Bell v. Bell* (1). For present purposes, the important point to note is that the repealed statute positively required an action for non-adherence to be first brought by the pursuer and an order for adherence to be obtained before, at the expiry of 4 years of *obstinat defectioun*, the decree for divorce could be made. One result of this was that adultery by the pursuer in the interval, which gave the defender a good answer to the claim for adherence, had the further consequence that a divorce for desertion could not be obtained. The unfaithfulness automatically disqualified the pursuer from succeeding in his preliminary action for non-adherence. Hence the main action must have failed.

E By the Conjugal Rights (Scotland) Amendment Act, 1861, s. 2 (now also repealed) the necessity for bringing this preliminary action was removed, but the same preliminary condition for success in the proceedings for divorce for desertion was imposed as before and had to be satisfied in the course of those proceedings, i.e., the pursuer had to establish in his suit for divorce that he or she was entitled to an order for adherence, and hence was defeated by his or her adultery no less than by a genuine offer by the defender to return to cohabitation. In *Mackenzie v. Mackenzie* (2) LORD WATSON laid it down, at p. 400, that the object of sect. 2 of the Act of 1861 was :

F . . . not to alter the substance of the older statute by giving any new right of action to the pursuer, or any new ground of excuse to the defender, but to simplify procedure by allowing the pursuer to prove non-adherence in his suit for divorce, and dispensing with the necessity for a separate action of adherence and all other preliminaries.

G But now that sect. 2 of the Act of 1861, together with the old Act of 1573, have been completely repealed, I cannot see how the preliminary condition imposed by the Act of 1573, and continued in a modified form by the Act of 1861, continues to apply. The order for adherence in Scots law is in substance the same as the order for restitution of conjugal rights in English law. The right to obtain such an order is not, in my opinion, included in the concept of "desertion" in the sense that, if the order could not be obtained, desertion cannot in any circumstances exist. The view I am expressing corresponds with the view that has been taken in the English courts of the concept of desertion in the Matrimonial Causes Act, 1937 : see *Herod v. Herod* (3). The construction of the English Act, which is not in the same terms, is, however, not in question in this appeal. In Scotland the right to obtain an order for adherence was by the earlier statutes made a condition precedent to a decree of divorce for desertion ; but those statutes are repealed out and out, and the

requirement that this condition should be satisfied has, therefore, been cancelled.

The majority in the Court of Session seek to meet this point by taking the view that in Scots law "desertion" necessarily implies a right in the deserted party to demand adherence. With the greatest respect to those who take that view, this seems to me to be confounding the condition precedent (now cancelled by statute) with that to which it is a condition precedent. "Desertion" means, as it has always meant, separation against the wish of the spouse seeking the remedy of divorce. Separation by mutual consent cannot constitute desertion. But it seems to me impossible, in view of the language of sect. 7 of the Act of 1938, to regard the earlier statutes as continuing to operate upon the present law of Scotland for any purpose whatever. If Parliament had desired to retain the condition imposed by the earlier statutes and merely to reduce the statutory period for desertion from 4 years to 3, then Parliament would not have repealed the former statutory provisions altogether, but would have left the statute of 1573 and sect. 2 of the Act of 1861 upon the statute book, while amending the law by substituting the new period for the old.

The whole question, in my view, turns on the language of the Divorce (Scotland) Act, 1938. Sect. 1 (1) (a) of that Act provides as follows :

Without prejudice to the power of the court to grant decree of divorce on the ground of adultery, it shall be competent for the court to grant decree of divorce on any of the following grounds, that is to say, that the defender (a) has wilfully and without reasonable cause deserted the pursuer and persisted in such desertion for a period of not less than three years . . .

If the defender in the first instance deserted the pursuer "wilfully and without reasonable cause" and did not return within 3 years, does the period of desertion necessarily cease from the mere fact that the pursuer commits adultery before the 3 years are up? If the pursuer's adultery should be regarded as the cause of the defender failing to return, undoubtedly that cause is reasonable and the period of desertion would terminate. But what if the adultery makes no difference to the defender's decision to persist in withdrawal? A crucial test for the proper construction of the section is provided by the case where the absent defender never hears of the adultery at all until after the 3 years are up. If so, he cannot have been led to persist for 3 years in his withdrawal because of it. In such a case, to adopt LORD KEITH's phrase, it has "no relevance to the question of desertion." A similar argument goes to show that the adultery of the pursuer as to which the defender is wholly indifferent cannot be regarded as the cause of the defender's persistence in desertion. If the defender is determined in no circumstances to return and the misconduct of the pursuer is not the cause of the continued withdrawal at all, I do not see how the pursuer's adultery can be regarded as terminating the desertion. No doubt it might be the basis of a cross-action for divorce, but if the deserter has made up his mind to desert whatever happens to the other spouse or however the other spouse behaves, and persists in that attitude for 3 years, the language of sect. 1 of the Act of 1938 appears to me to be satisfied.

While our judicial duty in this matter is limited to putting a proper construction on the words of the statute, it is legitimate to point out what are the results of the other construction. The situation of an abandoned wife will vary greatly in different cases. She may be a young and attractive woman without resources of her own, who is abandoned by her husband when she ought to have his care and protection, and the very circumstances in which she is abandoned may in some cases expose her to dangers and temptations which lead her to an act of unfaithfulness. Indeed, the husband may have done his best to contrive her downfall. Can it be the proper construction of the section in the Statute of 1938 that this act of frailty disentitles her to say that she has been deserted by a husband who has gone off with another woman and who makes it plain that he will not come back in any event? On the other hand, one can imagine cases where it was the conduct of the wife in the common home which had almost driven her husband to abandon her and her subsequent adultery determines him never to return to her.

In the course of my opinion in *Bell's* case (1), I indicated my own doubt as to whether the words of the statute "it shall be competent for the court" were not intended to leave a discretion as to whether, on a set of proved facts, the court should grant the decree. I still do not see how the language used "it

shall be competent for the court to grant decree of divorce" can be regarded as imposing an absolute duty to act regardless of circumstances. The fact that there is no "recrimination" in the Scots law of divorce seems to me to confirm the interpretation that the court has a certain discretion. But without deciding that point, I have come to the conclusion on the words of the statute (and that is all we have to go by) that, if the facts of this case turn out to be as LORD KEITH was prepared to hold, the court is not necessarily debarred from granting to the pursuer the remedy for which she asks.

A If my view prevailed, the case should go back to the First Division, to which it has been transmitted by the LORD ORDINARY, to ascertain whether the lapse of the pursuer operated as a cause of the defender's persistence in absence and, if not, to grant the decree.

B LORD ATKIN [read by LORD CLAUSON]: My Lords, the short point in this case is whether a spouse who brings an action for divorce for desertion against the other spouse and admits or is proved to have committed adultery in the period of three years for which persistence in desertion is necessary is thereby debarred absolutely from any right to divorce. The facts in the present case have not been finally determined. In the undefended action for divorce by the wife the LORD ORDINARY, LORD KEITH, reported the case to the Lower House: and the learned judges of the First Division (LORD KEITH, who sat with them, C dissenting) held as a matter of relevancy that the admission of adultery on the record disintitled the pursuer to a divorce. It was not disputed at the bar by counsel for the appellant, who conducted the case with conspicuous force and candour, that, before the recent Act, the Divorce (Scotland) Act, 1938, the law of Scotland was in accordance with the decision of the Court of Session. The deserted spouse had to show a willingness to adhere on his part, and a breach of the duty to adhere on the part of the deserter. Adultery by the deserted D spouse relieved the other from the duty to adhere, and desertion thereafter ceased to exist. The question is whether since the Act of 1938 the law is the same. My Lords, I hope to show that the Scots law of divorce for desertion is now regulated entirely by the Act of 1938, and that to decide such a case by the principles of the former law, I venture to think, defeats the express words of the legislature and becomes a dangerous anachronism.

E The full title of the Divorce (Scotland) Act, 1938, is "An Act to amend the law of Scotland with regard to divorce and dissolution of marriage." It is important to remember that at the time when it was passed the law of Scotland with regard to divorce enabled a spouse to obtain a divorce on two possible grounds: adultery, and desertion for a period of 4 years. The power to grant divorce on the ground of desertion was entirely statutory, depending upon the Act of the Parliament of Scotland, 1573, and the Conjugal Rights (Scotland) Amendment Act, 1861, both of which the new Act repealed. It will be seen F that the Act, leaving the law of divorce for adultery standing, proceeds to provide for the future 4 grounds of divorce: (a) desertion, (b) insanity, (c) cruelty, (d) sodomy. It provides as follows:

G 1 (i). Without prejudice to the power of the court to grant decree of divorce on the ground of adultery, it shall be competent for the court to grant decree of divorce on any of the following grounds, that is to say, that the defender (a) has wilfully and without reasonable cause deserted the pursuer and persisted in such desertion for a period of not less than three years . . .

Then follow (b), (c) and (d) as above, all new grounds in the law of Scotland.

H That the law was altered by reducing the period of desertion from 4 years to 3 is, of course, obvious; but subject to this change I understand the judgments of the Court of Session to say that the word "desertion" had acquired a legal meaning in the old law, and must be taken to be used in the same meaning in the new law. To use an expressive phrase of LORD CARMONT in the Court of Session in *Bell v. Bell* (1), at p. 264:

The word "desertion" lay at hand encrusted with the case law of ages.

Applying this view the LORD PRESIDENT holds that the word:

. . . connotes a parting from the deserted spouse in breach of matrimonial duty, and that it implies that the deserted spouse was entitled to claim as of right the adherence and cohabitation of the deserting spouse during the three years, and had not by his or her own misconduct lost that right . . . If desertion implies a breach of matrimonial duty committed against a spouse who is not in breach of the fundamental

matrimonial duties, and is therefore entitled to insist upon their fulfilment towards himself or herself, it necessarily follows that an act of adultery committed within the period of three years from the commencement of the desertion is a complete defence to an action of divorce founded upon the desertion. It does not matter whether the act of adultery was brought to the knowledge of the defender in the action of divorce or not, for the commission of adultery deprives the pursuer of the right to insist in the action.

My Lords, I cannot agree that it is permissible to construe an amending Act in this fashion. There is nothing to indicate that, when the legislature destroyed, as it did by repeal, the whole and sole foundation for the former law, it intended the incrustations of former decisions to remain, so that the words used in the new Act come into force with the incrustations still upon them. The effect of the decision is that the only amendment made in the law of divorce for desertion is the alteration of the period of 4 years to 3, a very limited change which I venture to think would have been expressed in very different language. After considering the history of the former statutes and the present decision, if the present decision stands, one seems forced to the conclusion that in this branch of the law the more it changes the more it means the same thing. It will be observed that when the legislature intends to introduce provisions of the former law it has no difficulty in saying so, as, for instance, in sect. 1 (c):

... has been guilty of such cruelty towards the pursuer as would justify, according to the law and practice existing at the passing of this Act, the granting of a decree of separation *a mensa et thoro* . . .

Again the Act, in sect. 2 (1), finds it necessary to complete what I consider to be the new code of divorce by providing that grant of decree on the ground *inter alia* of desertion should have the like effect on rights of property as if the decree had been granted on the ground of adultery: an express application of the old and surviving law of divorce for adultery to the new law of divorce for desertion.

It is said that the word "desertion" in the new Act has a well-established meaning in Scots law and must be used in the same sense in the new Act. No doubt where one finds the words "desert" and "desertion" in an Act governing rights in Scotland, one must ascertain their meaning in accordance with the law of Scotland that has to be applied, but for this purpose the only meaning which has to be supplied is the meaning which is not only that of Scotland, but, I venture to think, of every country whose laws regulate matrimonial obligations in the English language "an intentional withdrawal from the matrimonial *consortium* without just cause." In the present case the statute of 1938 defines all that is necessary beyond the element of withdrawal from *consortium*. It expressly contains all the other elements of the definition: "has wilfully and without reasonable cause" deserted. This relates to an act and a point of time; the other requisite is similar "has wilfully and without reasonable cause persisted in such desertion," i.e., the condition brought about by the first act referred to. There is nothing about adherence or breach of matrimonial duty on the part of the deserted spouse. That is all covered by the conception that there must be no reasonable cause for (a) deserting, (b) persistence in deserting. I notice that the LORD PRESIDENT relies on the statement of LORD MACMILLAN in *Bell's* case (1), at p. 26, that the word "desertion" as used in the Act of 1938

... means, as it always has been held to mean, the wilful and unjustifiable withdrawal from cohabitation of one of the spouses against the will of the other.

If in this definition "unjustifiable" means what the Act calls withdrawal "without reasonable cause," I see no objection to it, except that it cannot be logically applied as a definition of desertion in the Act, for the Act already prescribes that desertion is to be wilful and without reasonable cause. But if "unjustifiable" is given a different connotation from "without reasonable cause" and there is built up thereon the conception of the former law that matrimonial misconduct of the deserted spouse whether known or not necessarily prevents the continuance of abandonment of *consortium* from being unjustifiable, I, with the greatest respect, demur. To desert "without reasonable cause" must, to my mind, indicate that there has been no happening which in fact has reasonably caused the deserting spouse to desert, and, if he or she does not know of such happening, then for him or her it cannot possibly be the cause of his deserting act. Similarly of persistence in the original desertion. For the same reason, if it can be established that an event has happened which might have

constituted a reasonable cause for the other's persistence in remaining apart, yet if the deserting spouse knowing the fact is not influenced by it, then for him it is not a cause of his continued desertion. Nothing could illustrate this point better than the case which is unfortunately not infrequent. A husband goes off with another woman, sets up house with her, has children by her, but the wife cannot trace him so as to prove adultery. He may have gone abroad. It is obvious that he has definitely renounced his obligations to his former wife. He has no intention to return, and no conduct of hers will have any effect on his intention. Nothing that she does, therefore, in these circumstances, is the cause of his staying away, though in different circumstances where he might contemplate returning, the wife's conduct might reasonably cause him to remain apart. It is a matter of common knowledge that occurrences such as I have mentioned were one of the causes why relief by way of divorce for desertion was given to spouses in England, just because they could not prove adultery; and I am satisfied that the same considerations were present to the legislature when they determined to give the same relief to Scotland. In England adultery by the wife would be taken into account to see whether the desertion was without reasonable cause. If it had no causal effect on the husband's conduct then desertion would be established, but according to the English statute, the court would exercise its discretion in accordance with the Supreme Court of Judicature (Consolidation) Act, 1925, s. 178, as amended by the Matrimonial Causes Act, 1937, s. 4. In a case where a young woman was left economically dependent there is very little doubt how this discretion would be exercised. In Scotland the question would not arise for matrimonial misconduct in the pursuer is not in itself a bar to a divorce, admittedly in all cases except in desertion, and, as I think, not in desertion unless it has operated as a cause.

I think, therefore, that, apart from authority, the law in Scotland as to desertion made a fresh start with the Statute of 1938 which takes the place of the former statutory law. But, if I were mistaken in coming to this conclusion apart from authority, I think that the case of *Bell v. Bell* (1) establishes it. In that case the question was whether the pursuer, the husband, in an action for divorce on the ground of desertion was bound to aver willingness to adhere up to the commencement of the action or only during the 3 year period founded on. He had averred the latter so that it was unnecessary to consider whether even that averment is now necessary, a point upon which I venture to think much may be said to the contrary. But the former proposition had been maintained by a majority of the judges of the Court of Session, and, as I understand their judgments, upon the ground that such was the law before the Act of 1938, and that it had not been altered. There was some doubt whether the authorities established such to have been the law, but in any case the majority so held. In this House the decision was that it was no longer necessary so to aver: and it appears to me that the majority of their Lordships expressly decided on the ground that the old law was superseded by the new Act. At p. 8 VISCOUNT SIMON, L.C., says, :

... the whole of the existing law authorising divorce in Scotland for desertion is to be found in this last Act.

At p. 15 VISCOUNT MAUGHAM says :

If, then, we are thrown back on the words of the Act, without any good reason for following decisions and a practice which I regard as no longer applicable . . .

At p. 27 LORD WRIGHT says :

I read these two sections together as having the effect that the old law of desertion has been swept away and a new law substituted in the terms of sect. 1 (1) (a).

At p. 39 LORD MERRIMAN, P. says :

... I prefer the opposite view that Parliament intended to make a new departure in light of modern conditions including, amongst other things, considerable disquietude, not only in the public mind but also on the bench itself, as to certain anomalies and hardships in administering the former law.

It is true that my noble friends LORD THANKERTON and LORD MACMILLAN stood upon the ancient ways, but, in my respectful opinion, as they were in a minority on this ground then they should not find themselves in a majority to-day. I think, therefore, that this case is determined by authority of this House in favour of the appellant.

The last words I have cited of LORD MERRIMAN, P., suggest to me some concluding remarks. It was suggested in the course of discussion of the present case that, in construing the Act, possible social consequences should be ignored. My Lords, I cannot agree. It has always been legitimate for the purpose of seeing what remedy the legislature has provided to consider the mischief which they set out to remedy. For this purpose one cannot do better than resort to the preamble to the English Act of 1937, which no one can assert is not equally applicable to Scotland:

Whereas it is expedient for the true support of marriage, the protection of children, the removal of hardship, the reduction of illicit unions and unseemly litigation, the relief of conscience among the clergy, and the restoration of due respect for the law, that the Acts relating to marriage and divorce be amended.

To my mind, the removal of hardship and the reduction of illicit unions can only be effectively obtained by the abolition of any automatic bars due to marital infidelity and substituting the statutory test whether such infidelity in fact caused the separation or continued separation of the spouses. This is not to depreciate the high importance of observance of marriage vows. It is to give an increased measure of relief even to erring humanity and to restore to the possibility of a married home and lawful children those who otherwise must remain without the pale. Such, as I believe, were the objects and such the effect of the amending Act. I am of opinion that the appeal should be allowed and the cause remitted to the Court of Session to be reconsidered on the question of fact whether the admitted act of adultery of the pursuer in fact caused the persistence of the defender in his original desertion.

LORD THANKERTON: My Lords, this appeal arises in an undefended divorce action on the ground of the defender's desertion of the appellant. The LORD ORDINARY held the libel relevant, and, after a proof, in which there were three witnesses, the LORD ORDINARY (LORD KEITH) made *avizandum*, and, a few days later, he reported the whole cause to the Inner House by an interlocutor dated June 4, 1942, with a note appended thereto. After a hearing in the Inner House before 4 judges of the First Division, along with LORD KEITH, the court, LORD KEITH dissenting, dismissed the action by an interlocutor dated June 26, 1942, against which this appeal is taken.

It will be noted that there is no interlocutor which contains findings of fact, and, as will be seen, this appeal is solely based on a finding of fact which LORD KEITH, who was only 1 judge in a court of 5, expressed himself as ready to make. Apart from this, there is little doubt about the facts averred and proved.

The parties were married in 1912, and there are 2 children of the marriage, both of whom are now of age. In 1925 the defender left to seek employment in Canada, it being arranged that, when he had settled down there, he would send for the pursuer and her children. In 1926, after partially completed arrangements for the passage to Canada of the pursuer and the children, the pursuer received, towards the end of July, 1926, a letter from the defender stating that he had uplifted the passage money deposited by him. Since the defender left for Canada the pursuer has not seen him, and since July, 1926, the pursuer has not heard from him except in answer to a letter which she wrote to him in September, 1929, although her solicitor has heard from him in connection with the raising of the present action. Although the pursuer originally contended for an earlier date, she is now content to accept the expression of opinion by LORD KEITH in his note of June 4, 1942, that the period of desertion commenced "at an ill-defined date some weeks or months after July 6, 1926." In her summons and in her evidence, the pursuer admitted that she had given birth to an illegitimate child on Feb. 20, 1930, and she placed the act of adultery early in June, 1929, that is, within the statutory period of 3 years' desertion. It should be added that, in her letter to the defender in September, 1929, the pursuer informed him that she was pregnant, and she received a reply to the effect that he was going to have her watched. In connection with the present proceedings, the defender has written to the pursuer's solicitors that he was fully agreeable to the pursuer proceeding with the action, which he did not intend to defend.

In his opinion in the Inner House, LORD KEITH states, at p. 484:

In the present case I would have been prepared to hold that the act of adultery had no effect on the attitude or state of mind of the deserting spouse, and also produced

no change in the willingness of the deserted spouse to resume cohabitation, and to grant decree of divorce.

The other judges, in effect, held such a finding to be irrelevant, and expressed no opinion of its validity, but I must confess that, *prima facie*, I should feel a difficulty in arriving at such a finding as to the attitude of mind of the defender during the statutory period, as he was not a witness, and the only evidence available is that of the pursuer as to the defender's reply to her letter of September, 1929, which appears to be inconsistent with the finding proposed by LORD KEITH. His attitude towards the present action would not seem to be evidence of his attitude during the statutory period, but merely to express his present consent. However, as I am of opinion that such a finding would be irrelevant, I will express no concluded opinion on the evidence, and I will deal with the able argument submitted by counsel on behalf of the appellant.

Divorce *a vinculo* for desertion has always been statutory in Scotland, and it is now regulated by the Divorce (Scotland) Act, 1938, s. 1 (1) (a), the ground of action being that the defender "has wilfully and without reasonable cause deserted the pursuer, and persisted in such desertion for a period of not less than 3 years." Counsel for the appellant maintained that an important change of the law had been made by the Act of 1938. He admitted that he could not have successfully maintained the appeal prior to the recent Act, and he defined the change in the law effected by the recent Act as follows: he agreed that, prior to 1938, the pursuer in an action of divorce on the ground of desertion had to establish (a) that the defender had left the pursuer against his or her wish and had persistently refused to return, i.e., there must have been wilful non-adherence by the defender, while the pursuer was willing to adhere, and (b) that the pursuer not only had taken a series of steps to induce the defender to return, but had been in a position to insist on adherence. Counsel for the appellant contended that the second of these requisites had been abolished by the Act of 1938. At the same time he admitted that he would fail, unless he obtained a finding in fact that the pursuer's adultery had no effect on the attitude or state of mind of the defender and produced no change in the willingness of the deserter to resume cohabitation, as proposed by LORD KEITH.

My Lords, I remain of the opinion that I expressed in *Bell v. Bell* (1), at p. 19, that the Act of 1938 must be taken to have used the word "desertion" in its meaning as established in the law of Scotland. I have had the privilege of considering the opinion about to be delivered of LORD MACMILLAN, with which I agree, and in which he quotes from the speeches of VISCOUNT SIMON, L.C., VISCOUNT MAUGHAM and himself in *Bell's* case (1) to the same effect, and I will add a fifth quotation from the speech of LORD PORTER, at p. 31:

This would, I think, be the obvious construction of the Act if it alone is to be regarded, but so to decide out of hand is to neglect the previous history of the law of divorce for desertion in Scotland, and, perhaps, to overlook considerations which must be of weight in construing the Act. So far I have purposely avoided the use of the words "desert" or "desertion," but I have taken their content into consideration to the extent of emphasising the necessity for the existence of a spouse who has abandoned the partner to the marriage against his or her will and a partner willing to receive the absent one back at least during the minimum period of three years. To use the statutory word, I have recognised the necessity of a party willing and a party refusing to adhere. What ground then is there for such a recognition? The word itself, I think, requires such a construction. A consenting party cannot be deserted. It is true that the word "desert" is not to be found in the Act of 1573; the phrase there found is "diverts from other's company without a reasonable cause . . . and remains in their malicious obstinacy by the space of four years." But there is no doubt that "desert" and "desertion" have been commonly used in Scottish law as synonymous with this wording. In such circumstances I apprehend that "desert" and "desertion," when used in the Act of 1938, imply the existence not only of a party who has left the conjugal home but also of a party willing to adhere.

It thus appears that 5 out of the 7 Lords had resort to the previous law in order to construe correctly the words "deserted" and "desertion" in sect. 1 (1) (a) of the Act of 1938. In the present case, 4 out of 5 Scottish judges have followed a similar course.

Counsel for the appellant suggests that the wording of the Act of 1938 had effected the omission of a requisite which had previously existed. I am unable

to accept this suggestion, for, in my opinion, the language of the Act of 1938 is expressed in the language familiar to every judge and lawyer in Scotland as expressing all the requisites for divorce for desertion, at least since the authoritative decision of a court of 7 judges in *Watson v. Watson* (4), and, in particular, the opinion of LORD PRESIDENT INGLIS, at p. 739, from which I quote the material passage :

The best test of the effect of the Conjugal Rights Act on the earlier statute is to strike out of the earlier all that the later has abrogated as unnecessary, and judge of what remains as if the excised part had never been there, or as if the earlier statute were now re-enacted without the excised part. The Act of 1573 would in this view stand as follows, after the introductory words declaring the dogma which I have already quoted : "That whatsoever person or persons joined in lawful matrimonie, husband or wife, divertis frae ithers company without a reasonable cause alleged or deduced before a judge, and remains in their malicious obstinacy by the space of four years, and in the meantime refuses all privy admonitions, the husband of the wife or the wife of the husband, for due adherence, that then " (here follow the excised clauses), "the malicious and obstinate defection of the party offender to be a sufficient cause of divorce, and the said party offender to tyne and lose their tocher *et donationes propter nuptias*."

It will be obvious that, apart from the clause as to privy admonitions, the Act of 1938, using phraseology already familiar before 1890, expresses exactly the same conditions as necessary to divorce for desertion. The question in *Watson's* case (4) was whether the making of such privy admonitions was a necessary condition precedent prescribed by the old statute, and it was authoritatively held that it was not, but that it was a question of circumstances, and, as LORD SHAND puts it, at p. 744 :

Remonstrance for absence, or repeated requests that the deserting spouse should resume cohabitation—made seriously and in *bona fide*, but rejected and so unavailing—must be the best evidence in support of the points (1) that the pursuer has desired adherence or renewal of cohabitation, and (2) that the desertion has been wilful and obstinately insisted in.

Counsel for the appellant is, therefore, inaccurate in stating that, prior to 1938, a series of steps had to be taken by the pursuer, in so far as he implies that it was a statutory requisite. Counsel does not dispute that the pursuer's willingness to adhere is still requisite under the Act of 1938, and the Act itself prescribes LORD SHAND's second point. It follows that the language of the Act of 1938 reproduces exactly the requisites necessary under the Act of 1573, as amended by the Act of 1861. This may be further confirmed by the statement in LORD WARK's edition of the late PROFESSOR WALTON's work on HUSBAND AND WIFE, published in 1922 :

To justify decree it must in every case appear (1) that there has been wilful non-adherence ; (2) that it has been obstinately persisted in for four years ; (3) that it was without reasonable cause ; and (4) that the pursuer of the action, throughout the four years, was desirous of cohabitation, and ready to renew it.

If one alters the period from 4 to 3 years, I find difficulty in finding any distinction between this statement and the terms of sect. 1 (1) (a) of the Act of 1938, for surely it cannot be suggested that there is any difference between "desertion" and "non-adherence."

I return to *Watson's* case (4), to ascertain the construction placed by LORD PRESIDENT INGLIS on the Act of 1573 as amended in 1861, the statement of which by him has been already quoted by me. The learned judge then proceeds, at p. 739 :

Construing the Act so reformed, it seems clear that to meet its requirements there must be not only an offender against the conjugal obligation and duty of adherence, but also an injured party who does not condone the offence, but, on the contrary, remains faithful to the marriage vows, and desires and requires the offender to return to conjugal cohabitation, not as a statutory solemnity or matter of form, but as a substantive fact. In all cases, therefore, where the spouses are by mutual consent living apart, the statute plainly has no application, nor do the motives which induce them both to live apart in any way affect the question. It may even be highly expedient that they should never meet again. Their meeting might presumably be attended by serious consequences, perhaps even fatal to life or health. But such cases are not within the statute, which requires as the condition of its application obstinate non-adherence on the one side and a manifested desire for adherence on the other. In such cases as I have referred to (only because they were suggested in the course of the

argument), the law provides other remedies short of divorce *a vinculo*, such as voluntary contract of separation, or divorce *a mensa et toro*.

Counsel for the appellant did not dispute that such was the law of Scotland prior to 1938. I may again quote from LORD WARK'S WALTON ON HUSBAND AND WIFE, at p. 61 :

The remedy is one given to a spouse who has done his or her duty in the past, and is willing to do it in the future. The court will jealously guard against the possibility of two spouses, both of whom desire to be free, availing themselves of this mode of severing the marital tie. This would be to open a wide door to divorce by mutual consent, which is quite contrary to the history and policy of our law.

Reference may also be made to the opinions in *Hunter v. Hunter* (5).

The change in the law which counsel for the appellant claimed to have been effected by the Act of 1938 was that a spouse who has committed adultery within the statutory period of 3 years is no longer precluded from getting decree of divorce on the ground of desertion, provided that such adultery can be shown not to have contributed to or influenced the defender's original or continued desertion. In my opinion, for the reasons that I have stated, I can find no indication of any such change in the language of the Act of 1938, but, further, this argument appears to proceed on a fallacious view of the matter in two respects. In the first place, it ignores the real reason for the disqualification which the law prior to 1938 imposed on a pursuer who had committed adultery.

It was not because such a pursuer could not succeed in an action of adherence ; as pointed out by LORD PRESIDENT INGLIS, it was a matter of substance and involved faithfulness to the marriage vows. The commission of adultery is inconsistent with a proper desire for the return of the deserting spouse ; all that can be offered is cohabitation with an adulteress. Where a spouse is not entitled to require adherence, willingness to adhere can only be made effective by consent of the other spouse. It will be noted that the argument of counsel for the appellant does not depend on the rarity or veniality of the pursuer's adultery, but only upon its reaction on the mental attitude of the defender. In Scotland, the court has no discretion which enables it to consider the circumstances of the pursuer's lapse. Under counsel's contention, if the pursuer establishes the facts that he predicates, the court has no choice but to grant decree, however bad the circumstances or the duration of the pursuer's adultery may have been. The most ardent of reformers of our divorce laws might well hesitate at such a position of the law. The present case may well seem to be a hard one, but hard cases make bad law. In my opinion, the pursuer's adultery during the statutory period is inconsistent with the willingness to adhere, which counsel for the appellant accepts as being still a requisite.

The other fallacy in the argument of counsel for the appellant is to be found in his construction of the words " without reasonable cause " in sect. 1 (1) (a) of the Act of 1938. This is familiar language, dating back to the Act of 1573, and, as counsel admits, it has always been held to mean without reason available to the defender, or without reasonable excuse. It is *pars judicis* to take note of, and give effect to, defences which the defender does not choose to state (*Auld v. Auld* (6) ; *Hunter v. Hunter* (5) ; LORD WARK'S WALTON ON HUSBAND AND WIFE, p. 66). Again, there is nothing in the Act of 1938 to suggest any alteration on this construction of " without reasonable excuse." I may note that, in regard to England, the use by the legislature of the words " without reasonable excuse " in the Matrimonial Causes Act, 1857, s. 31, and of the words " without reasonable cause " in the Matrimonial Causes Act, 1884, s. 5, was held to afford no ground of distinction between these two expressions, *Wickins v. Wickins* (7). It can hardly be suggested that the use of the words " without cause " in the Matrimonial Causes Act, 1937, involves any change of meaning.

I am of opinion, therefore, that, whether on the ground that the Act of 1938, apart from the reduction of the statutory period from 4 years to 3 years, just re-enacted in terms the previous law, or on the terms of the Act of 1938, taken by themselves, the pursuer's contentions fail, and the appeal should be dismissed.

LORD MACMILLAN [read by LORD THANKERTON] : My Lords, this is an undefended action of divorce for desertion brought by a wife against her husband under the Divorce (Scotland) Act, 1938. By sect. 1 (1) (a) of that Act the Court of Session is empowered to grant decree of divorce on the ground that the defender " has wilfully and without reasonable cause deserted the pursuer and

persisted in such desertion for a period of not less than 3 years." The question is whether, in the circumstances of the present case, the pursuer is entitled to the statutory remedy which she seeks. No question of judicial discretion is involved, for no judicial discretion exists in Scotland in matters of divorce. The pursuer is at law either entitled or not entitled to judgment on stating and proving a relevant case. The summons in the action was signed on Dec. 15, 1941. The libel having been held to be relevant, proof for the pursuer was led before the LORD ORDINARY, LORD KEITH, who thereafter, without pronouncing judgment, reported the cause to the Inner House on account of the important question of principle which it raised. In an accompanying note the LORD ORDINARY set out the facts which he was prepared to hold proved. For the present purpose it is sufficient to state his material findings, viz. : (1) that the date from which the statutory period of 3 years must be reckoned is July 6, 1926, by which date the defender had demonstrated his intention not to adhere to the pursuer ; (2) that since that date the defender had lived apart from the pursuer without contributing anything to her support and without any desire or intention of resuming cohabitation with her ; (3) that within the statutory triennium the pursuer, as she admits in her condescendence, committed adultery in June, 1929, in consequence of which she gave birth to an illegitimate child on Feb. 20, 1930 ; (4) that the fact of the pursuer's adultery was communicated by her to the defender ; and (5) that, notwithstanding her adultery, the pursuer throughout the triennium was always ready and willing to resume cohabitation with her husband. The LORD ORDINARY has added, in the opinion which he delivered when he sat with their Lordships of the First Division at the hearing of the case, that he would have been :

. . . prepared to hold that the act of adultery had no effect on the attitude or state of mind of the deserting spouse, and also produced no change in the willingness of the deserted spouse to resume cohabitation . . .

I doubt if there was sufficient evidence of this, but I shall assume it to be the fact. Their Lordships of the First Division (the LORD ORDINARY dissenting) on June 26, 1942, pronounced an interlocutor dismissing the action. They thereby indicated that, in their opinion, the libel was not relevant and the ground on which they so held was that, on the facts as stated by the pursuer, which included an admission that she had committed adultery in June, 1929, she was not entitled to the remedy of divorce which she sought. Their decision accordingly is that a spouse who has committed adultery within 3 years of the commencement of the alleged desertion is not entitled to obtain a decree of divorce for desertion under the Act of 1938. It appears that the question whether the defender knows of or is influenced in his attitude by the pursuer's adultery was, in their opinion, immaterial.

Two important admissions were made, and, in my opinion, rightly made, at your Lordships' bar by the appellant's counsel in the course of his excellent argument. In the first place, he admitted that, but for the passing of the Act of 1938, his case would not have been maintainable. In the second place, he admitted that the appellant, even under the 1938 Act, would not be entitled to succeed if it were the fact that the defender had been influenced in his attitude by the pursuer's adultery. Having made these admissions, counsel for the appellant submitted that, by the Act of 1938, the previous law had been changed and that, under the new Act, the pursuer of an action of divorce for desertion who has committed adultery within 3 years of the commencement of the alleged desertion is not thereby precluded from obtaining decree of divorce, provided that the adultery can be shown not to have affected or influenced the defender's attitude towards the pursuer.

I propose, however, to address myself to the general question whether a pursuer in an action of divorce for desertion under the Act of 1938 who has committed adultery during the period of 3 years from the commencement of the alleged desertion is disentitled to the remedy given by the Act. If the answer is in the negative, the Act of 1938 has effected a fundamental change in the Scots law of divorce for desertion. If the answer is in the affirmative, it becomes unnecessary to consider the specialty of the defender's attitude in consequence of the adultery. The general question is one of vital importance and merits the most careful consideration.

The statute of 1938 repealed the previous legislation on the subject contained

in the Acts of 1573 and 1861, and the whole statutory law affecting the matter is now to be found in the Act of 1938. That Act requires 2 things to be established by the pursuer: (1) that the defender has wilfully and without reasonable cause "deserted" the pursuer; and (2) that for a period of not less than 3 years the defender has persisted in "such desertion," i.e., in wilful desertion without reasonable cause. The defender in the present case is found to have originally abandoned the *consortium* wilfully and without reasonable cause, and thus to have deserted the pursuer. The first requirement of the Act is satisfied. But did the defender throughout the period of 3 years following his initial act of desertion, persist in desertion wilfully and without reasonable cause, seeing that within the triennium the pursuer committed adultery?

The 1938 Act is the first statute applicable to Scotland to employ the words "deserted" and "desertion" to denote the matrimonial offence in question. It provides no definition of these terms, which, however, have long formed part of the legal, though not of the statutory, vocabulary of Scotland. In employing them the legislature must be presumed to have been aware of their accepted connotation in the law of Scotland, and to have intended them to be interpreted accordingly. So this House held in the recent case of *Bell v. Bell* (1). VISCOUNT SIMON, L.C., at p. 12, said:

... the essential nature of desertion in Scots law remains what it was before. It must be a separation against the wish of the spouse seeking the remedy . . .

At p. 14 VISCOUNT MAUGHAM said:

... the quality and characteristics of marital desertion, as understood in Scotland, remain unaltered in the Act of 1938.

I used similar language myself at p. 26 and other Lords in their speeches were no less emphatic in stating that the words "deserted" and "desertion" carried with them into the statute implications from the previous law of Scotland as to their meaning and effect. This is consonant with the:

... well-known rule or canon of construction that in construing an Act of Parliament one ought to take into account the state of the law and of judicial decisions at the time the Act is passed.

per BRETT, L.J., in *Yorkshire Insurance Co. v. Clayton* (8), at p. 426. I pause to make this comment. It is suggested that we must now look at the words of the 1938 Act alone for the whole law. Yet this House has held that, under the new Act the separation founded on must as before be against the wish of the spouse seeking the remedy. The Act does not say so. It refers only to the conduct of the defender but it is agreed that the attitude of the pursuer is also material. The vital, though unexpressed, requirement that the pursuer should be willing to adhere is derived solely from the previous law of Scotland which is held to be imported into the Act by its use of the words "deserted" and "desertion." It cannot be suggested that, because the Act says nothing about the separation being against the wish of the spouse seeking the remedy therefore it has repealed this cardinal requirement. So to hold would be to sanction divorce by mutual consent.

I now turn to a consideration of the words "without reasonable cause." These words, unlike the words "deserted" and "desertion," are imported identically from the original statute of 1573, and have frequently been the subject of judicial discussion and decision. Here I invoke JAMES, L.J., in *Ex parte Campbell* (9), at p. 706:

Where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts, and the legislature has repeated them without any alteration in a subsequent statute, I conceive that the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given them.

Now, if there is one thing that is clear in this branch of the law in Scotland it is that a spouse who had committed adultery could never pose as a deserted spouse or invoke the remedy of divorce for desertion. To be at once adulterous and deserted was a legal impossibility. The adultery of the pursuer always constituted a reasonable cause for non-adherence and precluded the granting of a decree of divorce for desertion. It was an absolute defence. Even if the defender did not choose to propound it as a defence it was *pars judicis* to take notice of the fact. The question whether the defender had been influenced in non-adherence by the pursuer's adultery was irrelevant. It will suffice to refer

to 2 or 3 authorities. In *Auld v. Auld* (6), which was an undefended action of divorce for desertion by the wife, the fact emerged at the proof and was admitted that the pursuer had had a bastard child seven years after her husband left her. The LORD ORDINARY, LORD LEE, said, at p. 37 :

Whether the original offender or not, the spouse who has assumed such freedom from the matrimonial obligations without legal warrant is not in a good case for coming to court to ask divorce on the ground of non-adherence. Having asserted her independence of legal status, and the obligations which accompany it, she is not entitled to demand that judicial sanction be given to her assumed position . . . the words of the Statute of 1573 imply that if the alleged deserting spouse can prove a "reasonable cause" for non-adherence, there can be no divorce.

Infidelity, as LORD PRESIDENT INGLIS said, was a conclusive defence under the Act of 1573 and remained so after the passing of the Conjugal Rights Amendment Act, 1861. This was not expressly stated in the Act of 1573, but was the judicial interpretation of the statute law. In 1890, in the Whole Court case of *Watson v. Watson* (4), an undefended action of divorce by a husband against his wife, LORD PRESIDENT INGLIS, construing the statute law as it then existed, said, at p. 739 :

It seems clear that to meet its requirements there must be not only an offender against the conjugal obligation and duty of adherence, but also an injured party who does not condone the offence, but, on the contrary, remains faithful to the marriage vows, and desires and requires the offender to return to conjugal cohabitation . . .

Divorce on the ground of desertion, said LORD M'LAREN, at p. 747 :

. . . is a remedy given to a spouse who has done his or her duty in the past, and is willing to do it in the future, and against the spouse who has neglected the duty of residence in the family.

In the subsequent case of *Hunter v. Hunter* (5), also an undefended action of divorce for desertion, the pursuer admitted that many years after her husband had left her and in the *bona fide* belief that he was dead she had gone through a ceremony of marriage with another man with whom she had lived as his wife. All the merits were on the pursuer's side, but the court dismissed the action as irrelevant in respect that the pursuer's cohabitation with another man as averred by her was a sufficient ground for non-adherence on the part of the defender and was, therefore, a bar to the action. The LORD JUSTICE-CLERK (MACDONALD), asks, at p. 775 :

Can she then sue for divorce . . . when by her own act she has placed herself in the position that any claim she had to call upon her husband to adhere is gone? I am unable to hold that she can.

At p. 779 LORD TRAYNER said :

I proceed . . . upon the ground that the pursuer cannot get divorce against her husband for desertion or non-adherence, when her own averments disclose that the defender has a reasonable cause for non-adherence.

It remains as true, in my opinion, under the Act of 1938 as it was under the repealed Acts, that decree of divorce is, in the words of LORD WATSON, nothing else than "a penalty for obstinate non-adherence" (*Mackenzie v. Mackenzie* (2), at p. 40). In this respect the statute of 1938 has, in my opinion, made no change in the law. In truth the requisites as defined in the 1938 Act, namely, wilful desertion without reasonable cause persisted in for a specified period are a precise re-enactment in modern English of the words of the old Scots statute—"divertis fra utheris companie without ane ressonabill caus alledgeit or deducit befor ane Judge and remanis in thair malicious obstinacie be the space of four zeiris." The translation accurately reproduces the substance of the old law, well understood in Scotland. In doing so, it did not, in my view, intend to introduce nor has it introduced a complete innovation of the law and rendered obsolete all the interpretations of the previous law whose terms it has so faithfully reproduced. It has been argued that, if all that was intended was the substitution of 3 years for 4 years, this could have been effected by a simple amendment of the Act of 1573. But I conceive that Parliament, commendably avoiding legislation by reference and desirous of grouping conveniently together all the grounds of divorce other than adultery, preferred to restate in modern language the existing requisites of divorce for desertion with the substitution of 3 for 4 years.

I recognise that in *Bell v. Bell* (1) this House unanimously held that the pursuer of an action of divorce for desertion under the Act of 1938 does not

require to aver willingness to adhere after the expiry of the triennium and up to the raising of the action. But as VISCOUNT MAUGHAM points out, at p. 16, the law on this point "was not conclusively settled before 1938." It was thus open to this House in construing the Act of 1938 to adopt the view which it did without upsetting a settled principle in the previous law of Scotland. That is emphatically not so in the present instance. To allow of divorce for desertion at the instance of a wife who has committed adultery within the statutory period would, in my opinion, be to infringe "the essential nature of desertion in Scots law" which, as VISCOUNT SIMON, L.C., has said, "remains as it was before." The separation must still be "against the wish of the spouse seeking the remedy of divorce." In my opinion, this must mean "against the wish of a spouse who is entitled to have his or her wish fulfilled." Even if the effect of the decision in *Bell v. Bell* (1) was that the 1938 Act had effected a change in what I was prepared in that case to assume was the previous law, it was a change entirely different in character from that now suggested. Desertion as a ground of divorce differs essentially from adultery and from all the other grounds of divorce introduced by the Act of 1938 in this respect that it is not unilateral but bilateral. It looks to the attitude and conduct not of one of the spouses alone, but of both. If the only requirement were that one spouse had left and remained away from the other wilfully and without reasonable cause, then, on this being proved, the other would be entitled to the remedy although acquiescing in and possibly welcoming the defection. That would be to sanction divorce by mutual agreement. Once it is agreed that the pursuer in such an action must during the triennium be desirous of maintaining the *consortium*, this means that throughout the 3 years there is a standing and genuine offer by the pursuer to receive back the errant defender to the *consortium* which has been wrongfully abandoned. A spouse who has committed adultery cannot offer a resumption of the *consortium* as it was before.

In the present case the pursuer states that she was willing to receive her husband back. But what had she to offer him? All she could offer him was *consortium* with an adulteress. That is not an offer which any husband could be required to accept, whatever his own conduct. Yet the pursuer who makes this insulting offer asks the court to grant her a remedy which will not only disregard her unfaithfulness, but also console her with one-third of any personal estate which the defender may possess.

It will have been observed that in none of the cases before the present case has it been suggested that the pursuer's adultery is no bar to divorce for desertion if it can be shown that the adultery was not the cause or a contributory cause of the non-adherence. To allow of such a plea in reply to an allegation of the pursuer's adultery would be an entire novelty in Scots law. The question has never been whether the defender left the pursuer or persisted in non-adherence because of the pursuer's adultery. The question has always been whether there existed a reasonable cause, namely, the pursuer's adultery, for the defender's non-adherence, not whether that was the cause which actuated the defender in his conduct. That is how the words "without reasonable cause" used in the Act of 1573 and now re-enacted in the statute of 1938 have always been construed and applied. If the pursuer admitted adultery in her condescendence that was a conclusive bar to the remedy sought. The admission rendered the libel irrelevant without any inquiry into the facts. The non-adhering spouse may have quitted the *consortium* for other reasons than the pursuer's adultery and may even have welcomed the adultery as a convenient pretext, but such considerations were beside the point. If there were to be an inquiry as to the defender's motives in such cases, I can foresee much difficulty in the administration of the law. Such cases as the present are generally undefended and it is the duty of the judge to satisfy himself that the pursuer is entitled to the remedy sought. It is agreed that, if the defender was actuated to any degree by the pursuer's adultery, the action must fail. How is the judge to satisfy himself as to this? Must he inquire if the defender knew of the adultery and as to his reactions? What means can he have of ascertaining the precise motives of an absent defender? Moreover, a defender who appears to resist such an action could always defeat it by simply stating that the adultery of the pursuer was an element in causing his or her persistence in non-adherence. Who could contradict this? And what if the defender originally left the pursuer

because of the pursuer's adultery but subsequently has persisted in non-adherence not because of the adultery, but because of a preference for a separate life? If the Lord Advocate had intervened in this case, as he would have been entitled to do, his plea would simply have been: "The pursuer having committed adultery during the period of alleged non-adherence is not entitled to divorce for desertion." That plea, in my opinion, would have had to be sustained.

I may state my conclusion on the whole matter succinctly in this way. The essence of desertion in the law of Scotland historically and in principle is failure in the duty of adherence, which is a cardinal duty of the married state. A pursuer in an action of divorce for desertion who within the statutory triennium has committed adultery has thereby absolved the defender from the duty of adherence. Being no longer under a duty to adhere, the defender cannot be found to be in desertion. There is a reasonable cause for non-adherence. The remedy is given for a breach of the matrimonial duty to adhere; there is no duty to adhere to an adulterous spouse; where there is no duty to adhere there can be no desertion. To charge a spouse with deserting an adulterous partner is a contradiction in terms and a misuse of legal language.

With the question of the effect of the adultery of the pursuer after the expiry of the statutory period of desertion, I am not called upon to deal in the present appeal, but I can see that different considerations may well be applicable in such a case.

I am in favour of dismissing the appeal.

LORD CLAUSON: My Lords, in this appeal a wife contends that, notwithstanding that she has committed adultery, the Court of Session is competent to grant her a decree of divorce against her husband who withdrew from cohabitation and for 3 years or more has persisted in that withdrawal. The appellant's adultery took place before the 3 years expired from the date of the husband's withdrawal from cohabitation.

The matter is governed by the Divorce (Scotland) Act, 1938, s. 1 (1), which repealed all the previous statutes under which alone it was competent for the Court of Session to grant decree of divorce in cases of withdrawal from cohabitation, and substituted a provision the material words of which are as follows:

... it shall be competent for the court to grant decree of divorce on ... the following grounds ... that the defender (a) has wilfully and without reasonable cause deserted the pursuer and persisted in such desertion for a period of not less than three years.

It is suggested that, on the evidence, the husband has been wholly influenced in his persistence by the fact of adultery; and it was argued by counsel for the appellant that, if this be so (and for the purpose of this opinion I assume it to be the fact), the adultery was thus not a cause of the husband's persistence in the withdrawal, and that it was accordingly a wholly immaterial circumstance.

Counsel for the appellant did not dispute that, before this Act, the court would not have been competent to grant a decree in the present case, since the husband's failure to cohabit would not, after the date of the wife's adultery, have been desertion within the meaning of that term as used in Scots law, not being "wilful and unjustifiable," the fact of the wife's adultery being sufficient justification. The history of Scots law in this matter, as it stood before the Statute of 1938, has been fully stated by LORD THANKERTON and LORD MACMILLAN, who have preceded me in addressing your Lordships, and I do not presume or desire to add to those statements. I will only observe that, as the law stood before 1938, the test of the court's competence was purely objective, being the fact of withdrawal for a stated period (4 years) from cohabitation coupled with the non-existence of any circumstance (e.g., the adultery of the pursuer) which would justify the withdrawal. The motives which influenced the withdrawing spouse in his persistence in withdrawing were wholly immaterial.

In order that the argument put forward by counsel may succeed, your Lordships must in the first place be satisfied that the effect of the relevant words of the statute is to make the test of the court's competency a subjective one, the questions for the court to ask itself being, first, what were the motives which actuated the defender in persisting for the relevant period (now 3 years in

place of 4 years) in his withdrawal from cohabitation, and secondly, were those motives reasonable. Counsel for the appellant would invite your Lordships to read "cause" in the statute as meaning the circumstances which operated on the defender's mind so as to induce in him the conduct which gives the court competence to grant the decree of divorce. It does not seem ever to have been suggested that the like word, as used in the statute which governed the matter before 1938, had this meaning, and I have to confess that I should myself have the greatest difficulty in deducing from the words of the statute of 1938 the conclusion that the legislature, with its care to use the same word "cause" in the new statute as in the old, meant to discard the older test of the competency of the court, namely, the facts, first, as to the withdrawal of the defender from cohabitation and, secondly, as to whether circumstances existed which would justify the defender's persistence in the withdrawal, and to adopt instead the test of, first, what were the circumstances which moved the defender to withdraw and to persist in the withdrawal and, secondly, whether he acted reasonably in permitting those circumstances to affect his conduct. The matter has been fully discussed in the opinions already delivered by LORD THANKERTON and LORD MACMILLAN, and I can see no escape from the conclusions they have reached.

I should be disposed, however, for my own part, to express my reason for concurring in the rejection of the appeal by saying that, if a correct meaning be attributed to the words "deserted" and "desertion" in the Act, the pursuer's case must fail. There is no question but that those words, which before 1938 do not appear to have been statutory words, when used in connection with matrimonial matters before 1938 meant, in Scotland, a withdrawal from such cohabitation as it was the legal duty of husband and wife to afford the one to the other: and there is also no question but that the law of Scotland, apart altogether from the statutes which afforded the remedy of divorce in certain cases of desertion, was and is that a husband is not legally bound to cohabit with a wife who has committed adultery, or at all events uncondoned adultery. According to the argument for the wife in the present case, the legislature, when enacting the Act of 1938, discarded this meaning of the terms "deserted" and "desertion" and used those terms in the colourless sense of "a withdrawal from cohabitation," with no reference to the legal position in Scots law (which the statute of 1938 admittedly in no way affects) of a husband whose wife has committed uncondoned adultery, namely, that he is released from any legal obligation to cohabit. My Lords, apart from the views of others, I should myself feel bound to reject this contention, and to hold that the legislature in dealing with a matter of purely Scots law, and using terms with a well-settled meaning as used by Scotsmen, and especially by Scots judges and lawyers, must be understood to use those terms with the meaning so well settled. The fact that the advice given to your Lordships has not been unanimous has naturally caused me some heart searchings, but I have the satisfaction of finding that the opinion to which I have come is shared with 3 out of 4 of the judges in the court below, and by 2 of my noble and learned friends who are particularly conversant with the usage of language among Scotsmen. Thus construing the Act, I am bound to advise your Lordships that the withdrawal of the husband from cohabitation lost the character of desertion, within the meaning of the Act, from the moment that the wife committed adultery. The fact that his withdrawal continued thereafter cannot properly be described as persistence in desertion within the meaning of the Act. From the moment that adultery was committed by the wife she lost her legal right to cohabitation, and the continuance thereafter of the husband's withdrawal from cohabitation was not desertion within the meaning of that term in the law of Scotland.

For these reasons I advise your Lordships to reject this appeal.

Appeal dismissed.

Solicitors: *Beaumont, Son & Rigden*, agents for *Wishart & Sanderson*, Edinburgh, agents for *W. B. Maxwell*, Hawick (for the appellant).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

Re ROYAL ALBION HOTEL, LIMITED.[COURT OF APPEAL (MacKinnon, du Parcq, L.J.J., and Uthwatt, J.), **June 1, 1943.**]*Emergency Legislation—Liabilities adjustment order—Company insolvent—Interim order—Postponement of liabilities—Whether practical and proper—Liabilities (War-Time Adjustment) Act, 1941 (c. 24), ss. 3 (6), 15.*

The Royal Albion Hotel, Ltd., was a private limited company which ceased to carry on business on July 12, 1940, as trading at a loss was anticipated. The company was insolvent owing to arrears of interest on mortgages, loans and other liabilities and had no assets which were not charged to creditors. On Nov. 25, 1942, a county court granted the company a protection order under the Liabilities (War-Time Adjustment) Act, 1941, and pursuant to sect. 3 (5) of that Act instructed the liabilities adjustment officer to investigate and report on the company's affairs. On consideration of the report, which merely stated the company's position and made certain recommendations, the county court judge, finding that the company's business had been seriously affected by the war and that it was impossible to make a final order at the time, made an interim order appointing a receiver for a limited period and postponing a settlement of the liabilities of the company. Certain secured creditors of the company brought an appeal to set aside the order or, alternatively, to have the application for a liabilities adjustment order reheard :—

HELD : the object of the Act is to provide a means of settlement of the affairs of the debtor and not merely a postponement of liquidation. Before exercising its powers the court must be satisfied that it is both practical and proper to deal with the case under the Act and must have regard not only to the prospects of the business, which in the case of a company must stand a reasonable chance of recovery, but also to the likelihood of ultimate benefit to the creditors, secured and unsecured, as well as to the debtor. These matters were not considered by the court of first instance, the order must be discharged and the application reheard.

[EDITORIAL NOTE. The Liabilities (War-Time Adjustment) Act, 1941, is primarily intended for the arrangement of the affairs of individual debtors and is only incidentally applied to private companies. In applying the Act to such companies the court is required to have regard to the means of the members and officers of the company. This, it is held, has two aspects. The court must consider the position of the officers and members of the company who are dependent on the continuance of the company for their means of livelihood. On the other hand, there may be certain members whose private fortune is such that they ought to come to the aid of the company rather than let its misfortunes fall wholly on the creditors. In such cases the distinction between the case of a company and an individual must be borne in mind. The members of the company are subjected to the disabilities and difficulties which fall upon the individual. The whole resources of the individual can be made available for the satisfaction of the creditors' debts, but the members of a company are not liable for the company's debt except in so far as they can be made contributories.

FOR THE LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1941, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 34, p. 20.]

APPEAL by creditors against an interim order, dated Jan. 28, 1943, and made by a county court under the Liabilities (War-Time Adjustment) Act, 1941, postponing the liabilities of an insolvent company. The facts are fully stated in the judgment.

R. W. Jennings for the appellants.

B. E. Dutton Briant for the respondent.

P. C. Lamb for Barclays Bank, Ltd.

UTHWATT, J. [delivering the judgment of the court]: On Nov. 25, 1942, The Royal Albion Hotel, Ltd., obtained from the Brighton County Court a protection order under the Liabilities (War-Time Adjustment) Act, 1941. Following upon that order the court, pursuant to sect. 3 (5) of that Act, referred the company's affairs to the liabilities adjustment officer for investigation and report, and on consideration of the report, the county court judge, on Jan. 28, 1943, made an interim order dealing with some of the matters for which, under the Act, provision may be made by a liabilities adjustment order. This appeal is brought by certain secured creditors asking that this order may be set aside

or, alternatively, that the application for a liabilities adjustment order may be reheard.

A The material facts are as follows : The Royal Albion Hotel, Ltd., is a private limited company with a share capital of £1,000. The business of the company has, at all material times, been confined to the running of the Royal Albion Hotel at Brighton. In June, 1937, all the shares in the company were purchased by Captain Edens and his parents from Lady Preston. On the occasion of that purchase the company, which theretofore held its hotel premises and furniture and equipment under agreements made with the former owners of the shares, bought from Lady Preston the freehold of the hotel premises and the furniture and equipment and goodwill of the business for £57,000. To help provide the purchase money the freehold of the premises, the goodwill of the business and the licences were mortgaged to the appellants for £30,000 repayable on Dec. 25, 1937, and carrying interest at $5\frac{1}{2}$ per cent. per annum reducible to $4\frac{1}{2}$ per cent. per annum on punctual payment ; first debentures for £10,000 ranking after the mortgage conferring a fixed charge on the freehold premises and a floating charge on the other assets of the company and carrying interest at 5 per cent. were created and issued to Lady Preston : and a further £15,000 was raised by loan, as to £10,000 from Captain Edens, and £5,000 from the parents of Captain Edens, second debentures for £18,000 being issued as collateral security for these two sums. There have been certain changes in the position of the Edens. C The parents of Captain Edens were repaid their loan with moneys borrowed by the company from Barclays Bank. Captain Edens remains a creditor for £10,000 but holds the £18,000 second debentures as security for his loan ; Barclays Bank are loan creditors for £4,000 secured by Captain Edens' guarantee and the deposit by him of the second debentures. Captain Edens acquired the shares held by his parents, and he now owns all the shares of the company except one, which stands in the name of his wife. D

The company continued to carry on business until July 12, 1940, on which day the hotel was closed for the reason that trading at a loss was anticipated. In July, 1942, the hotel was requisitioned, the furniture and equipment being put into store. The compensation payable in respect of the occupation of the freeholds has been recently fixed at £1,500 a year. The interest on the first mortgage and first debentures has been paid down to June, 1940. The interest E thereon in arrear computed to June, 1942, amounts to £4,300. The amount of interest due on the £10,000 loan made by Captain Edens is not stated and has not been proved in the proceedings. The unsecured indebtedness amounts approximately to £11,500 and includes sums due for income tax, rates, directors' fees, war damage contribution, and numerous trade bills for various amounts. The only asset of the company of any moment apart from those which we have mentioned, is its claim for expenditure in the removal of its furniture and F equipment estimated at £1,100.

The result is that, taking the value of the freehold, goodwill, furniture and equipment at the price paid for it, and, disregarding any interest on the first mortgage or first debentures accrued since June, 1942, or any interest due on the loan of £10,000 to Captain Edens or the sums expected to be recovered in respect of the removal or storage of the furniture, the liabilities of the company exceed G its assets by more than £8,000. The recent trading results of the company showed a net profit of £2,028 for the year ending November, 1937, a loss of £303 for the next year, and for the succeeding year a profit of £355. It is stated that, during the years 1937-40 an average of £1,500 a year was spent on repairs and renewals of an exceptional and non-recurring nature. For the purposes of the present case the trading results are not of any importance. The fact remains that the company is insolvent and has no assets which are not charged to H creditors.

The liabilities adjustment officer made a report under date Dec. 23, 1942. The report merely states the facts as to the company's position and makes certain recommendations. Those recommendations are :

(1) That after provision has been made for the payment of necessary outgoings such as war damage contributions and for the preservation of the assets of the company, in particular for the insurance against fire and/or war risks of the hotel premises and of the furniture now in store, that the whole of the compensation rent as and when received from the Royal Air Force for the use and occupation of the hotel premises be paid into

court for periodic distribution to the secured creditors. (2) That the mortgage interest due to the first mortgagees be reduced to a percentage producing not less than the net annual value of the said mortgaged premises. (3) That the interest payable on the first debentures be reduced to a percentage producing not less than the net annual value of the premises after payment of the first mortgage interest. (4) That the lease of Clive House, 14/15, Kings Road, Brighton, dated June 24, 1937, for 21 years be disclaimed and vacant possession given forthwith.

No reasons are given in the report for the view that it is practicable to deal with the case under the Act, and, indeed, the fact that the liabilities adjustment officer held this view is left to be inferred from the circumstance that proposals were made by him. The matter came before the judge on Jan. 28, 1943, when he made an order as follows :

During the period that the Air Ministry is in occupation of the company's premises, the Royal Albion Hotel, Grand Junction Road, Brighton, aforesaid or for a period of six months from this date, whichever period is the shorter : (1) Mr. George Herbert Yarnell, A.C.A., of the firm of Hill, Hunter & James, chartered accountants of 150, North Street, Brighton (hereinafter called "the receiver") be appointed to receive the rents and profits of the company's said premises and all other the income of the company. (2) The receiver do forthwith give security pursuant to the County Court Rules, Ord. 48, r. 16, in the sum of £700. (3) The receiver be paid remuneration at the rate of £15 per annum and the cost of completing his security out of the moneys which shall come into his hands. (4) The receiver do pay premiums due on fire insurance policies upon the company's property and discharge any accounts for the removal or storage of the company's furniture and effects out of any sums received by him from the Air Ministry and specifically allocated for such purposes and do from time to time having regard to future commitments pay all surplus moneys into court. (5) The receiver do at the end of the period leave at the court office his accounts as such receiver and do, within 14 days after the date of the registrar's certificate of the allowance of each account, pay into court the balance certified to be due from him or deal with the same in such manner as the court may direct. (6) Payment of all other debts of the company be postponed and it is further ordered that : (i) The lease, particulars of which are set out in the list marked "A" attached hereto, be disclaimed as from the date specified in column F of the said list. (ii) Further consideration of the said application be adjourned to a date to be fixed by the registrar at the expiration of the said period ; (iii) The costs of all parties in connection with this application and order be reserved. (iv) The receiver and all parties be at liberty to apply to the court as they may be advised.

The proceedings before the judge on the hearing of the application for the order were informal. No note was taken, but the judge has furnished the court with a statement as to the course of the discussion before him and the reasons which actuated his decision. It was clear to him, and it undoubtedly is the fact, that the company's business had been most seriously affected by the war and for that reason and the further reason that it was impossible there and then finally to settle the terms of a final adjustment order, he decided by way of interim order to appoint a receiver for a limited period and to reconsider the matter at the end of that period. An interim order did not seem to the judge to be avoidable or to present any difficulty. No one, the judge stated, could suggest any other practicable course.

It is, in our opinion, apparent that the judge—possibly misled by the meaning normally attached to the phrase "interim order"—assumed that he had jurisdiction under the Act to make an interim order without first being satisfied that there were fulfilled those conditions precedent which are necessary under the Act in order that a liabilities adjustment order may be made at all. In this, we think he was wrong. The order proposed by the judge may well, as he states, be a practicable course. That is not, however, to the point. The first question—and it is the main question—is whether it is practicable and proper to deal with the case at all under the Act. That question was not dealt with. The relevant provision of the Act upon this point is sect. 10. Under that section :

The court may provide for the adjustment and settlement of a debtor's affairs by means of a single liabilities adjustment order, or, if that is not practicable, may make an interim order or interim orders providing for any of the matters for which provision might be made by a liabilities adjustment order . . .

and it is stated in terms that references in the Act to a liabilities adjustment order shall include references to any such interim order. It follows that the conditions which justify the making of a single adjustment order must be present

before any interim order is made. The result is that the court has, pursuant to sect. 3 (6), to be satisfied not only that the debtor's troubles are due to war circumstances, but also that it is both practicable and proper to deal with the case under the Act. Further, as the debtor is a company, the court, before making an order has, under sect. 15 of the Act, to be satisfied that the object of the application is to enable the company to recover its business (a matter which does not mean merely that recovery of the business is the motive inducing the application but involves at least some reasonable expectation that such recovery is possible) and has, in considering whether it is practicable and proper to deal with the affairs of the company, to have regard to the constitution and affairs of the company and the means of the members and officers thereof.

The examination necessary to determine whether the conditions to be fulfilled before an order could be made was obviously not undertaken. We may add that we do not see how the question "Is it practicable and proper to deal with a debtor's affairs under the Act?" can be answered in the affirmative unless the court has envisaged, at least in broad outline, some general scheme, complying with the provisions of the Act, which will settle the debtor's affairs.

In these circumstances the order of the judge cannot stand. The question which remains is whether the proper course is merely to discharge the interim order and to let the matter be reheard by the judge or to make an order dismissing the application for a liabilities adjustment order and revoking the protection order with consequential directions dealing with matters done under the interim order.

Upon the facts before the court, we doubt if anyone can come to the conclusion that it is either practicable or proper to deal with the case under the Act. The company is insolvent in both senses of that word and all its assets are heavily charged. Under the Act the amount of the charge for capital on the company's assets cannot be reduced, though the interest payable may, so long as secured creditors of the company are not permitted to realise their security, be reduced. If the company is ever to resume business, it will be essential that the realisation of the business and property and the payment of its debts should be postponed and further capital raised. As matters stand, such postponement could not be legitimately ordered. In exercising the power to order postponement the court is bound to have regard not only to the prospects of the business, but to the likelihood of ultimate benefit to the creditors as well as the debtor, and "creditors" includes secured creditors as well as unsecured creditors. An order for postponement would here be in the interest of the company alone. As regards further capital it was stated in argument that there was the possibility of obtaining it. Whether it would be provided to an extent which would render it possible to come to the conclusion that the case could be rationally brought within the Act remains open. Hopeless as the case appears to be, we nevertheless think the company is entitled to have its case heard by the judge, and, in our view, the proper course to take is to discharge the order and to make no order as to costs, except that the appellants and Lady Preston are to be at liberty to add their solicitor and client costs of this appeal to their security.

Before parting with the case there are three general observations suggested by this case which we wish to make upon the Act. First, the Act is primarily concerned with individuals. Its general point is to provide a means for the settlement and adjustment of the affairs of a debtor who is in financial difficulties as a result of war circumstances. The object is not to postpone the evil day when commitments must be met, but to provide for the liquidation of commitments and so enable the debtor to make a fresh start untrammelled by the difficulties to which war circumstances have subjected him without undergoing the stigma of bankruptcy. The emphasis to our mind is on the settlement of the debtor's affairs. That this is the object of the Act appears directly from the provision in sect. 3 (6) that the liabilities adjustment order is to provide for the settlement and adjustment of the debtor's affairs. The duties and powers imposed upon and given to the court by the succeeding sections are to be read in the light of the object to which the order is to be directed. It is sufficient to refer to sect. 4. Under sect. 4 (1) the court is bound to provide that the debts proved in the proceedings are to be paid in full or to such extent as the court thinks practicable. That provision is mandatory and compliance

with it entails liquidation of the debtor's assets or some of them. Accordingly, the court is authorised to provide for the realisation of the debtor's assets or some of them. Subsect. (3) contains provisions under which the court is given power in certain circumstances to postpone the payment of debts or authorise the exemption of business property from realisation, but this is subject to the condition that regard is to be paid to the prospects of the business and to the ultimate likelihood of ultimate benefit to the creditors as well as the debtor. Put shortly, the point of subsect. (3) is not merely to enable a business to be carried on or debts to be postponed, but to enable that to be done as incident to the adjustment and settlement of the debtor's affairs. A

Secondly, where an application for an order under the Act is made by a private company, it is as well to bear in mind that the winding up of a company unable to pay its debts does not subject the company's shareholders or directors to any such disabilities as attach on the bankruptcy of an individual and, in our view, that is a consideration to which due weight should be given in determining the propriety of making an order in favour of a company. The Act itself treats companies on a different footing from individuals. Its application is confined to private companies and, before entertaining any application by a private company at all, the court has to be satisfied on two specified matters not required where the affairs of an individual are under consideration. Moreover, in considering whether it is practicable and proper to deal with the affairs of a company under the Act, the court is directed to have regard to the means of the members and officers thereof. In our view, this last requirement has two aspects. The court should, we think, consider how far the members and officers of the company are dependent on the continuance of the company for their means of livelihood; and also, where some of the members or officers of the company are well endowed, whether it is reasonable to expect them to come to the aid of the company rather than to allow the burden of the company's unfortunate financial position to fall upon the shoulders of its creditors. B

Lastly, under the Act it is the duty of the liabilities adjustment officer in his report to make proposals for the adjustment and settlement of the debtor's affairs if that appears to him to be practicable. A report containing proposals would, in cases of any difficulty or complication, be of help to the court if it contained a statement of the grounds upon which the officer came to his conclusion upon practicability, and we cannot help but think that, had the report in this case assumed that form, the order under review would never have been made. C

Appeal allowed with costs. The interim order to be discharged and the application for a liabilities adjustment order to be reheard. D

Solicitors: *Wilkinson, Howlett & Moorhouse* (for the appellants); *Boxall & Boxall* (for the respondent); *Palmer, Bull & Mant*, agents for *Lewis, Holman & Farndell*, Lewes (for Barclays Bank, Ltd.) E

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.] F

Re F. W. MARTEN.

[COURT OF APPEAL (Lord Greene, M.R., Goddard and du Parc, L.JJ.), **December 16, 1942.**] G

Emergency Legislation—Application for adjustment order—Protection order—Application for directions by liabilities adjustment officer—Power to revoke protection order on such application—Liabilities (War-Time Adjustment) Act, 1941 (c. 24).

The appellant applied for an adjustment order under the Liabilities (War-Time Adjustment) Act, 1941, and his affairs were referred to the liabilities adjustment officer for investigation and report. A protection order was made and the hearing stood adjourned until a date to be fixed after the receipt of that report. On July 20, 1942, the liabilities adjustment officer issued an interim report and, in view of circumstances set out in the report, asked for the directions of the court as to whether he should proceed with his investigations. After a hearing at which the debtor was represented by counsel, the county court judge made an order stating that the case H

was not one with which it was practicable and proper to deal under Part I of the Act, and directing that the protection order should be revoked on a day stated, on which date the application of the appellant for an adjustment order should be dismissed. It was contended that the judge should have fixed a day for the adjourned hearing of the original application and that he had no power to deal with it on the occasion of the application of the liabilities adjustment officer for directions :—

A HELD : when, as in this case, the judge was satisfied from the evidence before him that the case was not a practicable and proper one to be dealt with under the Act, he was entitled to stop the proceedings at that point before any further costs were incurred.

[EDITORIAL NOTE. This is only a practice point concerning the jurisdiction of the court under this special Act. The Act is obviously one intended to facilitate the arrangement of debtors affairs and it seems very necessary in such matters that all unnecessary costs should be avoided.]

B FOR THE LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1941, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 34, p. 23.]

APPEAL by the applicant from an order of His Honour JUDGE KONSTAM, Redhill County Court, dated July 22, 1942, revoking a protection order made Apr. 20, 1942, under the Liabilities (War-Time Adjustment) Act, 1941.

C *Ronald Hopkins* for the appellant.

Victor Wolff for a creditor.

The Liabilities Adjustment Officer appeared in person.

D *Hopkins* : The judge misconceived the character of the application and treated it as an adjourned hearing, whereas it was an application for directions by the liabilities adjustment officer. The application stood adjourned for the completion of the final report of the liabilities adjustment officer. The report sent in by the officer was not the report contemplated by r. 18 as being a condition precedent to the making or removal of an adjustment order. The judge did not find on the facts submitted to him that it was not a proper case, but he did so find on another matter which had not been submitted to him. The judge misdirected himself by allowing his mind to be influenced by considerations which could properly arise upon the adjourned hearing, but which could not properly arise on this particular hearing. By reason of the circumstances,

E there were many facts which the appellant was not able to put before the judge.

Counsel for the respondent was not called upon.

LORD GREENE, M.R. : This appeal is singularly devoid of substance.

F The appellant applied for an adjustment order under the Liabilities (War-Time Adjustment) Act, 1941. Upon that application, in the usual way, the affairs of the appellant were referred to the liabilities adjustment officer for investigation and report. A protection order was made, and it was ordered that the hearing of the proceedings should stand adjourned to a date to be fixed after the receipt of the report of the liabilities adjustment officer. The liabilities adjustment officer concluded his investigations up to a certain point, and on July 20, 1942, he issued an interim report. In para. 1 of that document he stated that the affairs of the appellant were of considerable complexity and he, the adjustment officer, was not in a position to submit a full report. Nevertheless, in para. 13 of the report, he did what under the rules he was entitled to do ; he asked the direction of the court, in view of the circumstances set out in the report. The directions for which he was asking appear from para. 6, in which he stated as follows :

G This interim report is being made in order to bring to the notice of the court two distinct matters which have emerged from my investigation and to solicit the court's directions as to whether my investigation should be continued, involving communication with upwards of 50 creditors, the submission of a full report and proposals, and consideration by the court at the normal adjourned hearing.

H He was inviting the directions of the court as to whether he should proceed to the end with his investigations, with all the expense and trouble that that might involve, when at the outset certain matters appeared which should be before the court in deciding whether or not the matter should proceed.

There is no need for me to refer to those particular matters ; but the county court judge, upon that application by the liabilities adjustment officer, made an order, and it is that order of which complaint is made. It was made after

argument at a hearing in which the adjustment officer appeared to assist the court, in which counsel for the debtor appeared and in which counsel for the creditor also appeared. The order, dated July 22, 1942, was made, in the first instance, upon the application of the liabilities adjustment officer for directions. That was the application contained in para. 13 of the report which I have mentioned. After reciting that evidence was given by the liabilities adjustment officer, counsel for the debtor and counsel for a creditor :

. . . at an adjourned hearing of the debtor's application for an adjustment order. A

It continued :

. . . whereas upon reading such report and upon hearing the liabilities adjustment officer and the counsel aforesaid it appears to me that the case is one which with it is not practicable and proper to deal under Part I of the said Act.

That is following the language of sub-sect. 6 of sect. 3 of the Act, under which, B
in addition to being satisfied with regard to certain specified matters, the court is also bound to decide that the case is one which it is practicable and proper to deal with under that part of the Act. If the court so decides it is empowered to make, and in fact is directed to make, an adjustment order. The order, therefore, on the face of it, shows that the county court judge in this case had come to the conclusion that the requirement of the subsection had not been fulfilled, and he came to that conclusion after reading the report, hearing the C
liabilities adjustment officer and the argument of counsel. That that paragraph accurately states what took place appears to me to be manifest when the judge's note is looked at. It is quite clear on that note that the substantial question which was argued before him was as to whether this was a proper case for an adjustment order at all.

The order then proceeded to dispense with the notice required under r. 20 (1) D
of the relevant rules. That is a rule under which, when the adjustment officer has reported, a day is to be fixed for the adjourned hearing of the application—that is the application of the debtor or the creditor for an adjustment order—and notice is to be given as there specified with a proviso that the court may in special circumstances dispense with the giving of notice. Quite clearly, what the judge was doing was this : he was treating the interim report as the final E
report and was dispensing with the notice which upon the making of a final report ought to be given before the fixing of a day for the adjourned hearing. The order then proceeded to direct that the protection order should remain in force for a limited time and should then be revoked on a day stated, and that upon that day the application of the debtor (that is the original application for an adjustment order) should be dismissed.

If I correctly understand the argument that was placed before us, it was to F
this effect. In the first place, it was said that the only matter properly before the court on that occasion was the question raised by the liabilities adjustment officer, namely, as to whether he should or should not proceed with his investigation. That being so, it was argued, the court had no power to go on and deal with the debtor's application the further hearing of which had been adjourned to a day to be fixed. In my opinion, there is no substance at all in that complaint. The matters which were referred to the judge by the adjustment officer were of such a character that the judge, in my opinion, was amply and perfectly G
entitled to take the view—indeed, I should have been surprised if he had taken the opposite view—that the case was not a practicable and proper case to deal with under the Act at all. One thing that he did is quite certain ; he answered the adjustment officer's question by saying : " You need not go on with these investigations " ; and the reason why he took that view was that he was satisfied on the major proposition that in view of these matters it was not a practicable and proper case at all. Having formed that view and having decided that the H
matter must not be allowed to proceed, it seems to me to be quite preposterous to suggest that the judge then ought to have said : " Although the step that I am taking involves the suspension of these proceedings as a result of which I shall not be able to make an order at all, nevertheless I must go through the formality of fixing a day on which the adjourned hearing of the original application will come before me, when I shall inevitably dismiss it, because the conclusion to which I have come on the adjustment's officer application is one which

makes it impossible for me to proceed." That appears to be the argument before us and, in my opinion, that argument has no substance at all. If it had been the fact that the debtor was not represented for some reason on that occasion, I can well understand that the judge ought to have gone through the formality of fixing an adjourned hearing at which he could be represented, but all this was done in the presence of counsel for the debtor. The point of substance was considered, and that point was whether or not, in view of what

A was said in the report in the paragraphs referred to, the case was one which it was proper to deal with under the Act at all. The whole of that matter being clear, it seems to me idle to say that the order is wrong through lack of jurisdiction in the judge because as a matter of form he was dealing with it on the application of the liabilities adjustment officer and not formally on a day fixed for the adjourned hearing of the original application. It seems to me that there is no substance in that point at all.

B The other point which was raised I must confess I do not understand ; perhaps it is my fault. It seems to me that there was ample evidence upon which the judge could instruct his own mind and come to the conclusion that this case was not one with which it was practicable and proper to deal under the Act. That being his conclusion and there being evidence to support it, once the first point is out of the way as to whether the occasion on which he decided was the appropriate occasion, it seems to me that no point can be raised in this court at all. It is said, however, that the judge, in some way which I am afraid I do not follow, did not direct his mind to the question whether the case was a proper one to deal with under the Act, but directed his mind to the question whether this debtor was a proper person to have the assistance of the Act. It seems to me that what the county court judge was deciding appears quite clearly from his own note, because there he said :

C

D In my opinion not a proper case for application of Liabilities Adjustment Act.

And he then went on to refer to the matters which had caused the liabilities adjustment officer to seek the directions of the court. If he had been able to discriminate between the appellant's activities and give him a separate adjustment order in relation to his normal business, it appears that he would have been inclined to do so ; but, since he was not entitled to do this, he revoked the protection order. I cannot see on the face of that note any evidence that the

E judge was not taking into account all the material before him, or that he was approaching the matter in some way which in law was wrong.

It is to be observed that the notice of appeal gives as the ground of the appeal the simple point :

The learned judge misdirected himself in law in holding upon the said liabilities adjustment officer's interim report or at all, that the case was one with which it was

F not practicable and/or proper to deal under Part I of the said Act and/or that there was no evidence on which he could properly find as aforesaid.

I can find no justification for that suggested ground. It seems to me that, once the judge had got material before him which satisfied him that he could not make an order in this case, he was not merely entitled to stop but justified in every way in stopping the matter then and there, without any further incurring of costs, having regard to the fact that he had before him counsel for

G the debtor and had the matter argued, as appears on the face of his note.

In the result the appeal must be dismissed with costs.

GODDARD, L.J. : I agree. I do not think it necessary to add anything to what LORD GREENE, M.R. has said.

DU PARCQ, L.J. : I agree.

H *Appeal dismissed with costs.*

Solicitors : *Druces & Attlee* (for the appellant) ; *A. E. Hamlin, Brown & Co.* (for the creditor).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

A. G. CHAMBERLAIN v. COMMISSIONERS OF INLAND REVENUE.

W. E. CHAMBERLAIN v. COMMISSIONERS OF INLAND REVENUE.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Macmillan and Lord Romer), **March 25, 26, 29, 30, June 9, 1943.**]

Income Tax—Disposition in favour of wife and children—Formation of company—Settlement of sums invested by the trustees in the purchase of shares in the company—Property comprised in the settlement—"Arrangement"—Finance Act, 1938 (c. 46), ss. 38 (2), 41 (4) (b).

The appellant formed an unlimited company called the Staffa Investment Co. (hereinafter called Staffa) which was incorporated on Dec. 20, 1935. The initial capital of the company consisted of £100,000, divided into 50,000 10s. preference shares and 7,500 £10 ordinary shares. By a sale agreement of Dec. 23, 1935, the appellant sold to Staffa 470 shares in Commercial Structures, Ltd. (hereinafter called Commercial) in consideration of 35,000 preference shares in Staffa (which at all times remained in his beneficial ownership and were never subject to any settlement) and £82,000 in cash which the appellant left on loan to the company without interest. The income of Staffa consisted only of the dividends received on the 470 shares in Commercial. On Mar. 10, 1936, the appellant executed a settlement under which he paid to the trustees £35,000, which was forthwith invested by the trustees in 350 ordinary shares of Staffa, which were thereafter held upon the trusts of the settlement in favour of the appellant's wife and his 4 children. Subsequently, the appellant altered, by means of a special resolution, the capital structure of Staffa, whereby the 7,500 ordinary shares were divided into 350 "A" shares, being those held by the trustees of the settlement of Mar. 10, 1936, 1,750 "B" shares, 1,750 "C" shares, 1,750 "D" shares, and 1,900 "E" shares. On Dec. 7, 1936, the appellant executed four settlements in favour of his infant children. Since these settlements provided for the accumulation of the income until the children attained the age of 21 years, they were not affected by the Finance Act, 1936, s. 21. The trustees were the same persons as the trustees of the settlement of Mar. 10, 1936. By each deed he settled £100 on trust for one of his 4 infant children, the sums to be invested as he should direct. The trustees invested each £100 respectively in the purchase of 10 of the "B," "C," "D," and "E" ordinary shares of Staffa. Dividends were paid in respect of these shares and were utilised in purchasing additional "B," "C," "D" and "E" shares respectively. The appellant was assessed under the Finance Act, 1938, s. 38 (2) to sur-tax for the year ending 1938 on the income of Staffa less the dividends paid on the 35,000 preference shares held by the appellant, the Crown contending that the formation and structure of Staffa together with the sale agreement of Dec. 23, 1935, and the settlements of Mar. 10, 1936, and Dec. 7, 1936, constituted an arrangement and settlement within the Finance Act, 1938, s. 41 (4) (b) :—

HELD : the formation and structure of Staffa together with the settlements and the sale agreement were not an arrangement within the Finance Act, 1938, s. 41 (4) (b), because the property comprised in the settlements were the sums provided by the settlor and not the whole assets of Staffa.

[EDITORIAL NOTE.] The terms "settlement" and "arrangement" are very widely defined by the relevant provisions of the Finance Acts but, if the whole income of an investment company is to be charged as the income of the settlor, it must be shown that the whole assets of the company have been settled by the settlement, or settlements if there are more than one. The facts of cases of this nature are necessarily complex, but the point here is quite short. It is whether the transactions here in question are an "arrangement" within the Finance Act, 1938, s. 41 (4) (b) such that the whole income of Staffa can be treated as the income of the settlor. Their Lordships all agree that the income of the company cannot be treated as the income of the settlor unless all its assets come within the settlement. In the present case there were 35,000 preference shares in Staffa which were at all times in the beneficial ownership of the settlor and were never subject to any settlement. This alone is

sufficient to prevent the whole income of Staffa being treated as the income from a settlement, even if the word "settlement" be enlarged to the meaning of the word "arrangement" in the Finance Act, 1938, s. 41 (4) (b). If it is to be held that the whole income of the company is the income of the settlor, then it must be shown that the whole income arises from property comprised in the settlement. The whole assets of Staffa were never included in these settlements and it is not possible to argue that the structure of the company and the sale agreement made the income of the company the income of the settlement, since, whatever "arrangement" was thus effected, there was always some income of the company which belonged absolutely to the appellant (the settlor) and was not comprised in the settlement.

FOR THE FINANCE ACT, 1938, ss. 38, 41, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 31, pp. 349, 354.]

Case referred to :

(1) *Inland Revenue Comrs. v. Morton*, [1941] S.C. 467.

CONSOLIDATED APPEALS by the taxpayers from a decision of the Court of Appeal affirming the decision of LAWRENCE, J. The facts are fully stated in the opinion of LORD THANKERTON.

Cyril L. King, K.C., and *Norman C. Armitage* for the appellants.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

VISCOUNT SIMON, L.C. [read by LORD THANKERTON] : My Lords, in these consolidated appeals I have had the advantage of perusing the opinion prepared by LORD THANKERTON and, finding myself in agreement with his conclusions and with the reasoning upon which they are based, do not find it necessary to express my own view at length. I move that both appeals be allowed, with costs here and below.

LORD THANKERTON : My Lords, these consolidated appeals relate to an additional assessment to sur-tax for the year ending Apr. 5, 1938, made on the appellant in each case, the amount in each case being the sum of £11,898. On the respective cases stated by the Special Commissioners, the assessments have been confirmed on appeal by LAWRENCE, J., in the King's Bench Division, and by the Court of Appeal. It was agreed at the hearing before this House, that the circumstances were so identical that your Lordships' decision on the appeal of Augustus George Chamberlain would govern the decision of the appeal of Walter Ernest Chamberlain, and, accordingly, I will deal with the former appeal, and I will refer to Augustus George Chamberlain as the appellant.

The claim by the Crown is primarily based on the Finance Act, 1938, s. 38 (2), along with the material provisions of sect. 41 of that Act, which provide as follows :—

38.—(2) If and so long as the terms of any settlement are such that—(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof; and (b) in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised; any income arising under the settlement from the property comprised in the settlement in any year of assessment or from a corresponding part of that property, or a corresponding part of any such income, as the case may be, shall be treated as the income of the settlor for that year and not as the income of any other person.

41.—(4) For the purposes of this part of this Act . . . (b) the expression "settlement" includes any disposition, trust, covenant, agreement or arrangement, and the expression "settlor" in relation to a settlement means any person by whom the settlement was made; (c) a person shall be deemed to have made a settlement if he has made or entered into the settlement directly or indirectly, and in particular (but without prejudice to the generality of the foregoing words of this paragraph) if he has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or enter into the settlement. . . .

While the facts are fully narrated in the case stated, it may be convenient to give a brief *resume* of them. The appellant and his brother carry on a successful business in the building trade through a company formed by them, called Commercial Structures, Ltd. They desired to make some provision for their children, and, while they adopted similar measures to secure this end, I need only deal with the steps taken by the appellant.

(i) In December, 1935, the appellant caused Staffa Investment Trust, to which I will refer as "Staffa," an unlimited company with a share capital, to be incorporated under the Companies Act, 1929. The initial capital of Staffa was £100,000 divided into 50,000 preference shares of 10s. each and 7,500 ordinary shares of £10 each. Three days later, by an agreement dated Dec. 23, 1935, the appellant sold to Staffa for £100,000, 470 shares of £1 each in Commercial Structures, Ltd., the price being satisfied as follows: as to £17,500 thereof, by the issue to the appellant of 35,000 preference shares of Staffa; as to £82,500, this sum was left on loan to Staffa free of interest. A

(ii) The next step was the execution of a deed of settlement, dated Mar. 10, 1936, under which the appellant paid to trustees £3,500, which was forthwith invested by the trustees in 350 ordinary shares of £10 each of Staffa, and was to be held on the trusts set out in the deed in favour of the appellant's wife and 4 children. It is agreed that the terms of this settlement are such that, under the Finance Act, 1938, s. 38 (2), any income arising under the said settlement from property comprised therein must be treated as the income of the appellant. B

(iii) The enactment of the Finance Act, 1936, s. 21, admittedly caused a reconsideration of the position by the appellant and the consequent measures taken in this step and the next one. The appellant was in voting control of Staffa, and possessed wide powers as governing director under art. 40 of Staffa's articles of association. At an extraordinary general meeting of Staffa on Dec. 3, 1936, art. 3 of the articles of association was altered so as to divide the 7,500 ordinary shares into: 350 "A" ordinary shares of £10 each (being those held by the trustees of the settlement of March, 1936); 1,750 "B" ordinary shares of £10 each; 1,750 "C" ordinary shares of £10 each; 1,750 "D" ordinary shares of £10 each; and 1,900 "E" ordinary shares of £10 each. The voting rights were not altered, and each class was entitled only to such dividend (if any) as the company should in general meeting determine. C

(iv) On Dec. 7, 1936, the appellant executed 4 deeds of settlement, under which he paid four sums of £100 each to the trustees under each deed respectively to be invested as the appellant should direct and to be held by them on trust for each of the appellant's 4 children, all of whom were then infants. These settlements are irrevocable. The 4 sums of £100 were invested respectively by the trustees in the purchase respectively of 10 "B," "C," "D" and "E" £10 ordinary shares of Staffa. In March, 1937, the trustees of each of the 4 settlements invested the amount of dividends received by them in the acquisition of 1,025 £10 shares of the same class respectively as the 10 shares already held by them. D

The assessment under challenge was based upon the view that the said settlements of Mar. 10, 1936, and Dec. 7, 1936, together with the incorporation and structure of Staffa constitute an arrangement amounting to a "settlement" within the Finance Act, 1938, s. 41 (4) (b), and that the appellant is the settlor. E

The assessment was arrived at as follows: in the year ending Apr. 5, 1938, Staffa paid to each of the trustees of the 4 settlements of Dec. 7, 1936, dividends in respect of their holdings, amounting in each case to £2,932, 10s. gross, which absorbed £11,730 of the income of Staffa for that year. No dividends have ever been paid in respect of the "A" ordinary shares, held by the trustees of the settlement of Mar. 10, 1936. Staffa had also paid to the appellant dividends on his preference shares amounting to £875. The actual income of Staffa for that year was £12,773, and the balance of £11,898 remaining after deduction of the preference dividends paid to the appellant, has been treated as the income of the appellant under the Finance Act, 1938, s. 38 (2), and the additional assessment under appeal has been made on the appellant in respect thereof. F

The Attorney-General maintained—as, indeed, had been held by the commissioners and both courts below—that, in this case, the "income arising under the settlement" within the meaning of sect. 38, was the income of the company, and that "the property comprised in the settlement" was the property held by the company, and he agreed that, if his contention was wrong, the assessment could not stand, and it follows that it would be unnecessary, in that view, to deal with any of the other contentions in the case. In my opinion, this contention is wrong, for reasons which can be stated very shortly. G

I may premise that, in seeking the due application of the Finance Act, 1938, H

s: 38, each case is apt to depend on its own facts, and other cases are not likely to be of material assistance. Further, it seems to me that, while the word "settlement" is defined in the widest terms, the more crucial point is likely to be the determination of what the "property comprised in the settlement" consists of in the particular case. The present case affords, in my opinion, a good illustration of this point, and the question may be thus stated. Did the property comprised in the settlement consist of the whole assets of Staffa, or is the property comprised in the settlement to be found separately comprised in each of the 5 deeds of settlement, the formation of Staffa being part of the arrangement conceived by the appellant, whereby a convenient and profitable investment was made available for the moneys respectively settled under the 5 deeds of settlement?

My Lords, I am of opinion that the latter alternative provides the correct view of the arrangement made by the appellant with a view to making provision for his children. While the formation of Staffa provided an available investment for the sums settled under the 5 deeds of settlement, under which the children's provisions were actually constituted, the continuance of such investment was not essential to the continuance of the trusts under the deeds of settlement. In other words, the sums settled under these deeds were the funds provided for the purpose of the settlement within the meaning of sect. 41 (4) (c). Staffa, though controlled by the appellant, did not, in my opinion, hold its assets as part of the provisions settled on the children. I am of opinion that the whole assets of Staffa did not constitute the property comprised in the settlement, and that the assessment cannot stand.

LORD ATKIN desires me to express his concurrence with this opinion.

LORD MACMILLAN [read by LORD THANKERTON]: My Lords, an additional assessment to sur-tax was made on the appellant A. G. Chamberlain for the year ending Apr. 5, 1938, in the sum of £11,898. This sum represented the whole actual income for the year of assessment of a company known as the Staffa Investment Co., less a sum of £875 received by the appellant by way of dividend on preference shares which he held in the company. The material facts in the case of W. E. Chamberlain, whose appeal has been consolidated with that of his brother, the other appellant, are admitted to be such that the two appeals must stand or fall together. I shall confine my attention to the case of A. G. Chamberlain to whom I shall refer throughout as the appellant.

The assessment on the appellant was based upon the Finance Act, 1938, s. 38, one of the 4 sections composing Pt. IV of that Act, which bears the heading "Income Tax (Settlements)." This legislation forms part of a code of increasing complexity, beginning with the Finance Act, 1922, s. 20, designed to overtake and circumvent a growing tendency on the part of taxpayers to endeavour to avoid or reduce tax liability by means of settlements. Stated quite generally, the method consisted in the disposal by the taxpayer of part of his property in such a way that the income should no longer be receivable by him, while at the same time he retained certain powers over or interests in the property or its income. The legislature's counter was to declare that the income of which the taxpayer had thus sought to disembarass himself should notwithstanding be treated as still his income and taxed in his hands accordingly.

In order that the income of the Staffa Investment Co. may, under the Finance Act, 1938, s. 38 (2), be treated as the income of the appellant, that income must be shown to be income arising under a settlement made by the appellant from property comprised in the settlement; it must further be shown that the settlement or some provision thereof is revocable or otherwise determinable, and that, if such revocation or determination should be effected, the appellant or his wife would become beneficially entitled to the whole or part of the settled property or to the whole or part of the income of the settled property. The term "settlement" includes any disposition, trust, covenant, agreement or arrangement (sect. 41 (4) (b)) and has thus a wider meaning than in the vocabulary of the strict conveyancer.

The first, and, indeed, the decisive question in the case is whether the appellant made a settlement comprising the whole assets of the Staffa Investment Co.

What he did was as follows. He was the owner of 470 £1 shares in a successful building company known as Commercial Structures, Ltd. Being minded to

make a provision for his wife and 4 children, he formed an unlimited company which he named the Staffa Investment Co., with an initial capital of £100,000 divided into 50,000 preference shares of 10s. each and 7,500 ordinary shares of £10 each. The company was incorporated on Dec. 20, 1935. On Dec. 23, 1935, the appellant by a sale agreement of that date sold to the company his 470 shares in Commercial Structures, Ltd., the price being satisfied by the issue to him of 35,000 preference shares of the company and as to the balance of £82,500 in cash, which the appellant left on loan to the company without interest. The 470 shares in Commercial Structures, Ltd., were the only assets of the Staffa Investment Co., and its income consisted solely of the dividends received on these shares. The constitution of the company was so framed as to give the appellant complete control over it. A

On March 10, 1936, the appellant executed a deed of settlement under which he paid to himself, his brother and his solicitor a sum of £3,500 to be held on trusts set out in the deed for the benefit of his wife and children. It was the intention of the appellant that the trust fund should be invested in the purchase of ordinary shares of the Staffa Investment Co., and this was effected by the acquisition of 350 ordinary shares of the company. It was conceded that this deed of Mar. 10, 1936, constituted a settlement within the meaning of sect. 38 of the 1938 Act and that any income arising from the property comprised therein, namely, the 350 ordinary shares of the Staffa Investment Co., was liable to be treated for tax purposes as the income of the appellant. In view of the passing of the Finance Act, 1936, s. 21, the appellant by means of a special resolution effected an alteration in the capital arrangements of the Staffa Investment Co., whereby the 7,500 ordinary £10 shares were divided into 350 "A" shares, being those held by the trustees of the settlement of Mar. 10, 1936, 1,750 "B" shares, 1,750 "C" shares, 1,750 "D" shares, and 1,900 "E" shares. Each of these classes of ordinary shares was entitled only to such dividend, if any, as the company might declare. The appellant then proceeded to execute 4 deeds of settlement, all dated Dec. 7, 1936, each in favour of the same trustees as those appointed by the settlement of Mar. 10, 1936. By these 4 deeds he settled 4 sums of £100 each to be invested by the trustees as he should direct and to be held on trust for each respectively of the appellant's 4 children, who were then all infants. These settlements were irrevocable and provided for the accumulation of the income until the children attained 21 years of age, with protective trusts to operate thereafter during their lives. The trustees of these settlements invested the settled sums of £100 in the purchase respectively of 10 of the "B" 10 of the "C," 10 of the "D" and 10 of the "E" ordinary £10 shares of the Staffa Investment Co. Dividends were paid to the trustees of each settlement in March, 1937, and the trustees utilised the proceeds to apply for 1,025 additional "B," "C," "D" and "E" shares respectively. Further dividends were paid on the "B," "C," "D" and "E" shares in 1938. No dividends were ever paid in respect of the shares held under the settlement of Mar. 10, 1936. D E F

The contention of the Crown, which was upheld by the Special Commissioners and has been affirmed by LAWRENCE, J., and the Court of Appeal, is that the formation and structure of the Staffa Investment Co., together with the sale agreement of Dec. 23, 1935, the settlement of Mar. 10, 1936, and the 4 settlements of Dec. 7, 1936, "constitute an arrangement and a settlement within the Finance Act, 1938, s. 41 (4) (b)." LAWRENCE, J., in affirming the decision of the Special Commissioners, did not deliver a reasoned opinion as it was admitted before him that the case was governed by the decision of the first division of the Court of Session in the Scottish case of the *Comrs. of Inland Revenue v. Morton* (1). G

I find myself unable to agree with the Crown's contention. I accept the view that the statutory expansion of the term "settlement," which includes an "arrangement," justifies and, indeed, requires a broad application of sect. 38 of the 1938 Act, but a settlement or arrangement to come within the statute must still be of the type which the language of the section contemplates. I agree with LORD MONCRIEFF that the settlement or arrangement must be one whereby the settlor charges certain property of his with rights in favour of others (*Comrs. of Inland Revenue v. Morton* (1), at p. 480). It must comprise certain property which is the subject of the settlement; it must confer the income of the comprised property on others, for it is the income so given to others that is to be treated as, nevertheless, the income of the settlor. There can be no question H

that the deeds of Mar. 10, 1936, and Dec. 7, 1936, were settlements. Each of them settled a sum of money provided by the settlor and provided for the application of the income for the benefit of third parties, although the 4 settlements of Dec. 7, 1936, because of their irrevocability do not fall within sect. 38. But none of these settlements comprised any property of the Staffa Investment Co. The trust funds were invested in shares of that company, which is quite a different matter. In point of fact, the whole assets of the company have never been settled at all so as to dedicate the whole of its income to any trust purposes.

A But it is said that the "formation and structure" of the company was just a part of an "arrangement" which must be looked at as a whole and which, when so looked at, is seen to be a settlement of the company's whole assets, namely, the 470 shares of Commercial Structures, Ltd., which originally belonged to the appellant. I am prepared to agree that the creation of the Staffa Investment Co. and its very special constitution were essential steps towards the effecting of the appellant's object. So no doubt was the sale to the company of his 470 shares in Commercial Structures, Ltd. But that sale was for consideration in money or money's worth, and resulted *inter alia* in the appellant receiving 35,000 preference shares of the Staffa Investment Co. for himself, the income of which he has himself enjoyed. How can it be said that the whole assets of the Staffa Investment Co. have been comprised in a settlement by the appellant when he himself retains a substantial interest in the company which

C has never been the subject of a settlement at all? The most attractive way of presenting the Crown case is to characterise the whole transaction as a single scheme which begins with 470 shares in Commercial Structures, Ltd., in the hands of the appellant as his personal property and after much manœuvring ends with the income from these shares no longer payable to himself but settled in favour of third parties. He who wishes the end wishes the means. This,

D however, is not, in my opinion, an accurate legal presentation of the matter, which requires a much closer analysis. I have already pointed out that the appellant has never settled the whole of the shares in the Staffa Investment Co. And further shares might still be issued. It is, I think, fallacious to confuse the steps taken by the appellant with a view to effecting a settlement or arrangement with the settlement or arrangement itself. When the appellant created the Staffa Investment Co., and sold to it his 470 shares in Commercial Structures,

E Ltd., he made no settlement or arrangement such as the statute contemplates. In point of fact, he never settled any shares of the Staffa Investment Co. What he did was to settle certain sums of money, with the intention, which he was in a position to carry out, that these sums should be invested in shares of the Staffa Investment Co. It was not until he granted the trust deeds that he entered the legal stage of settlement. All that he did previously was preparatory to making settlements. No settlement or arrangement of the nature of a

F settlement existed when the company was registered and the appellant sold to it his shares in Commercial Structures, Ltd. As I have said, what the appellant settled was money. That money was invested, as it was intended to be, in shares of the Staffa Investment Co., but I see nothing to prevent the trustees under the trust deeds from selling their shares in the company and investing the proceeds in other securities. Could it then be said that the whole assets of the Staffa Investment Co. were "settled"?

G It is essential to the Crown's case that it should make out that the whole assets of the Staffa Investment Co. are comprised in a "settlement" or "arrangement" made by the appellant within the meaning of the statute. In my opinion, the Crown has failed to establish this.

H It is unnecessary for me, having regard to the view which I have just expressed, to proceed to consider the further questions debated as to whether any "provision" of the "settlement" was determinable and whether the result of such determination would be to the benefit of the appellant or his wife. But I may say that I find it difficult to characterise the redemption by the Staffa Investment Co. of the shares held under the trust deeds or the winding up of the company as a determination of a "provision of the settlement." The trustees would continue to hold and administer the redemption moneys or the sums received on a winding up. Moreover, if it could be said that, in the event of redemption or winding up the appellant's wife might become beneficially entitled to at least part of the property comprised in the "settlement," then it would

appear that the Crown could only attribute to the appellant a "corresponding part" of the income of the property and not, as they have done, the whole income of the property said to be comprised in the settlement.

I am, accordingly, of opinion that these appeals should succeed. The legislature must try again, unless by legislation since 1938 it has already defeated such ingenuity as the appellants have displayed.

LORD ROMER : My Lords, the assessment of which the appellant, Augustus George Chamberlain (hereinafter called the appellant), complains in this case was made in the circumstances that are set out in para. 10 of the case stated for the opinion of the court. The paragraph runs substantially as follows :

The actual income of Staffa for the year ending April 5, 1938, was £12,773. £875 was paid by Staffa to the appellant in dividends on his 35,000 preference shares. £11,898, the balance of the £12,773, has been treated as the income of the appellant under the provisions of the Finance Act, 1938, s. 38 (2), and the additional assessment under appeal has been made upon the appellant in respect thereof. This assessment was based upon the view that the settlements of Mar. 10, 1936, and Dec. 7, 1936, together with the incorporation and structure of Staffa constitute an arrangement amounting to a "settlement" within the Finance Act, 1938, s. 41 (4) (b), and that the appellant is the settlor.

The omission from this paragraph of all reference to the sale agreement of Dec. 23, 1935, was probably an oversight. For the decision of the Special Commissioners, which has been upheld by the Court of Appeal, is set forth in para. 14 of the case and was in these terms :

Having considered the evidence and arguments adduced before us, we held that :— (A) the formation and structure of Staffa together with the settlements of Mar. 10, 1936, and Dec. 7, 1936, and the sale agreement of Dec. 23, 1935, constitute an arrangement and a settlement within the Finance Act, 1938, s. 41 (4) (b); (B) the income of Staffa was rightly treated as the income of the appellant by virtue of the Finance Act, 1938, s. 38 (2).

The strange thing about all this is that, although we are told what it is that, in the opinion of the commissioners and the Court of Appeal, constitutes the "settlement," we are not told of what the property comprised in the alleged settlement consists. It is true that the additional assessment upon the appellant can only be justified if the whole of the assets of Staffa that produced its income for the year ending Apr. 5, 1938, can be regarded as constituting the settled property. But the only income earning property owned by Staffa in that year was the block of shares in Commercial Structures, Ltd., sold to them by the appellant in December, 1935; and whether the settled property is to be treated as consisting of those shares alone or is to be treated as comprising the whole of Staffa's assets for the time being is a question to which I can find no certain answer either in the case or in the judgment of the Court of Appeal. I am inclined to think, however, that the court was in favour of the latter of the two alternatives. For in delivering the judgment of the court, DU PARCQ, L.J., when contemplating the possibility of a winding up of Staffa at a time when the only ordinary shares outstanding were the shares comprised in the deed of settlement of Mar. 10, 1936, said that in that event all the assets of the company, after providing for the par value of the appellant's preference shares, would go to the trustees of that settlement and that, in that way, the appellant's wife "might become beneficially entitled at least to part of the property then comprised in the settlement." But it is conceivable, and, indeed, probable, that the assets of Staffa distributed on a winding up among the holders of ordinary shares would not include any of the 470 shares in Commercial Structures, but the proceeds of their sale which by that time would have ceased to be traceable. And there I am content to leave it. For even if the various ingredients mentioned in para. 14 of the case can properly be regarded as forming one compound settlement, as to which I shall have something to say later on, the property that is the subject-matter of the settlement is, in my opinion, neither the 470 shares in Commercial Structures nor the whole assets for the time being of Staffa. If a man enters into a contract to buy 1,000 shares in a company with a view to settling 500 of them on his daughter and does so settle the 500 shares by deed, it may well be that, consistently with the Finance Act, 1938, s. 41 (4) (b), the settlement can be described as consisting of the contract and the deed

together. But the property comprised in the settlement is the 500 shares settled by the deed and not the whole of the 1,000 shares. The mere fact that the contract to buy 1,000 shares was a part of the arrangement for settling 500 of them is no conceivable justification for saying that the property comprised in the settlement included the other 500, even though the settlement be regarded as consisting of the whole arrangement. And yet that in substance is what has been said by the Special Commissioners and the Court of Appeal in the present case.

Turning again to the facts of the present case, it may be observed that, although in the memorandum of association of Staffa its objects are set out in no less than 24 clauses covering nearly every form of human activity, the acquisition of shares in Commercial Structures is nowhere mentioned. It may further be observed that the deed of settlement of Mar. 10, 1936, is a settlement of £3,500 cash and contains no reference to the acquisition by the trustees of any shares in Staffa. It would almost seem that the appellant wished it to appear that there was no connection between Commercial Structures, Staffa, and the settlement of the £3,500. It is, nevertheless, quite plain, and it is now admitted by the appellant, that the connection between the three was very close and that the forming of Staffa, the sale to it of the 470 shares in Commercial Structures, and the application of the £3,500 in subscribing for 350 ordinary shares in Staffa were all so many steps taken or caused to be taken by the appellant for the purpose of making some provision for his children out of the interest that he possessed in Commercial Structures, while retaining control over both that company and over Staffa. But the forming of Staffa and the sale to it of the appellant's 470 shares in Commercial Structures were capable of serving and may well have been intended to serve in the future other purposes as well. If, for instance, the appellant had in his mind the possibility at a later date of issuing and settling on his brothers and sisters further shares in Staffa whether preference or ordinary, the forming of Staffa and the sale to it of the 470 shares would have been steps taken to effect this purpose also, and could be treated as forming part of such subsequent settlement. Although, therefore, it may be possible to say, in view of the Finance Act, 1938, s. 41 (4) (b), that on Mar. 10, 1936, there came into existence a compound settlement in the form of an arrangement consisting of the forming of Staffa, the agreement for the sale to it of the 470 shares in Commercial Structures, the trust deed of that date and the subscription by the trustees of 350 ordinary shares, the property comprised in that settlement consisted of nothing but the last mentioned shares. It did not and could not consist of the whole of the assets of Staffa or even the 470 shares in Commercial Structures that Staffa held, any more than a subsequent settlement such as I have mentioned would or could have done. The appellant had an interest in all such assets as the holder of preference shares, and the holders of any subsequently issued preference shares and of all ordinary shares whenever they might have been issued would also be interested in such assets regardless of the date of their issue and of the date of any settlement of which they might be the subject-matter.

In mentioning the elements that conceivably constituted the settlement that came into existence on Mar. 10, 1936, I have omitted one that was included by the Special Commissioners. It is the "structure" of Staffa, which means, no doubt, the character and constitution of the company as disclosed by its memorandum and articles of association. But I must confess that, with all respect to the commissioners, it passes my comprehension how the structure of a company can form part of a settlement. That the constitution and character of Staffa have a very direct and important bearing upon the nature of the subject-matter of the settlement of Mar. 10, 1936, is, of course, quite true. For in order to ascertain what is sometimes called the "bundle of rights" represented by a share in Staffa, recourse must be had to the memorandum and articles of association of that company. But its constitution and character can no more form part of the settlement itself than can the constitution and character of the settlor.

My Lords, I have not so far made any reference to the deeds of settlement of Dec. 7, 1936. And for this reason. After the execution of the deed of settlement of Mar. 10, 1936, and the investment of the £3,500 in taking up shares in Staffa, a settlement had been finally made, and one of the purposes, possibly

the main purpose, for which Staffa had been formed and the 470 shares in Commercial Structures had been transferred to it had been fully accomplished. I can find nothing that even remotely suggests that at that time it was in the contemplation of the appellant to settle further Staffa shares upon his children ; and had it not been for the Finance Act, 1936, I do not suppose that any such further settlement would in fact have taken place. But sect. 21 of that Act put the appellant in danger of having all the income arising under the settlement of Mar. 10, 1936, treated as his income for the purposes of sur-tax, and it was only after he had considered the provisions of that section that he took the further steps that resulted in the execution of the four deeds of settlement of Dec. 7, 1936, and the acquisition by the trustees of those settlements of the "B," "C," "D" and "E" ordinary shares now held by them. I may observe in passing that these shares could not have been issued at all had the property comprised in the March settlement been all the assets of Staffa or even the 470 shares in Commercial Structures. But I have already given my reasons for thinking that the property comprised in the March settlement consisted merely of the 350 shares now known as the "A" shares in which the £3,500 had been invested, and for the same reasons I am satisfied that the property comprised in the December settlements consisted of nothing but "B," "C," "D" and "E" shares respectively. In order to bring about these last-mentioned settlements the appellant no doubt utilised 2 of the steps he had taken to bring about the March settlement, namely, the forming of Staffa and the agreement of Dec. 23, 1935. These 2 steps will, therefore, be ingredients that are common to the arrangements that respectively constitute the March and December settlements. The settlements are, nevertheless, quite distinct from one another and cannot properly be regarded as forming one comprehensive settlement. But, after all, the crucial question arising in the case is not whether there is 1 settlement or 5 settlements, but whether the property settled can be said to consist of either the total assets of Staffa or, alternatively, the 470 shares in Commercial Structures. As I am satisfied that this question must be answered in the negative, I would allow the appeal of the appellants Augustus George Chamberlain with whose case alone I have so far dealt. It necessarily follows that, in my opinion, the appeal of his brother Walter Ernest Chamberlain should also be allowed.

Appeals allowed with costs.

Solicitors : *R. C. Bartlett & Co.* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

BRANDON v. GRUNDY.

[COURT OF APPEAL (Lord Greene, M.R. and du Pareq, L.J.). **June 28, 1943.**]

Ecclesiastical Law—Parsonage house—Lease by former incumbent—Present incumbent seeking possession of house in order to let it—Whether tenant protected by Rent Restrictions Acts.

Landlord and Tenant—Rent restriction—Lease of parsonage house—Claim to possession for purpose of re-letting—Whether Rent Restrictions Acts applicable.

The restrictions imposed on the recovery of possession by the Rent Restrictions Acts do not apply to parsonage houses. This is so irrespective of whether or not an incumbent requires the house for his own occupation.

Gloucester (Bishop) v. Cunningham (1) applied.

[**EDITORIAL NOTE.** It was held in *Gloucester v. Cunningham* (1) that the Rent Acts did not apply to parsonage houses. In that case, however, the incumbent desired to reside in the parsonage house and it was sought to distinguish the present case from that decision because here the incumbent desired to re-let the house to another tenant, the house having been let by the former incumbent. The argument was, of course, that where the parsonage house was so let it should not be in any different position from other property let to tenants. This argument is rejected and it is confirmed that the Rent Acts do not apply to parsonage houses in any circumstances.

AS TO HOUSES WITHIN THE RENT ACTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-314, para. 369 ; and FOR CASES, see DIGEST, Vol. 31, pp. 562, 563, Nos. 7097-7107.]

Case referred to :—

(1) Gloucester (Bishop) v. Cunningham, [1943] 1 K.B. 101; [1943] 1 All E.R. 61; Digest Supp.; 112 L.J.K.B. 151; 168 L.T. 68.

APPEAL by the defendant from an order of ASQUITH, J., dated June 8, 1943. The facts are set out in the judgment of LORD GREENE, M.R.

C. Lewis Hauser (H. J. Astell Burt with him) for the appellant.

Kenneth Diplock for the respondent.

A LORD GREENE, M.R. : This appeal arises in an action to recover possession of a parsonage house known as St. Nicholas Rectory, 16, Lansdowne Crescent, in the city of Worcester. A lease of that house was granted by the last incumbent to the defendant, and notice to quit was given by the plaintiff, who is the present incumbent.

B The only ground on which it is said here that leave to defend ought to have been given is that there is an arguable case which the defendant can put up to the effect that, in the circumstances, the Rent Restrictions Act applies to this particular parsonage house. It is suggested that the Act applies because the present incumbent, in seeking to obtain possession of the house, is not intending to reside there himself, but proposes to let it, if possible obtaining a higher rent. Leave to defend has been refused, and the plaintiff has been given liberty to sign the appropriate judgment. Leave to defend was refused, because, in the recent case of the *Bishop of Gloucester v. Cunningham* (1), this court held that the Rent Restrictions Acts do not apply to parsonage houses.

C In that case the Bishop of Gloucester was seeking to recover possession for the purpose of enabling a new incumbent to take up his residence there. It is suggested that it is competent to the defendant here to argue that the decision of the court in that case was limited to cases where possession of the parsonage house is required for the actual occupation of the incumbent. There is no substance in that argument at all, because the decision of this court, quite clearly, was that the Rent Restrictions Acts do not apply to a parsonage house. No qualification on that proposition was made; and that was the *ratio decidendi* of the decision. If this court had intended to limit its decision to cases where possession was required only for the residence of the incumbent, the judgment would have been different in every material respect. It is quite clear that, having regard to the decision in that case, the point which the defendant here wishes to argue is quite unarguable.

E In the result the appeal must be dismissed with costs.

DU PARCQ, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *Cochrane & Crippwell* (for the appellant); *Hanhart & Co.*, agents for *John Stallard & Son*, Worcester (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

ied. LANGFORD PROPERTY CO.,
v. GOLDRICH. [1948] 2 All
439.

GRIFFITHS v. DAVIES.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.),
July 2, 1943.]

G Landlord and Tenant—Rent Restriction Application to ascertain standard rent—Previous judgment for possession and to recover arrears of rent at a rate higher than the standard rent—No estoppel—Illegality—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 11.

H The appellant was tenant of a house let at £26 per annum and, claiming that that was a higher rent than that permitted under the Rent Restrictions Acts, she applied under sect. 11 of the 1923 Act for the amount of the standard rent to be ascertained. The respondent contended that the appellant was precluded from putting forward her application because in 1933 the respondent had taken proceedings against the appellant and obtained judgment for possession, the order to be suspended if the current rent was paid and 2s. 6d. per month was paid off the arrears. In the 1933 proceedings the question of excess rent was not raised, but since that date rent had been paid and received at the rate of £26 per annum without objection :—

HELD : (i) the appellant was not estopped from making an application

under sect. 11 of the 1923 Act by reason of the previous proceedings, since a statutory prohibition or direction cannot be overridden by a previous judgment between the parties.

(ii) the fact that the appellant had enjoyed possession of the property on the terms of paying the rent required by the order of 1933 did not prevent her from asking for a determination of the standard rent.

[EDITORIAL NOTE.] Where a statute has said that a thing is illegal, then on grounds of general public policy the court must give effect and full effect to the statutory provision. In any ordinary case, the appellant here would have been estopped, but, since the recovery of more than the standard rent had been made illegal and was prohibited by Act of Parliament, the respondent could not be allowed to circumvent that statutory prohibition by what may be termed a side wind. Further, the respondent was not allowed to contend that the appellant had enjoyed the suspension of the judgment for possession on terms that she paid that higher rent, but here it must be noted that the terms of the judgment were that the "current" rent should be paid. No doubt this was understood between the parties to be the rent which had always been paid, but, upon its proper construction, the words "current rent" in the judgment could not mean a higher rent than the permitted rent, since the payment of a higher rent was illegal.

AS TO DETERMINATION OF STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-314, para. 369; and FOR CASES, see DIGEST, Vol. 31, pp. 564, 565, Nos. 7119-7123.]

Cases referred to:

- * (1) *Bradshaw v. M'Mullan*, [1920] 2 I.R. 412, 490; 21 Digest 139, case h; 54 I.L.T. 109.
- (2) *Maritime Electric Co., Ltd. v. General Dairies, Ltd.*, [1937] A.C. 622; [1937] 1 All E.R. 748; Digest Supp.; 106 L.J.P.C. 81; 156 L.T. 444.
- (3) *Broomhall v. Property Agents & Owners, Ltd.*, [1922] 1 K.B. 311; 31 Digest 564, 7117; 91 L.J.K.B. 332; 126 L.T. 344.

APPEAL by the plaintiff from an order of His Honour JUDGE MORRIS, Llanelly County Court, dated Dec. 4, 1942. The facts are fully set out in the judgment of LORD GREENE, M.R.

H. Samuels for the appellant.

Stephen R. Benson for the respondent.

Samuels: The proper and legal rent permitted by the Rent Restrictions Acts was not considered in the 1933 proceedings. In any event, one cannot set up estoppel to invalidate a statute: *Bradshaw v. M'Mullan* (1) and *Maritime Electric Co. v. General Dairies, Ltd.* (2). I also rely upon the principle stated in SPENCER BOWER ON ESTOPPEL, p. 112.

Benson: So far as the facts decided in 1933 are concerned the matter is *res judicata*. By the judgment of 1933, the tenant remains in possession only so long as she carries out the terms of that judgment. There is no suggestion that the arrears have been paid off although the payments have been kept up to date. Sect. 11 of the 1923 Act was inserted in consequence of the decision in *Broomhall v. Property Agents and Owners, Ltd.* (3). The section merely gives a discretion and, if it has been properly exercised, the court will not overrule it. If there be a discretion in the present case, it has been exercised judicially.

LORD GREENE, M.R.: This is an appeal by the tenant of a house, the contractual rent of which appears to be £26 per annum. The appellant wishes to show that that rent is more than the rent which can legally be claimed from her having regard to the relevant provisions of the Rent Restrictions Acts. She, accordingly, applied to the county court under sect. 11 of the 1923 Act, asking for the determination of certain questions bearing on the amount of the standard rent of the house. I need not refer in detail to the nature of those questions. When the application came before the registrar, the point was taken on behalf of the respondent, the owner of the house, that the appellant was precluded from putting forward her application because in the year 1933 certain proceedings had been taken by the respondent against the appellant, as the result of which judgment for possession was given. The judge's note relating to those proceedings in 1933 shows that the landlady was claiming arrears of rent as well as possession, notice to quit having been given. On the face of the note the contractual rent appears to have been 10s. per week. Judgment was given for possession, but that judgment was to be suspended if the current rent was paid and 2s. 6d. per month was paid off the arrears, there being judgment for £30, the amount of the arrears.

The registrar took the view (and his view was affirmed by the county court judge on appeal to him) that, by virtue of that judgment the appellant was precluded from challenging the propriety of the £26 per annum rent and, consequently, from taking the step authorised by sect. 11 of the 1923 Act, the only purpose of which would be to enable her for the future, and possibly retrospectively to make good against her landlady the claim that £26 was more than the permitted rent.

A Two points are taken on behalf of the appellant. First, it is said that the question of the rent of £26 being or not being excessive under the Acts was never raised in those earlier proceedings and was never adjudicated upon. It is said that the appellant, if she had been given an opportunity in the present proceedings, could have shown that she did not know of the point, and that that was a good excuse for not taking it in the earlier proceedings. It is not necessary to go into the question of whether or not that point is a good one. That it was open to her in those earlier proceedings to take the point that the £26 per year was an excessive rent is quite obvious; and, *prima facie*, it is a point which she ought to have taken according to the general rule that parties must put forward their whole case. We are not in a position to deal with the further point by which it was suggested that she was ignorant of her rights at the time, because we do not know anything about the facts. However, in view of the opinion which I have formed on the second point in the appeal, I need not take up further time in dealing with the first point.

C The second point is this. It is said that, having regard to the language of the Rent Restrictions Acts, those earlier proceedings, which might in cases not governed by those Acts be held to preclude the appellant from alleging that the rent was other than £26, do not preclude her from raising the point now. It is argued that the principle of estoppel or the principle of *res judicata* does not apply where to give effect to them would be to go counter to some statutory direction or prohibition. Therefore, it is necessary to look at the relevant language of the principal Act of 1920, sect. 1 of which provides:

D Subject to the provisions of this Act, where the rent of any dwelling-house to which this Act applies . . . has been [since a date stated] or is hereafter increased, then, if the increased rent or the increased rate of interest exceeds by more than the amount permitted under this Act the standard rent . . . the amount of such excess shall, notwithstanding any agreement to the contrary, be irrecoverable from the tenant . . .

E That is a statutory direction to the court to abstain from giving a judgment for recovery of rent which is shown to the court to be excessive.

It appears to me beyond all question that, if, in a previous case where the point was not taken, judgment for an amount of contractual rent which is, in fact, excessive has been given against the tenant, and, later, an action is brought against the tenant for the contractual rent at the same rate, in which later proceedings it is shown that that rent is excessive, the earlier judgment cannot give to the court a jurisdiction which this section has denied to it. In other words, if two actions are brought in respect of two different rent periods, and in the first judgment for the contractual rent is given and in the second it is shown that the contractual rent is too high, the court is bound in the second action to give effect to the provisions of the section and to refuse to give judgment for the recovery of the excess rent: otherwise the court would be doing something which the statute says it is not to do.

G Sect. 11 of the 1923 Act merely provides machinery for the purpose of deciding questions as to, among other things, the amount of standard rent. It is an ancillary jurisdiction for the purpose of enabling the court to decide, without reference to any existing claim for rent or for possession, the question what is the rent which, having regard to the terms of the Acts, is legally exigible from the tenant. The tenant who has obtained an order under that section can, in any subsequent proceedings, use that order for the purpose of establishing the standard rent on which he relies. It is ancillary in that sense.

I Is it to be said, because in the previous proceedings the point about excess rent was not taken, that for ever thereafter the tenant is precluded from invoking that ancillary machinery, the whole object of which is to enable the question propounded by sect. 1 of the 1920 Act to be answered, namely, is the rent excessive? In my opinion, the fact that this application is one under sect. 11 of the 1923 Act leaves the matter in precisely the same position, so far as *res*

judicata or estoppel is concerned, as if the point had been taken as a substantive defence in, let me say, a subsequent action for rent. It is equally competent to the tenant, notwithstanding what happened in 1933, to make an application under sect. 11 of the 1923 Act as it would have been competent to her to resist a claim for rent under sect. 1 of the 1920 Act.

I do not think I need refer at length to authority for the proposition that, where there is a statutory prohibition or direction, it cannot be overridden or defeated by a previous judgment between the parties. If authority for that proposition were required, it is to be found in the decision of the House of Lords in an Irish appeal, *Bradshaw v. M'Mullan* (1), where the matter is dealt with in the speech of LORD SHAW, at p. 425. That statement of the law is referred to in the judgment of the Privy Council in *Maritime Electric Co. v. General Dairies, Ltd.* (2), at p. 622 ([1937] 1 All E.R., at p. 755). It is a principle which is manifestly right, quite apart from authority.

A further point is taken on behalf of the respondent, namely, that the appellant has enjoyed the benefit of the suspension of the judgment for possession in 1933 on the terms laid down by the court that the current rent is to be paid. By "current rent" I apprehend is meant not merely the rent current at the date of the judgment, but the current rent as it accrued. We are told that the tenant has continued to pay the rent at the contractual rate of £26, and has also paid the instalments of 2s. 6d. per month off the arrears, although we are told those arrears have not yet been wiped out. It is said that, as the terms were that the current rent should be paid as a condition of the judgment being suspended, the appellant is not entitled now to take the benefit of that suspension and in effect repudiate one of the terms on which it was granted. In my opinion, that point will not bear examination, because the phrase "current rent" in the judgment must mean current rent whatever by law that rent should be. The contractual rent was £26. If that was excessive and the true rent was £20, then the condition on which the judgment for possession was suspended is and can only be a condition of paying rent at the rate of £20. In my opinion, the court would have had no jurisdiction to impose a condition for payment of rent at more than the permissible rate. Quite apart from that, and looking at the judgment on the true construction of its language, the words "current rent" must mean whatever rent is legally exigible under the contract as modified, if modified at all, by the terms of the Rent Restrictions Acts.

The last point taken was that under sect. 11 the county court has a discretion as to whether or not it will entertain an application to decide a question relating to standard rent. It may very well be that, in some cases, the court might be justified in saying that the matter could not appropriately or conveniently be decided by such proceedings—I express no opinion upon that. Assuming that in a suitable case the court could decline to exercise that jurisdiction, I am perfectly clear that it must exercise a judicial discretion, and could only refuse to entertain the application on proper grounds. The ground on which the county court judge here refused to entertain the application is one which, in my opinion, as I have already said, was ill-founded in law and, therefore, it cannot be said that the discretion, if there be one, under sect. 11 has been properly exercised.

In the result this appeal must be allowed and the matter must go back to the county court for the purpose of hearing and dealing with the application out of which this appeal arises.

MACKINNON, L.J. : I agree. I think the registrar was wrong in declining to entertain this application under sect. 11, and the county court judge was wrong in upholding him in that refusal. As far as I am concerned, that is the only thing that we are deciding. If it should happen, on the application being heard by the registrar, that he should find, for instance, that the standard rent was not 10s. per week but 5s. per week, so far as I am concerned, this decision must not be taken as indicating any result which would happen if the appellant seeks to go behind the judgment of 1933 and say that the 10s. per week and arrears there provided for must now be reduced. That is a question which is not before us, but as to which, I think, very different considerations may apply; and on which we are not, even by implication, expressing any opinion.

DU PARCQ, L.J. : I agree with the judgment of LORD GREENE, M.R., and

I also agree with what MACKINNON, L.J., has said and would wish expressly to reserve my opinion upon the question which he suggested may hereafter arise.

On the main question, I think the matter, on principle and authority, is reasonably plain. These Acts of Parliament were passed in the general interests of the public. It is apparent from them that the legislature foresaw what, indeed, has turned out to be the case, namely, that many people, when there is a shortage of housing accommodation, would be quite willing to pay what may be an excessive rent, and certainly is more than the standard rent. But the standard rent is a fixed sum, or at any rate a sum which it is possible to fix by a calculation made in accordance with the Acts; and that standard rent cannot be altered by any admission or omission on the part of the tenant. The Acts are so drawn as to penalise a landlord who takes more than the standard rent to the extent that what he has been overpaid is recoverable from him by the tenant. A landlord who tries to get more than the standard rent by means of fines or premiums is guilty of an offence for which he can be prosecuted. I might also refer to sect. 11 of the Act of 1920, by which the landlord is bound, if asked, to supply a statement as to what the standard rent is, again under penalties if he fails to do so without reasonable excuse. The whole scheme of the Act is to prevent a tenant from coming to any agreement or doing anything which shall increase the standard rent in such a way that his conduct or agreement will have any effect whatsoever on that figure.

In those circumstances, the words of LORD SHAW in *Bradshaw v. M'Mullan* (1) are particularly apposite to this case; and I agree that the appeal must be allowed.

LORD GREENE, M.R.: I should add that I entirely agree with the observations of MACKINNON, L.J. Nothing I have said can be construed as prejudging any position which may hereafter arise as a result of any order that the appellant may obtain when her application under sect. 11 of the 1923 Act has been dealt with.

Appeal allowed.

Solicitors: *Bircham & Co.* (for the appellant); *Rhys Roberts & Co.*, agents for *Mervyn D. J. Paton*, Llanelli (for the respondent).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

LANGLEY v. WILSON.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Lewis and Croom-Johnson, JJ.), **March 31, 1943.**]

Emergency Legislation—Motor vehicles—Restriction of journeys—Vehicle hired for journey of more than 15 miles by road—"Inner radius"—Motor Fuel (Hire Service) Order, 1941 (S.R. & O., 1941, No. 1745), para. 2 (b).

The proprietor of a motor vehicle let it out on hire with a driver for a journey from Varteg to Cardiff, a distance by road of more than 15 miles, but less than 15 miles in a straight line. The relevant restrictions did not allow motor fuel to be used otherwise than for a journey within the inner radius and the inner radius in the circumstances of this case was 15 miles of the place where the vehicle was normally kept. The question arose whether the 15 miles should be measured by road or in a straight line.

HELD: there was nothing to show that the word "radius" had any other than its natural meaning and the distance should, therefore, be measured in a straight line.

[**EDITORIAL NOTE.** The word "radius" has often been used in defining an area within which acts are permitted and the judgments herein will be of use in cases other than the important matter in connection with which they are here used.

AS TO RESTRICTIONS ON MOTOR VEHICLES, see BUTTERWORTH'S EMERGENCY LEGISLATION, [38], p. 1911.]

CASE STATED by the justices for the city of Cardiff sitting as a court of summary jurisdiction. The appellant was charged by certain informations preferred by the chief constable of the city of Cardiff for that he on May 16, 1942, being a

proprietor of a motor vehicle unlawfully used motor fuel except for a permitted purpose otherwise than for a journey within the inner radius contrary to the Motor Fuel (Hire Service) Order, 1941, made under the Defence (General) Regulations, reg. 55. The Motor Fuel (Hire Service) Order, 1941, provides as follows :

(1) Except for a permitted purpose, no proprietor shall apply and no hirer shall acquire any motor fuel for consumption in a motor vehicle let out on hire otherwise than for journeys within the inner radius : and no proprietor or hirer shall use or allow to be used otherwise than as aforesaid any motor fuel in such a vehicle. A

(2) Except for journeys within the inner radius in a motor vehicle let out on hire with a driver, no proprietor or hirer shall (a) supply or acquire respectively any motor fuel for consumption in a motor vehicle let out on hire, or (b) use or allow to be used any motor fuel in such a vehicle, unless and until the hirer has signed and delivered to the proprietor letting out that vehicle on hire a declaration containing the required particulars.

(3) In this Order, unless the context otherwise requires, the following expression has the meaning assigned to it, that is to say :— “ Inner radius ” means, in a case in which the proprietor letting out the motor vehicle normally keeps that vehicle at a place within the Metropolitan Police area, 20 miles of that place or, in any other case, 15 miles of the place where that vehicle is normally kept by such proprietor. B

It was proved at the hearing that the appellant was the proprietor of a motor vehicle normally kept at Varteg and on May 16, 1942, let it out on hire for a journey from Varteg to Cardiff. The purpose of the journey was not a permitted one within the Order. The distance covered by the motor vehicle from Varteg to Cardiff by road was 29 miles, but the distance in a straight line drawn on a map is between 12 and 14 miles. C

The magistrates accepted the contentions of the respondent that, the Order being made with the object of saving motor fuel, the ordinary meaning of radius was excluded and it had relation to the distance actually travelled. D

H. V. Lloyd-Jones for the appellant.

Carey Evans for the respondent.

VISCOUNT CALDECOTE, L.C.J. : The question for decision in this case is purely one of construction and the rule of construction which, in my view, is applicable is that words should be given their ordinary and natural meaning unless it appears from the context or other circumstances that they should be given a special meaning. There is here no context which suggests any special meaning and no evidence was given that the word “ radius ” has any special meaning in the motor trade. The word, therefore, should here receive its natural meaning, and in that sense it imputes a circle, so that what is permitted by the Order is a journey within a circle of 15 miles radius having its centre at the place where the vehicle is normally kept. The justices were mistaken in accepting the contentions of the respondent that, the object of the Order being the saving of fuel, the word “ radius ” was used with an unusual meaning and must be construed as 15 miles by road. The appeal must be allowed. E

LEWIS, J. : I agree. F

CROOM-JOHNSON, J. : I agree. The justices have decided that the word “ radius ” was used with a meaning other than its ordinary meaning, but there is no suggestion that radius had any technical meaning in the motor trade. The word is not a word of art and must therefore receive its ordinary meaning unless the context requires otherwise. Further, the Order is a penal one and must be strictly construed so that nothing is held to be within it which the words of the Order do not clearly cover. G

Appeal allowed.

Solicitors : *John T. Lewis & Woods*, agents for *C. James Hardwicke & Co.*, Cardiff (for the appellant) ; *Smith, Rundell, Dods & Bockett* (for the respondent). H

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

MACKILLOP v. INLAND REVENUE COMMISSIONERS,
INLAND REVENUE COMMISSIONERS v. MACKILLOP.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.J.J.),
June 4, 7, 1943.]

Income Tax—Reliefs—Officer serving abroad—How computed—Income Tax Act, 1918 (c. 40), Sched. D, case V., r. 2—Finance Act, 1920 (c. 18), s. 24.

A In the year 1935-36, the taxpayer and his wife possessed income consisting of army pay, a colonial allowance, and certain income from New Zealand sources, a small part of which was remitted to the United Kingdom. Since the taxpayer was on service abroad, he was denied certain reliefs from income tax, but as a British subject he was entitled to limited reliefs ascertained in accordance with the provisions of the Finance Act, 1920, s. 24. It was contended for the Crown that, in computing the reliefs, B Dominion income tax relief should not be taken into account. Further, the Crown, in calculating under the section the total income from all sources, including income which is not subject to tax charged in the United Kingdom, brought into account the whole of the New Zealand income, but the taxpayer contended that only that income which would have been taxed if he had been resident, namely, the amount of the remittances, should have been brought in :—

C HELD : (i) in arriving at the amount of tax which would be payable if the tax were chargeable on the total income from all sources, the calculation must be made by reference to all the reliefs which would be obtainable, including Dominion income tax relief.

D (ii) in calculating, under the Finance Act, 1920, s. 24, the total income from all sources, including income which is not subject to tax charged in the United Kingdom, the whole of the New Zealand income was properly brought into account.

[EDITORIAL NOTE. The Finance Act, 1920, s. 24, sets a limit upon the reliefs allowed to non-residents represented by the following proportion sum :

$$\frac{\text{amount of income tax payable}}{\text{amount of tax payable if chargeable on total income}} = \frac{\text{income subject to U.K. tax}}{\text{total income from all sources}}$$

E In this case the questions are what are the proper figures to be used as the denominators of the fractions. In fixing the first denominator are all reliefs and deductions from tax to be allowed ? This the Court of Appeal have answered, as did WROTTESELEY, J., in the affirmative and, by so doing, are said to have reversed the practice of the Revenue which has subsisted for 22 years. The other question raised was whether the total income from all sources included income not remitted to the United Kingdom. It is held on this that all the income of the non-resident is included whether or not it is remitted to the United Kingdom.

F AS TO DEDUCTIONS ALLOWABLE IN RESPECT OF THE INCOME OF A BRITISH SUBJECT DERIVED FROM FOREIGN SOURCES, see HALSBURY, Hailsham Edn., Vol. 17, p. 194, para. 397; and FOR CASES, see DIGEST, Vol. 28, pp. 79-81, Nos. 433-450.

APPEAL and cross-appeal from an order of WROTTESELEY, J., dated Nov. 10, 1942. The facts are fully set out in the judgment of LORD GREENE, M.R.

Col. MacKillop in person.

G The Solicitor-General (Sir David Maxwell Fyfe, K.C.), and Reginald P. Hills for the Inland Revenue Commissioners.

LORD GREENE, M.R. : These are two appeals from a decision of WROTTESELEY, J. The matter originated in an appeal by the taxpayer, Col. MacKillop, from a decision of the Special Commissioners rejecting two arguments which he had put forward. WROTTESELEY, J., allowed the appeal with regard to one of these points, but dismissed it upon the other. Both sides now appeal to this court.

H The year of assessment with which we are concerned is 1935-36. Accordingly, it is the tax legislation in force in respect of that year to which we must turn. Col. MacKillop during that period was on service in Singapore ; and the income which he and his wife possessed consisted of (i) army pay which, being derived from a United Kingdom source, was subject to United Kingdom income tax ; (ii) a colonial allowance, to which he only became entitled owing to his service abroad ; and (iii) certain income from sources in New Zealand. A small part of that New Zealand income was in fact remitted to this country, but the greater part of it was not. At the time in question Col. MacKillop was non-resident ;

and, so far as the United Kingdom tax was concerned, his liability had to be fixed on that basis. That being the position, the only United Kingdom income tax which Col. MacKillop was liable to pay was the tax upon his army pay.

He was, however, entitled to claim certain reliefs. His rights in respect of reliefs are to be found in the Finance Act, 1920, s. 24, the relevant parts of which are as follows :

Subject as hereinafter provided, no allowance in respect of earned income, and no deduction from assessable income, shall be given or made, and the income tax on the first £225 [that was the then figure] of the taxable income shall not be chargeable at the reduced rate under the foregoing provisions of this part of this Act, [ss. 16-23] and no relief shall be granted under sect. 32 of the Income Tax Act, 1918 [the section which deals with life insurance premiums] in the case of any individual who is not resident in the United Kingdom.

Then follows a proviso that that denial of relief was not to apply in certain cases ; and, among others, the case of a British subject. That is the case of Col. MacKillop. However, the persons entitled to the benefit of that proviso do not get the full relief, because the section goes on to put a limit to the relief that can be claimed. That limit is to be ascertained by a calculation set out in language which has given rise to the present controversy. It is as follows :

. . . so, however, that no such allowance, deduction, reduction of rate, or relief as aforesaid shall be given so as to reduce the amount of the income tax payable by that individual below an amount which bears the same proportion to the amount which would be payable by him by way of tax if the tax were chargeable on his total income from all sources, including income which is not subject to income tax charged in the United Kingdom, as the amount of the income subject to income tax so charged bears to the amount of his total income from all sources.

That provision is a provision not, I think, for measuring the amount of tax to be paid, but for measuring the amount of relief to be allowed. Relief is to be allowed, and it continues to be given until the point indicated in this section is reached and then it is stopped.

In dealing with the claim for relief, the Crown applied a principle which Col. MacKillop challenges in two respects. Before I come to that, I should like to make one or two quite general observations with regard to the structure of this part of the section. It directs certain calculations, and the object of the calculations is to discover the amount of the figure which I will call x , the amount below which the grant of relief is not to reduce the tax payable by the taxpayer. The other factor in this limb of the proportion sum is the amount which would be payable on a certain hypothesis there stated (which I have read). That can be called the hypothetical tax. So we have got the first limb of the proportion— x is to the hypothetical tax. Then comes the second limb. The two factors which go to make that up are the amount of the income subject to income tax so charged, that is to say, the amount of income which was in fact chargeable to United Kingdom income tax ; the other factor is the total income from all sources, which must mean the same as "sources" means in the earlier part of the section ; that is to say, total income from all sources including income which is not subject to any income tax chargeable in the United Kingdom. That, then, is the proportion sum : x is to the hypothetical tax as the income subject to United Kingdom income tax is to the total income from all sources, as so defined.

The point upon which WROTTESELEY, J., decided in favour of Col. MacKillop was this. The greater part of Col. MacKillop's and his wife's income consisted, as I have said, of income from various sources in New Zealand. He contends that, in calculating the hypothetical tax, the calculation must be made by reference to what the position would have been if in fact the hypothetical tax had been a tax imposed by the Income Tax Acts. Indeed, that is exactly what the language says the calculation is to be. It is an amount which would be payable by him by way of tax if the tax were chargeable on his total income from all sources. "So," says Col. MacKillop, "if tax were chargeable on my total income from all sources, including the New Zealand income, I should be entitled, under the provisions relating to Dominion income tax relief, to claim a reduction of the tax which I would otherwise have paid, and after making that reduction the notional amount would be the amount which would be payable by me on the hypothesis stated." That appears to me, as it appeared to

WROTTESELEY, J., to accord with what is *prima facie* the natural, grammatical meaning of the language used, but the Crown says that the language must not be construed in that way. The Crown admits that, in ascertaining the amount of this hypothetical tax, the calculation is to be made on the footing that the taxpayer is to be treated as notionally entitled to the reliefs, using that phrase as a general phrase, which are dealt with in the preceding sections. They say, however, that the permitted reliefs are limited to those particular reliefs, and do not include Dominion income tax relief which appears in a different section of the Act. That must be excluded on their view. One thing is to be noticed. Under the new scheme as introduced by the Act of 1920, the various reliefs with which sect. 24 is dealing are granted in some cases by way of deduction from assessable income. The first £225, as it was then, is charged at half the standard rate and not by way of reduction of assessment. In the case of the life insurance premiums, which are dealt with under the Income Tax Act, 1918, s. 32, the machinery for granting reliefs, putting it quite generally, was by way of reduction in the amount of tax payable—I am stating that quite broadly. That was the method by which that relief was granted. The method of allowing those reliefs for the purpose of calculating the hypothetical tax results, as it does in the case of an ordinary assessment, in arriving at the net figure of tax payable which appears at the bottom of the assessment. That is the figure in respect of which the taxpayer has to draw his cheque. Quite clearly the Crown is perfectly right, in calculating the amount of this hypothetical tax, to make the calculation on the basis that those reliefs must be brought into account.

In the case of Dominion relief, whatever the position may have been under the earlier legislation, by the Finance Act, 1920, s. 27, it is given either by way of a reduction in the amount of tax payable, in which case it stands in the same position as, for instance, the reduction in the case of life insurance premiums, or in a case where the claim to relief has not been established before January 1, in the year of assessment, by way of repayment. In any case, the whole scheme of it is to grant the Dominion relief by way of reduction of the amount of tax which the taxpayer ultimately has to bear.

That being the case, when you come to examine the language of sect. 24 with a view to discovering what amount of tax would be payable if the tax were chargeable on the total income from all sources, it seems to me that you must carry the hypothesis under which you are treating the entire income as subject to United Kingdom tax to its logical conclusion. You must calculate the amount by reference to all the reliefs which would be obtainable on that hypothesis and not with regard only to some of them. Indeed, the Crown's argument on this point involves reading into the section some such words as these: "The amount which would be payable by him by way of tax if the tax were chargeable on his total income and so forth, after granting to him the reliefs given in the foregoing sections, but no other reliefs." I cannot see any ground whatsoever for reading in any such qualification as that. That part of the section does not mention reliefs. All it directs you to ascertain is the amount which would be payable in an assumed state of facts. The amount which would be payable would be the amount which, on that assumed state of facts, would take into account all the reliefs, including Dominion relief. Therefore, in my opinion, the decision of WROTTESELEY, J., on that point was correct.

The other point, which is the subject-matter of Col. MacKillop's own appeal, is of a different character. The Crown, in calculating under the section the total income from all sources, including income which is not subject to tax charged in the United Kingdom, brought into the account the whole of the New Zealand income. Col. MacKillop maintains that the only amount which ought to have been brought in was the actual amount of the remittances. What he says is that the total income from all sources which is directed to be calculated here is the total income calculated on the hypothesis that he was resident here in the year in question. If he had been resident here, his New Zealand income would not have been taxed save in so far as it was remitted to this country.

The relevant rule is Sched. D, case V, r. 2, which, in the year in question, related to income:

... from possessions out of the United Kingdom, other than stocks, shares or rents. Income of that class constituted the greater part of this New Zealand income. Col. MacKillop says that, under that rule the only tax exigible against a person

resident in the United Kingdom is tax based on the actual remittances. "So," he says, "in making this calculation of total income, and treating me as resident here, for these purposes, you must make a hypothetical calculation of tax on the basis of my remittances and nothing else." On the other hand, the Crown say that the tax is to be calculated on the basis of the *de facto* total income. The hypothesis which is to be made in calculating the total income is, it is said, either, as the Solicitor-General put it, that the sources of income are in the United Kingdom, or, as Mr. Hills put it, that United Kingdom income tax extended to foreign sources. I personally do not find it necessary to introduce hypotheses of that kind. I prefer merely to look at the actual language used. The income which is to be dealt with is described as the :

... total income from all sources, including income which is not subject to income tax charged in the United Kingdom.

There, again, on this branch of the case, as on the other branch of the case, it seems to me that that language, in its natural, grammatical meaning, means what it says : namely, all income of the taxpayer including income on which he is not taxable, is to be brought into the calculation. Is there in the context, either in the section or in the Act, or is there anything in common sense and justice, which points to a construction such as that which Col. MacKillop claims is the right one ? In my opinion, there is not. I can see no reason for limiting the phrase "income which is not subject to income tax charged in the United Kingdom" to that income which, if the taxpayer had been resident, would have been taxed, namely, in the case of foreign possessions, remittances.

I can see no reason in justice, quite apart from construction, why the legislature should have intended to do any such thing. A person who lives abroad and has a foreign income has the advantage of having that income available for him to spend, without suffering the charge of British income tax. If he is going to demand reliefs, why should he be assumed to be in the very artificial position of a person who is in fact enjoying that income abroad, but for the purposes of the section is to be deemed to be not enjoying it because he is only remitting part of it to this country where he can spend it ? It seems to me to be a claim which contains no element of justice. Quite apart from these considerations, I cannot see, on any principle of construction, how the *prima facie* meaning of these words can be limited in the way Col. MacKillop suggests. Nor do I find it necessary to distract my mind by saying that the section must be interpreted on the assumption that the taxpayer is resident or is not resident here ; or that British income tax does or does not apply all over the world ; or that the source of income is or is not to be deemed to be here. Those speculations do not appear to me to assist when one has language such as one has here, which is, for an Income Tax Act, reasonably intelligible.

That disposes of the appeals ; and the result is that neither appeal succeeds.

MACKINNON, L.J. : I agree both as to the appeal and the cross-appeal.

DU PARCQ, L.J. : I also agree.

Appeal and cross-appeal dismissed. No order as to costs.

Solicitor : *Solicitor of Inland Revenue* (for the Crown).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

EXECUTRICES OF C. J. H. CORBETT v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Scott, MacKinnon and Luxmoore, L.JJ.), May 5, 6, June 9, 1943.]

Income Tax—Sur-tax—Transfer of assets to English company—Subsequent transfer to Canadian company—Whether "associated operation"—"Power to enjoy"—Finance Act, 1936 (c. 34), s. 18.

The father of C. died in 1882 leaving a large residuary estate to be divided by his trustees among his 6 children. For 50 years the estate remained undivided. On July 12, 1933, a deed of family arrangement was entered into by all the beneficiaries for the purpose of dealing with it and releasing the then trustees. Part of the residuary estate then consisted of investments, sinking fund policies in connection with certain leases, and debts

owing to the estate. The bulk of the investments, all the policies and debts were in pursuance of the deed transferred to an English company called Woodgate Investment Trust (hereinafter called Woodgate) incorporated for the purpose under the provisions of the deed. The consideration for the transfer was satisfied in part by the issue to the beneficiaries of all the shares in the company in 6 equal parcels. The beneficiaries became dissatisfied because British income tax law does not allow deduction of the premiums on leasehold sinking fund policies in order to arrive at taxable income. Therefore, on Mar. 16, 1935, they created a Canadian company called Danehill Investments, Ltd. (hereinafter called Danehill), and to this company Woodgate transferred the sinking fund policies and also a sufficient portion of the investments which were situate outside the United Kingdom to pay the premiums on those policies and to defray the cost of running the company out of the income receivable from the investments. The consideration for this transaction was the issue to Woodgate of all the shares in Danehill. C. was assessed to sur-tax, under the Finance Act, 1936, s. 18, in respect of income derived from his holdings in Danehill. The appellants, the executrices of C., contended that the case did not come under the Finance Act, 1936, s. 18, on the grounds that (a) the transfer from Woodgate to Danehill was not "associated" with the transfer to Woodgate and (b) C. was not in a position "to enjoy," because, being only entitled to one-sixth of the total voting power, he could not control the actions of Woodgate:—

HELD: (i) whether the transfer to Danehill was "associated" with the transfer to Woodgate was a question of fact and the finding of the Commissioners, since there was evidence to support it, must be affirmed.

(ii) the proviso to sect. 18 (1) allows the taxpayer to escape from liability, only if he proves that some objective other than avoidance of tax was the main purpose of the transfer. The appellants had failed to do this and the assessment must stand.

[EDITORIAL NOTE.] There is usually some little difficulty in proving a state of mind such as an intention. In the case of the Finance Act, 1936, s. 18, which deals with the transfer of assets abroad for the purpose of avoiding tax, the legislature has avoided the difficulty of proving an intention for it is held that it is sufficient if it is proved that the result of the transfer is the avoidance of tax.

AS TO EXEMPTION OF INCOME TAX, see HALSBURY, Hailsham Edn., Vol. 17, pp. 79-81, paras. 161-162; and FOR CASES, see DIGEST, Vol. 28, pp. 82-84, Nos. 469-483.]

Cases referred to:

* (1) *Latilla v. Inland Revenue Comrs.*, [1943] A.C. 377; [1943] 1 All E.R. 265; Digest Supp.; 112 L.J.K.B. 158; 168 L.T. 411; *affg.*, [1942] 1 K.B. 299; [1942] 1 All E.R. 214.

(2) *Howard de Walden (Lord) v. Inland Revenue Comrs.*, [1942] 1 K.B. 389; [1942] 1 All E.R. 287; Digest Supp.; 111 L.J.K.B. 273.

(3) *MacDonald v. Inland Revenue Comrs.*, [1940] 1 K.B. 802; Digest Supp.; 109 L.J.K.B. 609.

(4) *Cottingham's Executors v. Inland Revenue Comrs.*, [1939] 1 K.B. 250; [1938] 4 All E.R. 663; Digest Supp.; 108 L.J.K.B. 223; 160 L.T. 7.

APPEAL by the taxpayer from an order of MACNAGHTEN, J., dated Oct. 12, 1942. The facts are fully set out in the judgment.

Cyril King, K.C., and *L. C. Graham-Dixon* for the appellants.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

King, K.C.: It is contended by the Crown that the transfer to Woodgate and the transfer by Woodgate to Danehill was an "associated operation" and, that, by virtue of the operation Corbett junior acquired a power "to enjoy" the income of Danehill. The two transfers were not associated. It is necessary to find a connection between the operations. The first transfer was for the purpose of giving a release to the trustees. At the time of the first transfer nobody had the transfer to Danehill in mind. Corbett junior was not in a position "to enjoy" because, since he had only one-sixth of the total voting power, he could not control the action of Woodgate. The proviso to sect. 18 (1) shows that the intention of avoiding tax must be present. At the time of the transfer to Woodgate there was no such intention.

The Attorney-General: There is no obligation under the section upon the commissioners to establish a tax-avoiding plan or intention either in the transfer or in the associated operation. It is sufficient if they show the result. The taxpayer can avoid liability by showing that there was no motive of avoiding tax, but the onus is on the taxpayer. That the two transfers were associated is a finding of fact.

King, K.C., in reply: Sect. 18 is to some extent a penal section and should be construed strictly. The section does not say that it is sufficient for the taxpayer to obtain a power "to enjoy." He must acquire a right by virtue of which he has a power "to enjoy." [Counsel referred to *MacDonald v. Inland Revenue Comrs.* (3) and *Cottingham's Executors v. Inland Revenue Comrs.* (4).]

SCOTT, L.J. [delivering the judgment of the court]: An additional assessment to sur-tax was made upon the appellants as personal representatives of one, C. J. H. Corbett (to whom I refer as Corbett junior) for the year 1935-6 in the sum of £566. On appeal by the present appellants the Special Commissioners held that the appellants had been rightly assessed, and that the correct figure was £577. MACNAGHTEN, J., dismissed an appeal and in our opinion he was right. The question in issue is whether certain income-producing assets held by a Canadian company came into its ownership in circumstances which, by reason of the special provisions of the Finance Act, 1936, s. 18, cast liability to income tax upon the appellants. The broad object of the section is shown by its preamble:

For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows . . .

The enacting provisions of the section deal with those transfers of assets which are to entail liability to income tax. For the year 1935-36 subsect. (7) was necessary to create the liability to sur-tax.

The material facts can be stated shortly. The father of the deceased, Charles Joseph Corbett (who is hereinafter referred to as Corbett senior) died in 1882, leaving a large residuary estate to be divided by the trustees of his will equally between his 6 children. For 50 years the estate remained undivided. On July 12, 1933, a deed of family arrangement was entered into by all the beneficiaries (which description includes throughout this judgment the personal representatives of those who had died previously) for the purpose of dealing with it and releasing the then trustees of the will. Part of the residuary estate then consisted of investments, sinking fund policies in connection with certain leases, and debts owing to the estate. The bulk of the investments, all the policies and debts were in pursuance of the deed transferred to an English company called Woodgate Investment Trust (hereinafter referred to as Woodgate) incorporated for the purpose under the provisions of the deed. The consideration for the transfer was satisfied in part by the issue to the beneficiaries of all the shares of the company in 6 equal parcels. The beneficiaries, it is said in the special case, became "dissatisfied" because British income tax law does not allow deduction of the premiums on such a policy in order to arrive at taxable income. They therefore decided to create a Canadian company, to transfer to it the sinking fund policies and also a sufficient portion of the investments which were situate outside the United Kingdom to pay the premiums on those policies and defray the cost of running the company out of the income receivable from the investments. This plan was duly carried out by the incorporation, on Mar. 16, 1935, of a Canadian company under the name of Daneshill Investments, Ltd. (hereinafter referred to as Daneshill), and the transfer to it by Woodgate of the above-mentioned items, the consideration being, among other things, the issue to Woodgate of all the shares of Daneshill.

It is these transactions which led to the additional assessment upon the appellants under the Finance Act, 1936, s. 18. The main enacting part of the section is subsect. (1). The proviso to subsect. (1) was replaced in 1938 by what is now subsect. (1B), but the original proviso was in force at the time material to the appeal. Subsects. (2)-(5) are explanatory of subsect. (1); they are important because they are directed to forestalling and preventing attempts to cut down the scope of subsect. (1). Subsect. (1) provides that, where an individual

ordinarily resident in the United Kingdom has by means of transfer of assets, by virtue or in consequence of which in conjunction with associated operations, income becomes payable to a person resident or domiciled out of the United Kingdom acquired rights by virtue of which he has power to enjoy, whether forthwith or in the future, income of such a person out of the United Kingdom, which, if it were income of that individual received by him in the United Kingdom would be chargeable to tax, that income shall (in effect) be chargeable.

A An "associated operation" is defined by subsect. (2), while the phrase "power to enjoy" is defined in subsect. (3). All the shareholders in Woodgate, who were the beneficiaries, had an identical interest in getting the premiums paid by Danehill out of the income produced by the foreign investments which had been transferred for that purpose by Woodgate to Danehill, because that income being receivable in Canada would, but for the provisions of sect. 18, be free from liability to United Kingdom income tax. The result of the transaction

B constituted, in our opinion, "power to enjoy" within subsect. (3) (a), (b), (c), (d) and (e) respectively.

The only argument of the appellants which had any plausibility was that based on the lapse of time between the transfer to Woodgate, and the transfer by Woodgate to Danehill. Counsel for the appellants contended that that interval was sufficient—presumably he meant in law—to prevent the Canadian operation from being associated with the transfer to Woodgate. The first

C answer is that that question is not one of law, but of fact; and the finding of the Special Commissioners that the operation was associated is conclusive, unless it could be said that there was no evidence to support it. Such a submission is, in our view, wholly unacceptable.

The other argument of counsel for the appellants was that Corbett junior was not in a position "to enjoy," because being only entitled to about one-sixth of the total voting power he could not control the action of Woodgate.

D There are two answers to this contention. All the shareholders had a common interest and had to pull together in order that each might severally attain the desired result—namely, the escape from United Kingdom income tax. If this identity of interest, and the common sense inference therefrom that they would vote together, could be disregarded, each shareholder would escape assessment to tax by pleading inability to control the others. The other answer is the

E plain indication of subsect. (3) (d) that arguments based on the need of consent by another person are irrelevant. The section in its true interpretation imposes the objective test of actual results. It does not call upon the Commissioners of Inland Revenue to establish the existence of any intent in the taxpayer's mind to avoid liability to income tax. It is enough for them to establish the fact that "by virtue or in consequence," etc., the results follow. Indeed, the

F proviso to subsect. (1) shows that the exact opposite is the statutory position. That provision allows the taxpayer an escape from liability attendant upon the specified consequences if, but only if, he proves to the satisfaction of the Special Commissioners that some other objective was his main purpose. In other words, the onus is on him; and in the present case the Special Commissioners were not satisfied that the appellants had discharged it.

We have arrived at the above conclusions without reference to subsect. (4);

G but the provisions there contained support our reasoning in two respects. It provides that "regard shall be had" (i) to "the substantial result and effect of the transfer and any associated operations" and (ii) "to all benefits which may at any time accrue." As to the first, there was ample evidence that the admittedly associated operation of transfer to Danehill had, in conjunction with the previous transfer to Woodgate, the substantial results stated in the last finding of the Special Commissioners. As to the second, it is to be noted that

H it is the only reference to time contained in the whole of the section, and it is mentioned in subsect. (4) only to make it plain that in that context time does not matter. The interval during which the beneficiaries were thinking out their "associated operations" could not make any difference to the legal conclusion, unless the Special Commissioners had found as a fact that it negatived the "conjunction" or association between the two operations—the transfer to and the transfer by Woodgate. They did not so find.

There have been decisions of this court upon the section: *Latilla v. Comrs. of Inland Revenue* (1), and *Lord Howard de Walden v. Comrs. of Inland Revenue* (2).

In each LORD GREENE, M.R., delivered the judgment of the court, and in each the court rejected any narrow or technical construction of the language of the section; see the former at pp. 303, 304 ([1942] 1 All E.R., at pp. 215, 216); and the latter at pp. 396-398 ([1942] 1 All E.R., at pp. 288-290). The former case went to the House of Lords, and VISCOUNT SIMON, L.C., in moving the dismissal of the taxpayer's appeal, quoted the language of LORD GREENE, M.R., with complete approval: see p. 383 ([1943] 1 All E.R., at p. 267); and LORD PORTER pointed out that the section used the word "payable" not "as a word of art," but in its every-day sense: see p. 384 ([1943] 1 All E.R., at p. 268). The appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Slaughter & May* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

R. v. DUNNE, *Ex parte* SINNATT.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Humphreys and Lewis, JJ.), May 4, 1943.]

Magistrates—Fines—Committal to prison in default—Inquiry as to means—Criminal Justice Administration Act, 1914 (c. 58), ss. 1 (1), 5—Money Payments (Justices Procedure) Act, 1935 (c. 46), s. 1 (3).

The applicant was convicted before a metropolitan police magistrate on three summonses for selling goods in excess of the quota permitted under the Limitation of Supplies (Miscellaneous) (No. 5) Order, 1940. He was fined a total of £1,500 and was given three months in which to pay. Having failed to do so he was ordered to attend an inquiry as to his means. At the hearing, which was presided over by the same magistrate who had convicted, the magistrate indicated to counsel for the applicant that the evidence given at the previous hearing pointed to the fact that the applicant had had sufficient means to pay the fine. No evidence to contradict this was tendered, and the magistrate ordered the applicant to pay the fines forthwith or in default to be committed. The applicant moved for an order of *certiorari* to quash the magistrate's order on the grounds (i) that the magistrate had no power to issue the warrant unless he was satisfied that the applicant had had, since the conviction, the means to pay the fine, and that there was no such evidence; and (ii) that the onus of proving the applicant's means was on the prosecution:—

HELD: (i) the case came under the Money Payments (Justices Procedure) Act, 1935, s. 1 (3), and it was not necessary to prove that the applicant had the means to pay before committing him to prison. There was in any case sufficient material to show that he had had the means.

(ii) under the Money Payments (Justices Procedure) Act, 1935, s. 1 (3), there is no onus on the prosecution to show that the applicant has had sufficient means.

[EDITORIAL NOTE.] Where imprisonment is imposed by reason of default in payment of a fine, it is now necessary to show that the accused has had the means to pay the fine. Where the matter is dealt with at the time of the conviction, the matter is governed by the Criminal Justice Administration Act, 1914, s. 1. If the accused is given time to pay and the question of non-payment is inquired into at a date subsequent to the conviction, the matter is governed by the Money Payments (Justices Procedure) Act, 1935, s. 1. It was here sought to be said that the onus is upon the prosecution to show that the accused has had the means to pay, but it is held to be sufficient that, from the general evidence given during the proceedings, it appears that the accused has had sums paid to him of which he gives no sufficient account as to why they are not available for the payment of the fine. Where there is such evidence and the accused offers no explanation, the court is justified in ordering a committal.

FOR THE MONEY PAYMENTS (JUSTICES PROCEDURE) ACT, 1935, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 28, p. 126.]

Case referred to:

* (1) *R. v. Woking JJ.*, [1942] 2 K.B. 240; [1942] 2 All E.R. 179; Digest Supp.

APPLICATION for an order of *certiorari* to quash an order made by a magistrate sitting at Bow Street, London, committing the applicant to prison in default of payment of a fine.

The applicant was convicted before a metropolitan police magistrate on three summonses for selling goods in excess of the quota permitted under the Limitation of Supplies (Miscellaneous) (No. 5) Order, 1940. He was fined a total of £1,500 and was given three months in which to pay. Having failed to do so, he was ordered to attend an inquiry as to his means. At the hearing, which was presided over by the magistrate who convicted in the first instance, the magistrate indicated to counsel for the applicant that the evidence proved at the previous hearing pointed to the fact that the applicant had had sufficient means to pay the fine; the applicant proffered no evidence to contradict this, and the magistrate ordered that the applicant pay the fines forthwith and in default be committed. The applicant moved for an order of *certiorari* to quash the magistrate's order.

D. Weitzman for the applicant.

Solicitor-General and *G. Granville Sharp* for the respondent.

VISCOUNT CALDECOTE, L.C.J.: The Criminal Justice Administration Act, 1914, s. 1, provides as follows:

A warrant committing a person to prison in respect of non-payment of a sum adjudged to be paid by a conviction of a court of summary jurisdiction shall not be issued forthwith unless the court which passed the sentence is satisfied that he is possessed of sufficient means to enable him to pay the sum forthwith, or unless, upon being asked by the court whether he desires that time should be allowed for payment, he does not express any such desire, or fails to satisfy the court that he has a fixed abode within its jurisdiction, or unless the court for any other special reason expressly directs that no time shall be allowed.

That section, I think, deals with the position that arises immediately upon conviction and the question is whether a warrant committing the accused to prison shall be issued forthwith, if he does not pay the fine. In this particular case, at the hearing at which the applicant was convicted and fined, time for payment was given. These circumstances are dealt with by the Money Payments (Justices Procedure) Act, 1935, s. 1 (3), which provides as follows:

A warrant of commitment to prison in respect of the non-payment of a sum adjudged to be paid by a conviction of a court of summary jurisdiction shall not be issued in the case of a defendant who has been allowed time for payment, unless on an occasion subsequent to his conviction the competent court has made inquiry as to his means in his presence . . .

That subsection deals clearly, as I think, with the position in a case where a defendant has been allowed time for payment. It seems to me to be the section to be applied in this case. There was no suggestion or question as to the order for payment being made forthwith on Apr. 12 when the conviction took place. Then a question arose as to whether a warrant for commitment should be issued. When counsel for the applicant was asked whether his contention was that the wrong procedure had been adopted as far as the inquiry as to means was concerned, his answer was that no question of that sort was raised. His contention was that there was no material on which the magistrate made the order after inquiry as to means had been held. Therefore, I base what I have to say in this case upon the view that the proper procedure was adopted on the occasion of the inquiry as to the defendant's means. The whole strength of the argument of counsel for the applicant has been based upon the words of the 1914 Act: that the court should be satisfied that the defendant is possessed of sufficient means to enable him to pay the sum forthwith. The 1935 Act simply requires an inquiry as to means in his presence.

In *R. v. Woking JJ.* (1), it was decided that where the inquiry as to means had been held by magistrates other than the magistrate who had convicted the defendant, the magistrates could not, in a case where there was no evidence of any sort except that the defendant had no means, fly in the face of that evidence and make an order for the issue of a warrant committing the defendant to prison. In that case it was sought to justify an order for the issue of a warrant by relying upon the gravity of the offence. The court held that that could not be done by justices who were different from the justices who had convicted the defendant and, therefore, as to the inquiry as to means, if the evidence was all

one way, it was not possible for them to say: "We have held the inquiry and disregarded the evidence which has been given and notwithstanding the position exposed by that evidence we commit the defendant to prison."

In the present case an inquiry as to means was held and certain material was before the magistrate. I now come to consider what that material was. The magistrate who held the means inquiry was the same court as the one that tried the original case, and was, therefore, a competent court under sect. 15 of the 1935 Act. At the means inquiry counsel for the defendant made a number of statements. They can be quite shortly summarised as stating that the applicant was not possessed of assets at that time. The magistrate, having heard the evidence given at the trial and the other proceedings, put a point of view which occurred to me and which he thought it right to put to counsel. In the affidavit of the magistrate sworn in reply to the affidavit made by the applicant, the magistrate said:

I was addressed by counsel as to the said Sinnatt's means and saw no reason to suppose that any examination conducted by me would elicit any further information as to his financial position at the time of the inquiry. I did put the following matters to counsel upon which he could have replied or have called the said Sinnatt: That it had been proved that large sums of money amounting to many thousands of pounds had been paid or credited to Hispano Britannic Co., Ltd., by way of commissions on fraudulent sales of non-existent quota. . . . I asked counsel for the said Sinnatt what had become of that money. I was informed that there were no assets of the company extant except one office chair.

In a further affidavit the magistrate said:

I formed the opinion at the hearing of the inquiry as to the said Sinnatt's means that the evidence of the directors of Hispano Britannic Co., Ltd., which I had heard as to the part played by the said Sinnatt in the affairs of the company, placed some responsibility upon the said Sinnatt to gainsay such evidence if such a course were possible for him and I did not consider that the statement of counsel on the instructions of the said Sinnatt was such as sufficed to satisfy me that the said Sinnatt's position was not that stated by his ex co-directors.

Sinnatt did not go into the witness-box and give evidence in answer to the magistrate's comment upon the evidence which had been given in the previous proceedings. It seems to me, in the light of those facts, that it is quite impossible to say that the magistrate arrived at a conclusion which was improper in any way if, as the facts show, he took the view that there was material upon which he could make the order. We have been pressed with the point that the 1914 Act requires evidence to satisfy the magistrate that a defendant is possessed of sufficient means to enable him to pay the sum forthwith, but, for the reasons I have mentioned, that is not the section that applies to this case. If, on the other hand, I turn to the section which, I think, does apply to this case, namely, sect. 1 (3) of the 1935 Act, the magistrate seems to me to have dealt with the provisions of that subsection. There was plenty of material, in the absence of evidence to the contrary, to show that the defendant was possessed of means, matters to which the magistrate called the attention of the defendant. I do not accept the argument that the onus of proof that the defendant had means was upon the prosecution. It is quite true that, if, as in the *Woking* case (1), an inquiry was held, the magistrate must not disregard it.

In this case there was ample material to enable the magistrate to make an order to commit the defendant to prison in default of payment of the money. I think the order was justified by reason of the matters which are proved in the magistrate's affidavits, to which I have called attention, and this application for an order of *certiorari* must be refused.

HUMPHREYS, J.: I am of the same opinion. A question of default in the payment of a fine has been raised in this case. I think the point has been put in this way, that where a magistrate, or a bench of magistrates, under the Money Payments (Justices Procedure) Act, 1935, s. 1 (3), are holding an inquiry into the matters provided by sect. 11 of that Act, the court is debarred from making any order for committal to prison unless it then has evidence to satisfy it that the defendant has means or has had means since the original conviction was made. There is no section of the Act of 1935 to support that argument. It is said that one ought to read into that Act the Criminal Justice Administration Act, 1914, s. 1. I agree with the judgment delivered by my Lord, in which he

pointed out, on the question of committal, that sect. 1 of the Act of 1914 prevents the making of an order of committal to prison forthwith in the case where a person has not been given the opportunity of paying a fine, unless certain matters are shown, and one of those matters is that the accused then is possessed of sufficient means to pay the sum forthwith. It may well be said that that means that the court is satisfied by those who are responsible that the accused person is then possessed of sufficient means and it puts the onus on the prosecution.

A What happened here was that the position was provided for by a later Act, the Money Payments (Justices Procedure) Act, 1935, sect. 1 (3) of which deals with the case in this way :

B A warrant of commitment to prison in respect of the non-payment of a sum adjudged to be paid by a conviction of a court of summary jurisdiction shall not be issued in the case of a defendant who has been allowed time for payment, unless on an occasion subsequent to his conviction the competent court has made inquiry as to his means in his presence . .

C There are no words in that section which are intended to indicate that the onus lies on the prosecution to prove anything at all. Here we are dealing with a different state of affairs from those prevailing at the time when sect. 1 (1) of the Act of 1914 was passed. I think it is quite impossible to say that when one reads sect. 1 (3) of the Act of 1935 it puts the onus on the prosecution to prove anything at all. In point of fact, it is common ground that the accused was present at the time when the inquiry as to means was held and could have given evidence as to his means if he had desired to do so. It may well be that this point will arise in some case where the tribunal as to means is a different tribunal from that which was sitting on the original conviction. However, that point does not arise in this case. The same magistrate was sitting on both occasions, and I think it would be quite wrong to say that there was any onus placed on anybody to prove anything at all. The words of the section are as general as it is possible to imagine. All that the magistrates are required to do, as a competent court, is to make inquiry as to the means of the person in his presence. That he did. The magistrate took into consideration such matters as had been proved before him at the time of the conviction. That is, I think, shown by sect. 5 of the 1914 Act, which provides :

E A court of summary jurisdiction in fixing the amount of any fine to be imposed on an offender shall take into consideration, amongst other things, the means of the offender so far as they appear or are known to the court ; and where a fine is imposed the payment of the court fees and police fees payable in the case up to and including conviction shall not be taken into consideration in fixing the amount of the fine or be imposed in addition to the fine, but the amount of the fine, or of such part thereof as may be paid or recovered, shall be applied as follows . . .

F In this case the magistrate, in imposing a fine of £1,500, was satisfied that that was a sum which could be paid not exactly forthwith, but that the defendant would be able to raise that money at the end of three months and, therefore, he gave him three months within which to pay. As far as the facts of this case are concerned, the magistrate seems to me, in holding the inquiry as to means, to have behaved with perfect propriety. He put it to counsel, who was asking him not to make the order for committal on the ground that the defendant was a person actually without means, the difficulty that he felt, namely, that the evidence had been the other way up to that time and he left it to counsel to deal with the matter, and in his discretion counsel did not call any evidence on that matter. Therefore, the magistrate was fully entitled to make the order he did. I agree with my Lord in the judgment which he has pronounced.

H LEWIS, J. : I agree.

Application dismissed with costs.

Solicitors : *Lawrence Barnett & Co.* (for the applicant) ; *Treasury Solicitor* (for the respondent).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

CONWAY *v.* STOCKS.

[KING's BENCH DIVISION (Viscount Caldecote, L.C.J., Lewis and Cassels, JJ.), April 9, 1943.]

Emergency Legislation—Essential work—Absence from work not referred to works committee—Certificate that no appropriate committee existed—Whether opinion of national service officer conclusive—Defence (General) Regulations, reg. 58A—Essential Work (General Provisions) (Amendment) Order, 1942 (S.R. & O., A 1942, No. 583), art. 6A.

The appellant, a national service officer, preferred informations against the respondent, an employee at an undertaking scheduled under the Essential Work (General Provisions) (Amendment) Order, 1942, who had absented himself from work on three occasions in July, 1942, contrary to the Defence (General) Regulations, reg. 58A. The appellant did not require the matter of the respondent's absence from work to be referred to the works committee which existed in the undertaking, but certified that an appropriate committee did not exist. The respondent contended (i) that the works committee was an appropriate committee to which, by the Essential Work (General Provisions) (Amendment) Order, 1942, art. 6A, the appellant was bound to require the matter of the respondent's absence from work to be referred; (ii) that the appellant's opinion that the works committee was not an appropriate committee was not final and the justices were entitled to decide the matter after hearing the evidence:—

HELD: an appropriate committee within the meaning of the Essential Work (General Provisions) (Amendment) Order, 1942, art. 6A, is a committee which, in the opinion of the national service officer, can appropriately deal with the matter in question, and his decision is final and conclusive.

[EDITORIAL NOTE. The limitations of the jurisdiction of the courts under the Emergency Legislation have been the subject of a number of decisions and this decision deals with the finality of a decision of a national service officer, whether a works committee is an appropriate committee within the regulations for dealing with the case of an absentee.

AS TO THE ESSENTIAL WORK (GENERAL PROVISIONS) ORDER, 1942, see BUTTERWORTH'S EMERGENCY LEGISLATION [14], 128.]

CASE STATED by six justices of the peace for the West Riding of the county of York, sitting at Otley, under the Summary Jurisdiction Acts, 1857 and 1879, dismissing informations preferred by the appellant, a national service officer, against the respondent who had absented himself from his work at an undertaking scheduled under the Essential Work (General Provisions) (Amendment) Order, 1942.

The appellant, an officer of the Ministry of Labour and National Service, preferred informations against the respondent, a fitter employed at an undertaking scheduled under the Essential Work (General Provisions) (Amendment) Order, 1942, who had absented himself from work on July 20, 22 and 24, 1942, in contravention of the Defence (General) Regulations, reg. 58A. At the date when the management reported the matter to the appellant, there existed in the undertaking a works committee which had appointed a standing committee to deal with cases of absentees. The appellant did not require the matter of the respondent's absence from work to be referred to the committee, but produced a certificate pursuant to art. 6 (4) (a) of the Order stating that an appropriate committee did not exist in the undertaking.

The Essential Work (General Provisions) (Amendment) Order, 1942, has been revoked by the Essential Work (General Provisions) (No. 2) Order, 1942 (S.R. & O., 1942, No. 1594), but art. 6A of the earlier Order is repeated in the later Order as art. 6. The Essential Work (General Provisions) (Amendment) Order, 1942, art. 6A, provided as follows:

(2) Where a specified person has absented himself from work or has been persistently late in presenting himself for work, the person carrying on the undertaking may report the matter to a national service officer, and that officer shall, if there exists in the undertaking a works committee or other joint council which in his opinion can appropriately deal with the matter (hereinafter in this article referred to as an "appropriate committee"), require the person carrying on the undertaking to refer the matter to that committee unless the matter has already been referred to it.

(3) Where at the date of any such report as aforesaid an appropriate committee exists in the undertaking in which the specified person is employed, proceedings shall not be instituted against that person for an offence against the Defence (General) Regulations, 1939, reg. 58A, for a contravention of or failure to comply with any of the provisions of para. (1) of this article unless (a) the matter has been referred to the committee, and (b) the committee before considering the matter has notified the person who is the subject of the reference so as to give him an opportunity within 4 days of the sending or giving of the notification to him such representations to the committee, either orally or in writing, as he may desire, and (c) the committee has made a report to the national service officer.

(4) (a) . . . a certificate purporting to be signed by a national service officer that at the date of any such report to him as aforesaid an appropriate committee did not exist in the undertaking . . . shall be sufficient evidence of the facts unless the contrary is proved.

Arthian Davies for the appellant.

VISCOUNT CALDECOTE, L.C.J.: In orders which have been made by the Minister of Labour and National Service under the Defence (General) Regulations, reg. 58A, certain questions with regard to essential work are dealt with. Without going into detail as to the whole of the scheme, it is sufficient to say that the Minister, by taking proper steps, can designate a particular works as a place where essential work is being carried on. It was desired to prevent people engaged in those works from absenting themselves from work, and by an Order of 1942, it was provided that proceedings should not be instituted against a person for a contravention of or failure to comply with the provisions of the article, where an appropriate committee existed in the undertaking in which the specified person was employed. It is a somewhat roundabout method of arriving at the desired result. The scheme, as I understand it, is that a person who absents himself shall be liable to penalties, but, if it can be dealt with by what is called an "appropriate committee," he is not to be subjected to proceedings until certain conditions have been complied with. The first point to consider is: What is an "appropriate committee"? An "appropriate committee" is a committee or joint council which, in the opinion of a national service officer, can appropriately deal with the matter. He is made the authority to decide whether or not there is an "appropriate committee," and it does not matter what other people think. If he, acting in good faith, forms the opinion that there is an "appropriate committee," then the proper procedure must be followed. If, on the other hand, in his opinion there is no committee which can appropriately deal with the matter, there is no "appropriate committee" in fact, and proceedings can be instituted.

The order goes on to say, for obvious reasons of convenience, that, when a person is prosecuted, it will be sufficient to produce a certificate signed by the national service officer that an "appropriate committee" does not exist in the undertaking, and, when such a certificate is produced, that is sufficient evidence of the facts stated in the certificate, unless the contrary is proved. I must here say that I am not surprised that a bench of justices might be, and, as I think, were misled into thinking that that permitted them to inquire into the question whether there was or was not an "appropriate committee"—but an "appropriate committee" is a term of art to describe a committee which can, in the opinion of the national service officer, appropriately deal with the matter. It would seem to result from this that the only facts which can be disproved by evidence are the facts that the certificate purporting to be signed by the officer was not signed by him, and that the statement that an "appropriate committee" did not exist was not true, because it was not his opinion that there was no committee that could appropriately deal with the matter. The mistake which the justices have made is in thinking that it is for them to decide whether there is a committee or body that can appropriately deal with the matter, whereas the order makes the opinion of the national service officer final and conclusive in the matter.

I think the justices were wrong, and that the case must go back to them for them to hear in the light of our decision.

LEWIS, J.: I agree. I think the contentions set out in the case on the part of the appellant were right, namely:

(1) That by art. 6A (2) of the said orders an "appropriate committee" means a works committee or other joint council which in the opinion of the national service officer

can appropriately deal with the matter in question; (2) That as, in the opinion of the appellant as proved by his aforesaid certificate and his oral evidence given before us there did not exist in the said undertaking a works committee or joint council which could appropriately deal with the matter of the respondent's absence from work there was no appropriate committee, and that it was not open to us to go behind the appellant's opinion and to find that the committee which in fact existed was an appropriate committee within the meaning of the Order.

I agree with my Lord for the reasons he has given.

CASSELS, J.: I agree, and have nothing to add.

Appeal allowed with costs. Case remitted to justices.

Solicitor to the Ministry of Labour and National Service (for the appellant).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. FITTE.

[COURT OF APPEAL (Lord Greene, M.R., Luxmoore and Goddard, L.J.J.),
May 13, 14, June 29, 1943.]

Income Tax—Sur-tax—Settlements—Avoidance of tax—Covenant to pay annual sum—Whether settlor could become sole beneficiary and terminate liability for annual payments—Finance Act, 1938 (c. 46), s. 38 (1).

The respondent had by certain deeds covenanted to pay annual sums for the benefit of his nieces and for the persons and charities named in a schedule. These deeds contained a power of revocation with the consent of the trustees and a power to declare new trusts of the sums payable under the deeds for the benefit of himself or his personal representatives. Upon the coming into force of the Finance Act, 1938, the respondent revoked these deeds and by new deeds he covenanted to pay annual sums to trustees to be held by them upon trust (*inter alia*) for such of the persons who had been or were or should be employed by the respondent or by any company of which he had been or was or should be a director, or among the members of a named club, as he should appoint. On behalf of the Crown it was contended that the respondent was properly assessed to sur-tax pursuant to the Finance Act, 1938, s. 38, in respect of the annual sums payable under the deeds, on the grounds that, since the respondent might, in the one case, be employed by a company of which he was a director, and in the other, might become a member of the club, he could in that event appoint the whole of the future income under the appropriate deed irrevocably to himself, and thus become the sole beneficiary thereunder and, therefore, in a position to determine the trusts declared by that deed:—

HELD: reading all the deeds together, it was clear that the classes of persons to be benefited must be read as meaning the members of those classes other than the respondent, and therefore he was not and could not be an appointee under the new deeds.

Decision of MACNAGHTEN, J., ([1942] 2 All E.R. 500) affirmed.

[EDITORIAL NOTE. If any person has at any time any power to determine any provision of the settlement so that the settlor ceases to be liable to make the payments provided thereby, then the income thereof is to be treated as the income of the settlor. In this case, the settlor had a power of appointment and, in exercise of this, he appointed the income to certain classes of persons. At the time of the appointment he was not a member of any of those classes, but it was clearly possible that he might at some time become a member and in some cases he might of his own motion have made himself a member of one or more of such classes. The Crown contended that this case fell within the subsection—Finance Act, 1938, s. 38 (1)—but it is held that such a construction of the documents in the case was too far-fetched and could not be adopted.]

AS TO REVOCABLE AND OTHER DISPOSITIONS OF INCOME, see HALSBURY, Hailsham Edn., Vol. 17, pp. 267-270, paras. 537-539; and FOR CASES, see DIGEST SUPP., Income Tax, Nos. 575b-576g.]

Case referred to:

(1) *Hart v. Hart* (1881), 18 Ch.D. 670; 17 Digest 319, 1303; 50 L.J.Ch. 697; 45 L.T. 13.

APPEAL by the Inland Revenue Commissioners from an order of MACNAGHTEN, J., dated May 14, 1942, reported [1942] 2 All E.R. 500. The facts are fully set out in the judgments.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), J. H. Stamp and Reginald P. Hills for the appellants.

Cyril King, K.C., and N. C. Armitage for the respondent.

LORD GREENE, M.R. : I have read the judgments prepared by LUXMOORE and GODDARD, L.J.J. I agree with them both in their reasoning and in their conclusions, and do not desire to add anything.

A LUXMOORE, L.J. : This appeal relates to (a) an additional assessment to sur-tax in the sum of £4,733 made upon Daniel Fitte for the year 1937-38 and (b) an assessment to sur-tax in the sum of £55,762 made upon him for the year 1938-39. Both assessments were made on the footing that the annual sums payable under certain deeds ought to be treated as Fitte's income by virtue of the Finance Act, 1938, s. 38 (1) (a). Fitte appealed to the Special Commissioners against both assessments and was successful in getting them discharged. An appeal was made against these decisions. It was heard by MACNAGHTEN, J., who upheld the decisions of the Special Commissioners. The Crown has appealed to this court.

B The material facts are as follows : on Apr. 15, 1935, Fitte executed 2 deeds of covenant. By one of these deeds (hereinafter referred to as the first deed), which contained a recital that Fitte was desirous of making some provision for the maintenance of his niece Margaret Isobel Mount, he covenanted with trustees to pay to them, during the joint lives of himself and his niece, such an annual sum as should after deduction of income tax therefrom at the standard rate for the time being in force leave a clear annual sum of £125. The trustees were directed to stand possessed of this sum upon trust to apply the whole or part thereof for the benefit of the said niece as they in their sole discretion should think fit. By cl. 5 of the first deed power was reserved to Fitte with the consent of the trustees to declare, by any deed or deeds revocable or irrevocable, such new or other trusts of and concerning the income or any part thereof as he might think fit for the benefit of himself, his executors or administrators or any other person or persons and, for that purpose wholly or partially, to revoke and make void the trusts, powers and provisions therein declared and contained of and concerning the same.

C D The other deed of Apr. 15, 1935 (hereinafter referred to as the second deed) contained a recital and trusts and provisions similar to those above referred to, except that the principal beneficiary was Pauline Beryl Mount, another niece of Fitte.

E F On Mar. 6, 1936, Fitte executed a further deed of covenant (hereinafter referred to as the third deed). This deed contained a recital that Fitte was desirous of constituting a trust for the benefit of the charities and persons named or described in the schedule thereto. By the operative part of the deed Fitte covenanted with the trustees to pay to them during his life in the manner therein mentioned such an annual sum as should, after deduction of income tax therefrom at the standard rate for the time being in force, leave a clear annual sum of £3,300. The trustees were directed to stand possessed of the annual sum payable in respect of each year ending Mar. 25 upon trust to pay or apply the same to or for the benefit of such one or more of the charities and persons named or described in the said schedule at such time or times, and in such manner as Fitte, before or during such year or within one month after the expiration thereof, should in writing appoint or direct, and in default of such appointment or direction and so far as the same should not extend the annual sum was to be held upon trust in the discretion of the trustees to be exercised within 3 months after the expiration of the said year, to pay or apply the same to or for the benefit of such one or more of the said charities or persons as the trustees should think fit, and in default of any such exercise of discretion and so far as the same should not extend in trust for such of the said charities named in the schedule as should for the time being be in existence and such of the said persons named in the schedule as should for the time being be living in equal shares. By cl. 8 of this deed Fitte reserved power with the consent of the trustees by any deed or deeds revocable or irrevocable to declare such new or other trusts of and concerning the income payable thereunder or any part thereof as he might think fit for the benefit of himself, his executors or administrators or any other person or persons and for that purpose wholly or partially to revoke and make void the trusts

powers and provisions of the trust deed. The schedule contained the names of a number of individuals and their addresses as well as the names of many institutions and associations, most of which were of a charitable nature. It concluded with a general clause in these terms: "All such persons as have been or are or shall at any time be (a) employed by the settlor or (b) employed by any company of which the settlor has been or is or shall at any time be a director or which is certified by the settlor to be subsidiary to or associated with any such company as aforesaid or (c) members of the Vesta Rowing Club."

After the execution of each of these 3 deeds Fitte was admittedly entitled to claim a deduction from his future liability to sur-tax in respect of the gross amount required to produce each of the net annual sums covenanted to be paid, but the position was altered by the passing of the Finance Act, 1938. By sect. 38 of that Act it was provided (so far as material) that:

If and so long as the terms of any settlement are such that (a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof and, in the event of the exercise of the power, the settlor . . . will or may cease to be liable to make any annual payments payable by virtue or in consequence of any provision of the settlement . . . any sums payable by the settlor . . . by virtue or in consequence of that provision of the settlement in any year of assessment shall be treated as the income of the settlor for that year and not as the income of any other person.

Subsect. (7) provided that the provisions of sect. 38 should apply for the purposes of assessment to income tax for the year 1937-38 and subsequent years and should apply in relation to any settlement wherever made and whether made before or after the passing of the 1938 Act.

It is admitted that, in consequence of the provisions quoted, the annual sums covenanted to be paid by Fitte under the provisions of the 3 deeds became liable to be treated for tax purposes as his income unless he availed himself of the advantages afforded in Pt. II of Sched. III to the Act in respect of settlements made before Apr. 27, 1938. Para. 1 of this part of the third schedule provided as follows:

Subject to the provisions of this part of this schedule, in the case of a settlement made before Apr. 27, 1938, subsect. (1) [of sect. 38 of the Act] shall not, by reason only of the provisions of para. (a) thereof, apply to sums payable by the settlor by virtue or in consequence of any provision of the settlement in a year to which this part of this schedule applies, if (a) at the expiration of 3 months from the date of the passing of this Act [that is, July 29, 1938] (i) no person has or can have any such power as is referred to in the said para. (a); and (ii) the settlor has not received and is not entitled to receive any consideration in respect of the release or disclaimer of any such power; or (c) before the expiration of 3 months from the date of the passing of this Act (i) the settlement, or the provision by virtue or in consequence whereof the annual payments are payable, has been revoked; and (ii) a new settlement has been made by the settlor by virtue or in consequence whereof the settlor is liable to make the like annual payments . . .

On Oct. 25, 1938, 3 days before the expiration of the period of 3 months from the passing of the 1938 Act, Fitte executed 3 further deeds. One was expressed to be supplemental to the first deed. It contains a recital that under the provisions of cl. 5 of the first deed the grantor was desirous of benefiting other persons and of releasing the power of revocation contained in that clause without receiving or being entitled to receive any consideration in respect of such release. The supplemental deed directed that the income under the first deed should be applied by the trustees for the benefit of such one or more of the persons named in the schedule as Fitte should appoint and, in default of such appointment, as the trustees should think fit. By cl. 2 of the supplemental deed Fitte released the power of revocation contained in the principal deed. The schedule to the supplemental deed contains the names and addresses of 11 individuals of whom Margaret Isobel Mount is one. The schedule also contains a general clause in the same terms as the general clause already quoted from the schedule to the third deed with the omission of the words "or (c) members of the Vesta Rowing Club." Another of the 3 deeds was expressed to be supplemental to the second deed. This deed was in all its terms similar to the supplemental deed above referred to. The last of the 3 deeds was expressed to be supplemental to the third deed. It contains a recital that the settlor was

desirous of (a) extending the list of charities and persons for whose benefit the net annual sum of £3,300 was to be applied and (b) thereupon releasing the power of revocation contained in cl. 8 of the third deed without receiving or being entitled to receive any consideration in respect of such release. The operative part of the supplemental deed directs that the income under the third deed shall be payable and applicable as it would have been under the third deed if the persons named or described in the schedule to the supplemental deed had been named or described in the schedule to the third deed in addition to the charities and persons actually named or described therein. The supplemental deed also contains a release by the settlor of the power of revocation contained in the third deed.

It is, I think, obvious from the recitals in each of the supplemental deeds and the respective forms of those deeds, as well as from the date thereof, that in executing each of them Fitte had in mind the provisions of sect. 38 of the 1938 Act and also those in Pt. II of Sched. III thereto, and that his object was to take advantage of those provisions so that the annual sums payable under the first, second and third deeds respectively should not be treated as his income, and would remain deductible in his sur-tax assessments. The real question is, did he by the execution of the supplemental deeds attain his object? The Crown claims that, whatever his intention may have been, he failed to do so because, on the true construction of each of the supplemental deeds, Fitte may become an object of the respective powers of appointment in certain events, for example, by becoming an employee of any such company as is described in the general clause or, in the case of the third deed, by election to membership of the Vesta Rowing Club. It is argued that, if he may become an object of any of these powers, he could in that event appoint the whole of the future income under the appropriate deed irrevocably to himself and, by so doing, would become the sole beneficiary thereunder and so be in a position to determine the trusts declared by that deed. Fitte's answer to this contention is: "I am not and cannot on the true construction of any of the deeds become an object of any of the powers and cannot therefore under any circumstances appoint to myself."

To decide which contention is correct entails a consideration of the various deeds. The first and second deeds, as respectively varied by the 2 supplemental deeds, differ in some material respects from the third deed, as varied by the deed supplemental to it, and must, therefore, be considered separately.

In neither the first nor second deed is Fitte mentioned by name as an object of the power of appointment, and, except for the power to declare new trusts for the benefit of himself or any other person or persons and for that purpose wholly or partially to revoke the original trusts, it would be impossible to suggest that Fitte had any beneficial interest under the deed. By neither of the supplemental deeds is any new trust expressed—at least directly—in favour of Fitte, while the original power of revocation is extinguished and consequently the power of new appointment for his own benefit or the benefit of his executors or administrators. The Crown do not suggest that Fitte is an object of the new power of appointment conferred on him by the supplemental deed, but it is argued that he may become such an object, under the general clause at the end of the schedule thereto, in the event of his becoming an employee of any such company as is there described. The power of appointment is in terms limited to such one or more of the persons whose names and addresses appear in the schedule. Read literally, this would exclude the persons described in the general clause, but I do not think it would be proper to read the document in this way. As already pointed out, Fitte had power under the first and second deeds respectively to declare new trusts for the benefit of himself and his executors and administrators, but he has not purported to exercise this power in express terms in his own favour. He has stated in the recital his intention of benefiting "other persons." It is true that "other" may refer to persons other than the niece named in the first or second deed as the case may be, but it may also refer to and include persons other than Fitte himself. It seems to me to be an important consideration that Fitte extinguished the original power to declare new trusts for his own benefit or that of his executors or administrators without naming himself as an appointee, for, if he intended to retain the right to appoint to himself, one would have expected him to adopt the obvious course of inserting

his own name in the schedules to the supplemental deeds and not to leave the question whether he should be included as an object of the powers of appointment to the future decision of some third person or body of persons. I am satisfied that the plain object of the supplemental deeds was to avoid the operation of sect. 38 and to take advantage of the provisions set out in Pt. II of Sched. III to the Act. Indeed, no one reading these deeds could have any real doubt on this point. In my judgment, the intention of Fitte, as expressed in each of the first 2 supplemental deeds, read in the light of the surrounding circumstances which it is legitimate to consider, is expressed with sufficient clarity to enable the court to hold as a matter of construction that Fitte would not become an object of the power of appointment, even in the unlikely event of his becoming an employee of any such company as is mentioned in the schedule to the supplemental deeds. Fitte cannot, therefore, determine the trusts of the first and second deeds as varied by the supplemental deeds and each case falls within the provisions of para. 1 of Pt. II of Sched. III of the 1938 Act, so that the income under the first and second deeds cannot be treated as Fitte's income. A B

Somewhat different considerations apply to the third deed and the deed supplemental to it, for in that case the question whether Fitte is or may be an object of the power of appointment depends on the construction of the original deed and not on that of the supplemental deed. The power is to pay or apply the income for the benefit of such one or more of the charities and persons named or described in the schedule. The number of charities and persons named is large and is extended over a still wider field by the addition of the persons described in the general clause at the end of the schedule. Admittedly Fitte was not an object of the power at the time the third deed was executed, but it was argued that he might at some future date become an object, either by becoming an employee of any such company as is there mentioned, or by election to membership of the Vesta Rowing Club. Plainly Fitte's object in executing the third deed was to provide for annual payments to charities and other associations and persons to the largest extent possible by obtaining the benefit of a reduction of his liability to sur-tax, and so increasing the amount available for his bounty. Any appointment in his own favour would *pro tanto* defeat his object. Cl. 8, which confers the power to declare new trusts, expressly states that such new trusts may be for Fitte's own benefit. This, in my opinion, points to his exclusion from the class of persons named or described in the general clause as objects of the power. The supplemental deed does not mention Fitte as one of the additional persons to be included among the classes of objects, while at the same time the powers of declaring new trusts and revoking the original trusts are extinguished. C D E

Reading the third deed and the deed supplemental to it in the light of the surrounding circumstances legitimate to be considered, I have no real doubt that the settlor never intended to include himself as a potential object of the power of appointment, and I see no difficulty in construing the third deed as excluding Fitte as a possible appointee and, therefore, as giving effect to his obvious intention. In this case also I have come to the conclusion that the income to be dealt with under these 2 deeds cannot be treated under sect. 38 of the Act as part of Fitte's income. Having regard to the conclusion that Fitte is not and cannot become an appointee under any of the deeds it is unnecessary to consider whether, had he been able to appoint to himself, such an appointment would have determined his liability to make further payments under the deeds and so put an end to the trusts thereby declared. For these reasons I am of opinion that the appeal fails and must be dismissed with the usual consequences. F G

GODDARD, L.J. : On Apr. 15, 1935, the respondent executed 2 settlements identical in terms with the object of benefiting 2 nieces. By these settlements he covenanted with trustees to pay to them during the joint lives of himself and his nieces such annual sum as, after the deduction of tax, should leave a clear annual sum in each case of £125. The trustees were to apply these sums for the benefit of the nieces as they should think fit, and each deed reserved power to the respondent, with the consent of the trustees, to revoke the trusts for the purpose of declaring new trusts for the benefit of himself or any other person or persons. The following year the respondent executed a further H

settlement, dated Mar. 6, 1936, whereby he covenanted to pay the trustees such a sum as, after deduction of tax, would leave the clear annual sum of £3,300 which the trustees were to apply for the benefit, as they should think fit, of 102 specified charities, clubs and institutions, 79 named individuals, and all such persons as had been or were or should at any time be employed by the settlor, or employed by any company of which he had been or was or should be a director, or of any subsidiary of such company, or the members of the Vesta Rowing Club. This settlement also contained a power of revocation for the purpose of enabling the settlor to declare new trusts for the benefit of himself or any other person. That these were genuine settlements executed in good faith is not disputed. It was, and is, quite common for people to pay pensions and charitable subscriptions, or to provide for relatives and others by means of a covenant, and there is no objection to so doing from the point of view of taxation. However, the Finance Act, 1938, made an alteration in the law, and by sect. 38 (1) (a) it was provided that, if the settlor could revoke or otherwise determine the settlements or any provision thereof so that he would thereby cease to be liable to make the annual payments, the sums payable under the settlements should be treated as the income of the settlor and not of any other person. The Act gave settlors an opportunity of ridding themselves of this liability if, within 3 months of the passing of the Act, they gave up, without consideration, their power of revocation or determination of the settlement. The respondent desired to avail himself of the opportunity thus given, and, accordingly, on Oct. 25, 1938, he executed 3 supplemental deeds. In the case of the settlements on his nieces he recited that he was desirous of benefiting other persons and of releasing his power of revocation, and then directed the trustees to apply the income for the benefit of such one or more of the persons whose names and addresses appear in the schedule, at such times and in such manner as he should before or during each year ending Jan. 18, or within one month thereafter appoint or direct, and, in default of appointment, among such persons in the discretion of the trustees. The schedule contained a list of 11 such persons, including the nieces and also persons employed or to be employed by the grantor or by any company of which he was a director, with terms similar to the provision in the deed of Mar. 6, 1936, relating to these employees. It will be convenient to consider the nieces' settlements before dealing with that relating to the charities. The settlor's intention would appear to be quite clear. Under the original deeds he desired to benefit his nieces, but, if for any reason he desired to withdraw his bounty from them, the income was to revert to himself or to anyone else that he might select. When the Finance Act, 1938, came into operation, he gave up his power to revoke the settlement and named certain persons and classes who were to take the benefit should he desire to withdraw it from his nieces. The contention of the Inland Revenue is that he might get himself appointed as a servant of one of the companies of which he was a director and then appoint the income to himself. The Special Commissioners rejected this contention as too remote and without substance, which is only another way of saying that it was too far-fetched to have any reality. His object in executing the supplemental deeds is clear; it was to avail himself of the *locus poenitentiae* given by the Act, and the question really becomes simply one of construction. Suppose he had expressly recited in the supplemental deed that this was his intention; it could then hardly have been doubted that the deed would have had to be read as excluding himself as a possible beneficiary, otherwise the whole of the object of the deed would have been destroyed. It surely can make no difference that there is no express recital to this effect, because, in construing any document, the surrounding circumstances existing at the time it was made are to be taken into account, and in this respect a deed is no different from any other written instrument: *Hart v. Hart* (1). It is no doubt true that a settlor may state his intention in a recital and yet fail in the operative part of the deed to give effect to his declared purpose, but that is not to say that any doubt, if doubt there be, as to his intention may not be resolved by a recital or the circumstances under which the deed was executed. Then the supplemental deeds state that the settlor is desirous of benefiting "other persons." No doubt that primarily means persons other than the nieces, but the words would seem equally to exclude the settlor himself. If a settlor states that he desires to benefit A, B and other persons, surely no one could read that

as including himself. Accordingly, in my opinion, if the respondent were to be, or to get himself, appointed a servant of one of the companies and then give a direction to the trustees to pay the income to him, it would be a rankly dishonest act, and they would be bound to disregard the direction on the ground that he was not an object of the trust. To construe these deeds otherwise would be to have no regard to realities, but, by applying artificial reasoning, to reach a result which is manifestly contrary to their expressed intention.

Turning now to what may for convenience be called the charitable deed. By a deed supplemental to the original deed the settlor recited that he was desirous of extending the list of charities and persons and of releasing his power of revocation, and, accordingly, by cl. 1, he exercised the power of revocation and new appointment by including among the beneficiaries an added number of persons, including the Lord Mayor of London and the mayors of the London boroughs, and by cl. 2 he relinquished his power of revocation. A difference between the charitable deeds and those relating to the nieces is that the provision as to servants of companies of which the settlor was or might be a director appeared in the original deed, as did the members of the Vesta Rowing Club. Nevertheless, here again it is, in my opinion, impossible to construe the original deed as including the settlor as a possible beneficiary either as a potential future servant of one of these companies or as a member of the rowing club. The deed recites that he is desirous of constituting a trust for the benefit of the charities and persons named in the schedule, and obviously his intention was to pay his subscriptions and pensions by means of a covenant. As a matter of construction the court ought to reject the idea that he himself was included as a possible beneficiary as being foreign to the whole purpose of the deed. Or, to put it in another way, the court ought to imply the words "other than himself" both as respects the servants of the companies and the members of the club. This construction is fortified by the supplemental deed by which the power to revoke given by cl. 8 of the original deed is surrendered. Under cl. 8 he could have appointed the income to himself, and by giving up this power it would seem that he intended that he should have no future interest in the settlement. If he does become Lord Mayor or mayor of a London borough, he will not be able to appoint to himself beneficially during his year of office.

As, in my opinion, the settlor is not in any circumstances entitled to appoint the income to himself, it is unnecessary to consider whether, if he did purport to do so, it would have the effect of making him cease to be liable to make further annual payments under the provisions of the settlement.

In my opinion, the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Taylor & Taylor* (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

GREENHALGH v. MALLARD AND OTHERS.

[COURT OF APPEAL (Lord Greene M.R., Luxmoore and Goddard, L.JJ.),
May 25, 26, 27, 1943.]

Companies—Private company—Articles of association—Restriction on transfer of shares—Whether applicable to all sales both to members and non-members. Contract—Implied terms—Undertaking to vote as required—Transfer of shares—Breach of contract—Whether obligation binding upon transferees with notice.

On Mar. 28, 1941, the appellant entered into an agreement by which he undertook to provide £11,000 in the form of subscriptions for debentures in a private company which was in urgent need of that sum. The agreement also provided for the allotment of certain shares to the appellant and to 3 directors of the company. By a collateral agreement made about the same time it was provided that the 3 directors should vote with and support the appellant, who would thus gain control of sufficient votes to enable

him to carry an ordinary resolution; but this control was lost when, in November, 1941, each of the 3 directors sold all but 100 of his shares to certain other members of the company. Art. 10, para. (a) of the company's articles of association provided that no shares in the company should be transferred to a person not a member of the company so long as any member of the company might be willing to purchase them at a fair value in accordance with para. (b). Para. (b) began by providing that, if any member desired to sell or transfer any of his shares, he should notify his desire to the directors by sending them a notice in writing to that effect. It was contended for the appellant (i) that the restrictions on transfer applied to sales to members as well as to non-members and that, since in this case the shares had not been offered to members as a whole, the transfers were invalid (ii) that the 3 directors, in parting with their shares broke their contract by putting it out of their power to support the appellant with the votes necessary to carry an ordinary resolution (iii) that the burden of the contract followed the shares in the hands of the purchasers who acquired them with notice of the contract and these purchasers were, therefore, unable to use their voting power against the appellant:—

HELD: (i) the language of art. 10, para. (b) was not sufficiently clear to cut down the right of transfer inherent in the ownership of shares, and the restriction must, therefore, be taken to apply only to cases of sales to non-members.

(ii) the obligation under the contract was only to vote in respect of whatever shares the 3 directors might have or from time to time acquire and it came to an end when the shares were sold. There could, therefore, be no question of a restrictive covenant affecting the shares in the hands of the purchasers.

[EDITORIAL NOTE. This case discusses matters of importance in the carrying on of a private company. Such a company is often a family affair and it is naturally desired to avoid outside interference. At times, however, for financial reasons, it is necessary to seek outside help and those who provide this help usually require some control over the affairs of the company. One means adopted for the retention of control is the placing of restrictions on the transfer of shares. Such restrictions are to be strictly construed because shares, being personal property, are *prima facie* transferable. It is held, therefore, that the right to transfer them can be cut down only by use of clear words to that effect. In the other aspect of this case, it was sought to attach a restrictive covenant to shares somewhat in the same way as restrictive covenants are attached to land and are then said to run with the land. It was said that, where shares had been acquired upon the terms that the holders should vote in support of a person bringing financial assistance to the company, then either there was a breach of contract when the holders parted with those shares to persons not bound to vote in that way, or the shares in the hands of the transferees were still bound by the agreement to vote in that way. The Court of Appeal have avoided a decision on the principle involved in these contentions since they have taken the view that the obligation to vote in a particular way, when its terms were properly construed, was an obligation that could not extend beyond the time when the shares were parted with and thus cease in any event on a sale of the shares.

AS TO RESTRICTIONS ON TRANSFERS OF SHARES, see HALSBURY, Hailsham Edn., Vol. 5, pp. 270-272, para. 469; and FOR CASES, see DIGEST, Vol. 9, pp. 375, 376, Nos. 2388-2392.

AS TO RESTRICTIONS ON ALIENATION OF PERSONAL PROPERTY, see HALSBURY, Hailsham Edn., Vol. 25, pp. 220-222, para. 375; and FOR CASES, see DIGEST, Vol. 37, pp. 171-172, Nos. 131-136.]

Cases referred to:

(1) *Delavenne v. Broadhurst*, [1931] 1 Ch. 234; Digest Supp.; 100 L.J.Ch. 112; 144 L.T. 342.

(2) *Stirling v. Maitland* (1864), 5 B. & S. 841; 12 Digest 616, 5091; 34 L.J.Q.B. 1; 11 L.T. 337.

* (3) *Southern Foundries* (1926), *Ltd. v. Shirlaw*, [1940] A.C. 701; [1940] 2 All E.R. 445; Digest Supp.; 109 L.J.K.B. 461.

* (4) *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A.C. 108; 41 Digest 321, 1800; 95 L.J.P.C. 71; 134 L.T. 227.

(5) *De Mattos v. Gibson* (1859), 4 De G. & J. 276, 284; 41 Digest 321, 1804; 28 L.J.Ch. 498; 33 L.T.O.S. 193.

APPEAL of the plaintiff from an order of UTHWATT, J., dated Jan. 28, 1943. The facts are fully set out in the judgment of LORD GREENE, M.R.

Gilbert Beyfus, K.C., and A. S. Diamond for the appellant.

Russell Vick, K.C., and H. O. Danckwerts for the 7 named personal respondents.

C. A. J. Bonner for the respondent company.

LORD GREENE, M.R. : The first question in this appeal raises a short point upon the construction of the articles of association of the company, and it is convenient to dispose of that point at once. The question is as to the validity of certain transfers which were passed by the board. Those transfers would be invalidly passed if the construction of the relevant articles for which counsel for the appellant contends is the right one. The company is a private company, and the articles of association contain restrictions on transfer and transmission of shares set out in art. 10. That article is divided into 5 lettered paragraphs, (a), (b), (c), (d) and (e). It starts in para. (a) with an express and clear prohibition against transfers to persons who are not members of the company, save in the circumstances specified. It says :

No shares in the company shall be transferred to a person not a member of the company so long as any member of the company may be willing to purchase such shares at a fair value to be ascertained in accordance with sub-cl. (b) hereof.

Pausing there, it cannot be suggested that sub-cl. (a) contains any prohibition express or implied against transfers to persons who are members of the company. The object of it is quite clear : it is to put a clog upon the power to transfer outside the ring of members of the company, and nothing else. It tells us that in para. (b) it is going to give directions for ascertaining the fair value which is referred to in para. (a), and in para. (b) such directions are to be found in the usual machinery of transfer notices, and so on. Para. (b) begins with language which, when read literally and apart from any context, is, I think, quite rightly described as unqualified and general in its application. Its words are as follows :

If any member desires to sell or transfer his shares or any of them, he shall notify his desire to the directors by sending them a notice in writing (hereinafter called "a transfer notice") to the effect that he desires to sell or transfer such shares.

It then goes on to lay down directions as to the form of the transfer notice and for ascertaining the fair value of the shares.

In the present case the transfers that are attacked were in favour of members of the company, and accordingly, if this article on its true construction allows unrestricted sales amongst members of the company, those transfers were properly passed. On the other hand, if para. (b) is to be read as of general application to all sales, whether to members or non-members, then it is a condition of the validity of any transfer, whether to a member or a non-member, that the shares shall in the first instance have been offered to the members as a whole in the manner specified in the paragraph. Nobody can suggest that these articles are artistically drawn ; indeed, the draftsman appears to have endeavoured to improve upon certain well-known forms, and his efforts at improvement are not particularly happy.

Art. 10 (d) provides for what is to happen if the directors are unable to find a purchaser among the members of the company. In that event :

... the selling member may sell such shares as remain unsold to any person, though not a member of the company, and at any price ...

subject to an overriding right in the directors to refuse registration in the cases there mentioned.

It is perfectly just to observe that the opening words of para. (b), if read out of their context, are of general application, and the phrase :

If any member desires to sell or transfer his shares or any of them ...

would appear to apply to any sale or transfer, whether to a member or not. Counsel for the appellant wishes us to read the paragraph in that sense. It is to be observed that, if the paragraph be read in that sense, the effect is to remove all content and meaning from the phrase "to a person not a member of the company" in para. (a). The reason why I say that is that the argument of counsel for the appellant involves finding in para. (b) a prohibition against transfer which applies both to transfers to members and transfers to non-members, and, if that prohibition is to be found in para. (b), it has the

effect of making unnecessary—and, indeed, meaningless—the words “to a person not a member of the company” in para. (a). By so construing para. (b), the article will read as containing a prohibition that no shares in the company shall be transferred to any person, whether a member or not, so long as any member may be willing to purchase such shares. That result is one which certainly points strongly in the direction of the correctness of the opinion formed by UTHWATT, J., which was that para. (b) does not apply to cases where the proposed sale is a sale to a member.

As BENNETT, J., pointed out in the course of his judgment in *Delaunay v. Broadhurst* (1), to which UTHWATT, J., refers in his judgment, there was not there, any more than there is in this case, an express prohibition against transfers to members. There is an express prohibition against transfers to non-members. If a prohibition against transfers to members is to be found it can only be found by implying into the affirmative directions in para. (b) a negative restriction which is not expressed in terms.

Questions of construction of this kind are always difficult, but in the case of the restriction of transfer of shares I think it is right for the court to remember that a share, being personal property, is *prima facie* transferable, although the conditions of the transfer are to be found in the terms laid down in the articles. If the right of transfer, which is inherent in property of this kind, is to be taken away or cut down, it seems to me that it should be done by language of sufficient clarity to make it apparent that that was the intention.

I am of the opinion that UTHWATT, J., took the right view in this case. Although the argument may be said to be rather nicely balanced, I think that, in deciding what is the true construction of the words used in the present case, one must bear in mind that, under what I conceive to be the practice, and what, in my experience, has always been the way in which judges have regarded these matters, the right of transfer remains unimpaired, save to the extent that with reasonable clearness it has been taken away or cut down. Here I find that not merely has that right not been taken away, but the language (rather obscure though it is) does not cut it down. Therefore, in my opinion, UTHWATT, J., was right in his conclusion upon this part of the case.

The facts which it is necessary to have in mind in considering the other questions raised in this appeal can, for present purposes, be shortly stated.

On Mar. 28, 1941, the appellant entered into an agreement by which he undertook to provide a sum of £11,000 in the form of subscriptions for debentures, that sum being immediately needed by the company to pay off a pressing debenture holder. The agreement contained a number of other provisions, of which it is only necessary for me to mention one. The unissued ordinary shares of the company's capital were to be sub-divided—they were 10s. shares—into shares of 2s. each; but their effective voting power was to remain the same as the voting power attached to the existing 10s. shares. The agreement provides for the manner in which those unissued sub-divided shares were to be allotted. The great majority of them were to be allotted to the appellant; the remainder were to be allotted to Mrs. Quinlan, Mr. Hallam, and Mr. Joseph Mallard, in such proportions as they liked to agree upon. In point of fact they were allotted equally, if I remember rightly. I will call those three persons the three directors. The appellant was also to be appointed a director. The effect of that agreement, as far as the voting control of the company was concerned, would have been this. The appellant would have been a minority shareholder, and would not by himself have been in a position to control the company; either in respect of an ordinary resolution or, *a fortiori*, in respect of an extraordinary or special resolution.

By way of collateral agreement, on or about the same date (it may have been a day or two earlier) the parties attempted to make provision for the voting control. That agreement was made between the three directors and the appellant in the following terms:

In consideration of the provisions of cl. 8 of the agreement dated Mar. 28, 1941, we the undersigned hereby mutually agree that we will as and when required by C. Greenhalgh vote with and support the said C. Greenhalgh.

The said C. Greenhalgh on his part agrees to use his votes in favour of the signatories and any of them to this letter for the purpose of re-electing them to the board of directors upon them or any of them retiring according to rotation.

It was signed by the three directors and the appellant.

As things stood at that time and on the footing that the unissued sub-divided shares were to be issued in the manner provided for in the main agreement, the result, so long as the shareholders remained as they were, would have been to give the appellant control of sufficient votes—and substantially more than sufficient votes—to enable him to carry an ordinary resolution, but substantially less than the number that would have been necessary to enable him to carry an extraordinary or a special resolution. I need not go into the figures.

Greenhalgh, not unnaturally, understood that, if he came to the rescue of the company, putting up a large sum for the purpose of the debentures and a substantial sum in respect of the shares, it was on the footing that he was going to have control of the company. That that was the intention and the expectation of the parties is, I think, quite clear. As a result of the action taken by the three directors, with the assistance of the other individual defendants, the control in question has been lost, unless the appellant is entitled to succeed on the ground that he puts forward in this action.

I can conveniently deal with the question by stating certain contentions that the appellant presented before this court. First of all, he put forward the case on the construction of the articles with which we have already dealt. Before I come to the other contentions I had better complete the statement of the facts. At a later date, namely, in November, 1941, the three directors sold their shares to the other individual defendants. I need not refer to the circumstances in which they were sold, nor is it important to consider how the purchase money was found. The sales of the shares were, as found by UTHWATT, J., out and out sales. The three directors by those sales divested themselves of the whole of their shareholding save as to 100 shares each, which they retained, and in respect of which there is no question that they are bound to vote in support of the appellant when required. The effect of that sale was that the three directors by transferring the bulk of their shares put the appellant in the position that he is unable to call on them to provide that voting power which alone would enable him to pass an ordinary resolution. He, not unnaturally, complains. It may very well be that, if they had realised exactly the merits of what they were doing, these three directors would have hesitated before they carried out their scheme, but we are not concerned with what they might have done; we are concerned solely with the legal rights of the parties.

This part of the appeal comes before us on three separate grounds; one of which, and one only, would have the result of avoiding the effect of the transaction, to a certain extent, because it would place the purchasers of the shares in a position in which they could not use their voting power in a manner which was in opposition to the appellant. In other words, on that branch of the case, if it were substantiated, the appellant would be entitled to a measure of specific relief, i.e., an injunction against the purchasers. On the other two contentions, the remedy could be in damages only.

I will now deal with the remaining arguments for the appellant. It is said first that the action of the three directors, in parting with the shares required to provide the appellant with the control, comes within the principle stated by COCKBURN, C.J., in *Stirling v. Maitland* (2). That principle is sufficiently quoted in the speech of LORD ATKIN in *Southern Foundries v. Shirlaw* (3), at p. 717 ([1940] 2 All E.R., at p. 454). It is to this effect:

If a party enters into an arrangement which can only take effect by the continuance of an existing state of circumstances . . . I look on the law to be that . . . there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative.

That proposition, says LORD ATKIN, is well-established law, although he himself would have preferred to base it on a rule of law and not on an implied term in the contract. Applying that principle it is said: Here is a contract to vote with and support the appellant. The three directors by selling their shares have put it out of their power to do so, and therefore they have broken their contract.

The second argument is quite different. It is said: Here is a contract in relation to the shares and it contains an implied negative. The parties to the contract, when they agreed to vote with and support the appellant impliedly contracted not to vote against him. The burden of the contract, it is then said,

continues and binds the shares in the hands of any person who subsequently acquires them with notice of the contract. We are told that the purchasers had notice of the contract, and it is contended that they are bound by the restrictions imposed by the contract on the holders of the shares and are not able to use their voting power against the appellant.

A It is on that part of the argument that the appellant, if successful, could get relief by way of injunction. That argument was based on a case decided in the Privy Council, *Lord Strathcona S.S. Co. v. Dominion Coal Co.* (4). Those whose memory enables them to go back to the time when that case was decided will remember that some of the observations made in relation to constructive trustees and the running of restrictive covenants with personality were regarded by the profession as novel if not revolutionary. The decision was based on what had been said by KNIGHT BRUCE, L.J., in *De Mattos v. Gibson* (5). If B and when the matters discussed in *Lord Strathcona S.S. Co.'s* case (4) have to be considered by this or any other court, it will be necessary to give them a very close examination. It may be relevant, if that case arises, to note that the observations of KNIGHT BRUCE, L.J., were made on an interlocutory motion. The other member of the court, TURNER, L.J., refused to make any pronouncement at all upon the subject; and when after the trial of the action the matter came before LORD CHELMSFORD on appeal, he dealt with it without any reference at all to the views which KNIGHT BRUCE, L.J., had expressed. C LORD CHELMSFORD treated the question as being whether in the particular circumstances the mortgagee of the ship was not guilty of procuring a breach of contract by making it impossible for the owner to carry out the terms of the charter which he had entered into. However, fortunately, in the view that I take, it is not necessary for the court to engage in the determination of those matters.

D I have thought it convenient to put these two arguments together, since both of them depend upon an assumed construction of the contract. If the contract is such that it only imposes an obligation to vote in respect of whatever shares the contracting parties happen to have available, it follows that directly they sell their shares the contract is at an end—until possibly they acquire more shares. The principle enunciated by COCKBURN, C.J., cannot by its nature have any application in a case where the act which is alleged to be bringing the state of circumstances to an end is one which is no breach of the contract. E Here the sale by these directors of their shares is not something which is out of their power under the contract; it is something which, under the contract, they are perfectly entitled to do. The obligation under the contract is an obligation which, in my opinion, endures so long, and so long only, as the contracting party has power to use his vote. Therefore, to sell the shares cannot be F said to be a breach of the contract.

The argument that the restrictive covenant follows the shares in the hands of the purchasers is based on the same assumption as to the nature of the contract, because it necessarily assumes that the contract is one that has been entered into for, I suppose, some indefinite time, at any rate, for the lives of the parties. If the contract on its true construction ceases to operate when the shares are sold, then in the hands of the purchaser there can be no question of a continuing obligation which runs with the shares. The contract has come to an end. G Even if the principle of the *Strathcona* case (4) were applicable, the restrictive covenant could only affect the shares in the hands of the purchaser if the contract on its true construction were to endure for a period covering the time when they were in the hands of that purchaser. If the obligation comes to an end when the shares are sold, there can be no restrictive covenant affecting H them in the purchaser's hands.

I think it is plain that the obligation is only to vote in respect of whatever shares the three directors might have or from time to time acquire. Any other construction would mean that never could any of them sell one single share; there would have been an obligation to keep the shares, and, if the appellant had survived the three directors, or any of them, it would have passed to their legal personal representatives. I cannot see how any other limit could be drawn. Similarly in the case of the appellant. His obligation to use his vote in support of the board would have continued so long as any of them were alive.

I cannot bring myself to see that this document can be construed as imposing an absolute duty on the owner of the shares not to sell them. An obligation of that kind might have unforeseeable results. If it had been so intended, nothing would have been easier than to say so, but a mere undertaking by the shareholder to vote in a particular way, cannot by implication impose upon him a prohibition against the sale of his shares.

The fact of the matter is that, when the parties made the agreement, they were under the impression that the company was going to be a happy family, and that everything would go smoothly; and that in all probability everybody would keep his shares. If somebody had said to Joseph Mallard at the time: "Are you intending, by implication, in this agreement to bind yourself never to sell your shares, so long as the appellant be alive," I venture to think that Joseph Mallard would have said that that was a thing he had never considered and that he would have to think twice before he agreed to it.

There is one further point on the construction of this agreement which is worth referring to. It is made, on the face of it, in consideration of the main agreement. Cl. 8 of the main agreement says:

In the event of the death of the said Greenhalgh the said Mrs. Quinlan, J. E. Hallam, and Mr. J. T. L. Mallard are to have an option to be exercised within twelve months after the death of Mr. Greenhalgh to take over the whole of the debentures and shares held by him at the time of his death at the same price as he had paid for them plus accrued interest thereon.

That clause applies to all the debentures, be they more or less, and all the shares, be they more or less, which are referred to in the agreement. On the face of it, it is contemplating that Greenhalgh when he dies may have possibly more and possibly less shares than the 19,000 odd which, under the main agreement, were going to be allotted to him. I only mention that as an indication that the parties were at any rate by this main agreement certainly not contemplating that Greenhalgh was always going to have at least the same number of shares.

One last point was raised. It was to the effect that in the contract there must, at any rate, be implied a term that the three directors would not transfer their shares for the express purpose of depriving the plaintiff of their support. No such implication can, in my opinion, be made. The result, in my opinion, is that the appeal must fail and be dismissed with costs. I come to this conclusion with some regret as I cannot help feeling that the appellant has been shabbily treated.

LUXMOORE, L.J.: I agree. The several findings of fact which were made by UTHWATT, J., and on which he has based his judgment, have not been challenged in this court. Having regard to those findings of fact, I find myself in agreement with his judgment on each of the questions which were dealt with by him, and I do not desire to add to or to alter or to criticise anything which he has said. I also find myself in complete agreement with what has been said by LORD GREENE, M.R., in the judgment he has just delivered. I agree with him that the appeal fails, and with the usual consequences.

GODDARD, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *S. A. Bailey & Co.* (for the appellant); *Pritchard, Englefield & Co.*, agents for *Field, Cunningham & Co.*, Manchester (for the 7 named personal respondents); *Maude & Tunnicliffe*, agents for *Jackson, Barrett & Gass*, Stockport (for the respondent company).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

EDWARDS v. LONDON PASSENGER TRANSPORT BOARD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.),
June 24, 1943.]

Workmen's Compensation—Accident—Accident happening between spells of duty—Time between spells except for 45 minutes meal time paid for by employers—Workman proceeding from one point to another—Time and route at workman's discretion—Workman proceeding for purposes of his own—Whether accident arose out of and in the course of the employment.

The appellant was a bus conductor in the employ of the respondents. On Jan. 21, 1941, he finished a spell of duty at 7.25 p.m. and had to commence another spell of duty at a different point at 9.34 p.m. The appellant was not required to go to the second point by any particular route or manner or at any particular time during the intervening period of 2 hours 9 mins., provided he was there at 9.34 p.m. The period of 2 hours 9 mins. was divided into 12 mins. travelling time, 45 mins. meal time and 72 mins. stand-by time. The company kept a record of these times together with the spells of active duty to ensure that, in accordance with the contract of service, the time between the commencement of the first spell of active work and the end of the last spell should not exceed 12 hours and that the maximum time for active work should not exceed 8 hours. The appellant was paid for the travelling time and for the stand-by time but not for the meal time. Shortly after 7.25 p.m. on the day in question the appellant, while proceeding from the one point to the other, met with an accident. He was in fact going to the point where his second spell of duty commenced, but was going there for his own purposes and intended, after transacting his own business there, to proceed to his home near by and have a meal before returning there for his second spell of duty. It was contended that the appellant was injured by an accident arising out of and in the course of his employment:—

HELD: upon the facts of this case the accident did not arise out of and in the course of his employment.

[EDITORIAL NOTE.] This case considers a position which is becoming common in the circumstances of modern industrial practice more especially in transport services. The fact that many more employees are required to be on duty during rush hours makes the arrangement of men's spells of duty a matter of some complication and it seems impossible to avoid what is called "stand-by" time. When an accident occurs within this period, it seems to depend entirely upon the particular facts of each case whether the accident arises out of and in the course of the employment.

AS TO ACCIDENTS ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 34, pp. 822-861, paras. 1160-1181; and FOR CASES, see F DIGEST, Vol. 34, pp. 276-297, Nos. 2332-2470.]

Cases referred to:

(1) *St. Helens Colliery Co., Ltd., v. Hewitson*, [1924] A.C. 59; 34 Digest 280, 2364; 93 L.J.K.B. 177; 130 L.T. 291; *sub nom. St. Helen's Colliery Co., Ltd., v. Hewitson*, 16 B.W.C.C. 230.

(2) *Shepherdson v. Hayward* (1940), 33 B.W.C.C. 57; Digest Supp.

(3) *Moule v. Marmite Food Extract Co.* (1927), 20 B.W.C.C. 446; Digest Supp.

(4) *Alderman v. Great Western Ry. Co.*, [1937] A.C. 454; [1937] 2 All E.R. 408; Digest Supp.; 106 L.J.K.B. 335; 156 L.T. 441; 30 B.W.C.C. 64.

APPEAL by the applicant from an order of His Honour JUDGE DRUCQUER, dated Feb. 26, 1943, and made at Willesden County Court.

G. H. Oliver for the appellant.

R. T. Monier-Williams for the respondents.

Oliver: When a man is instructed to go to a place by his employer and the time is allowed and paid for and an accident befalls the man, the employer is responsible. The matter is not affected by the fact that the man is allowed 45 minutes for a meal. As soon as the man had started on his journey he was in the position of a man who had been sent to do a job away from his employers' premises. [Counsel referred to *Shepherdson v. Hayward* (2), *St. Helens Colliery Co., Ltd., v. Hewitson* (1), *Moule v. Marmite Food Extract Co.* (3) and *Alderman v. Great Western Ry. Co.* (4).]

Monier-Williams: The present case is covered by *St. Helens Colliery Co., Ltd., v. Hewitson* (1). The respondents have no power over a man during

the stand-by time. In the present case, it is impossible to say that the appellant's duty required him to be at the place where the accident occurred at that particular time. Therefore it is impossible to say that the accident arose out of the employment. [Counsel referred to *Moule v. Marmite Food Extract Co.* (3) and *Alderman v. Great Western Ry. Co.* (4).]

Oliver, in reply.

LORD GREENE, M.R. : This appeal raises a point which has a considerable air of complication about it ; but I have come, after some hesitation, to a clear conclusion as to how it ought to be decided.

The appellant was a bus conductor employed by the London Passenger Transport Board and his duty was to act as conductor of a bus which left the garage at Hendon at 4.59 p.m. and returned to the garage at 7.25 p.m. That was his first spell of duty. He also had a second spell of duty, beginning at 9.34 p.m. and ending at 7 minutes past midnight ; but that spell of duty began, not at the garage where the first spell ended, but at a point rather less than half a mile away, namely a hotel called The Bell, Hendon, which was the starting point of that particular route. It will be seen that between the hours of 7.25 p.m. and 9.34 p.m. there is an interval of 2 hours and 9 minutes. The accident took place during that time. The 2 hours and 9 minutes can be analysed into 3 periods : first, a period of 12 minutes called travelling time ; secondly, a period of 45 minutes meal-time, and, thirdly, a period of 72 minutes stand-by time. Those periods have to be ascertained and calculated in respect of each employee of the London Passenger Transport Board who falls within this category of conductor, for the purpose of working the collective agreement as to hours of work and wages, which is contained in a little buff book with which we have been provided. The stand-by time and the travelling time are both counted for the purpose of ascertaining wages. The man is paid for those times ; he is not paid for the 45 minutes for meals. Those 3 elements are taken into account for the purpose of ascertaining whether or not the workman is being employed in accordance with the terms of the agreement as to the conditions and times of employment. The system involves what is called a spread-over of duty. That means that a conductor will be on the bus for a certain time, and if he has a second spell on the bus in the day he will be on the bus during that spell, but the interval (which may be short or may be long according to the particular route that he is working and the particular times during which he is working) is an interval during which he is in effect precluded from earning any money but nevertheless, although he is not working for the Board during that time, that time is, so far as he is concerned, a dead or sterile time. It is, I think, notorious that the working of the system had been a matter of complaint among the employees on the ground that on occasions and in places it worked hardly on the employees because, in addition to their periods of actual duty, they were compelled to have this large amount of dead time during their day. One of the objects of the agreement was to limit the spread-over ; and the agreement provides that the maximum spread-over of duties shall not exceed 12 hours and also that the maximum time worked shall not exceed 8 hours. Those are the conditions, and for the purpose, first of all, of seeing that those conditions are complied with it is necessary to examine the nature of the interval between 2 spells of duty and see of what elements it is made up. It is also important to do that from the point of view of wages because, although the man is not paid for his meal time, he is paid for his travelling time and he is paid for his stand-by time, and he has a guaranteed day of 8 hours ; so in any event he gets 8 hours' pay. In order to ensure that the calculations for the purposes I have mentioned may be clearly set out for each employee, the Board has a system by which duty sheets are kept giving the time which each man spends during the day—on the bus, in travelling time, in stand-by time and in meal time—which can be ascertained by a process of calculation ; it is not in terms mentioned in any of the heads, but there it is.

In the present case, the appellant, having left his bus at the garage at 7.25 p.m., proceeded to walk in the dark (there being no bus available and the bus being his normal method of making the journey) in the direction by one route to the Bell Hotel, and before he had got very far he was knocked down by a foot passenger who was rushing along the pavement and suffered an injury

which turned out to be extremely serious. His intention at the moment when he was knocked down was to proceed to the Bell Hotel, not for the purpose of waiting at the Bell Hotel for the bus which he would have to board when his second spell of duty started, but for the purpose of making certain inquiries which were for his own convenience, as the county court judge held. His intention was, after making those inquiries, to proceed to his own home hard by in a road called Victoria Road, which lay off the direct route between the Hendon garage and The Bell. In those circumstances it is said that when the accident took place he was engaged in performing a duty to his employers, namely, the duty of taking himself from the point where his first spell of duty terminated to the point where his next spell of duty would begin some 2 hours and 9 minutes later. It is said that provided he was on that route, as in fact he was—at any rate on one route between the two points, and I think a reasonable route—at any time between the two spells of duty, no matter what his purpose was at the time or what he was going to do, any accident that took place would arise out of and in the course of his employment. The county court judge held that the accident did not so arise, and in my opinion he came to the right conclusion.

The matter, in my opinion, really depends on the true inference to be drawn as to the contract between the appellant and his employers. If it had been a case in which the contract was to leave his bus after the first spell ended and proceed forthwith by the nearest route to The Bell and there pick up the other bus, I should not have had very much difficulty in coming to the conclusion that part of the work that he was being employed to do at the time was to take himself from one point to the other; and it could truly be said in such a case, I think, that, when the accident occurred, he was in a place at a time where it was his duty to be.

However, each case, it seems to me, must depend on the terms of the actual contract; and in the present case I cannot see my way to hold that the contract is similar to the one which I have suggested. This was not a case where he was under any duty to take himself from the garage to The Bell by any particular route or with any particular speed or at any particular time, subject only to this, that he must present himself at The Bell in time to board his bus for the second spell of duty. Provided he did that the whole of the intervening time was at his own disposal. He could make his way to The Bell by any circuitous route he pleased. If he had wanted to take a walk for 2 hours he could have mapped out for himself a journey of 2 hours from the garage to The Bell. He could have taken his meal where he liked; he could have gone direct to The Bell if he had pleased and taken his meal there. He could have gone by any means he liked. He could have gone by bus. If a friend chose to take him on the back of his motor-cycle or in a car or if he chose to walk or if he chose to run—it matters not one bit. Provided he reported at The Bell in time for his second spell it seems to me he was performing his contract. In other words, the interval between the time when he gets off the bus at the garage at the conclusion of his first spell and the time when he boards the other bus at The Bell at the beginning of his second spell is for him perfectly free time in which he may do what he likes and go where he likes—subject to this, that for the whole of that time except 45 minutes he is entitled to be paid, and also subject to this, that, for the purpose of this collective contract, an account must be taken of the whole of that intervening time for the purpose of ensuring that the contractual conditions as to wages and conditions of labour are performed. Subject to those considerations, what he does with his time or how it is split up into these elements is of no materiality whatsoever in considering the question: was it his duty to be at that place at the time when the accident happened?

In my opinion, on the terms of the contract under which this particular man must be inferred to have been working he cannot say that the accident arose out of and in the course of his employment. I come to this conclusion with some regret, particularly as the man has suffered a very serious injury; and, if it had been a case of the kind I imagined, which it might very well be in the case of other employees, namely, a case where his second turn of duty at another place begins so soon after his first turn of duty ends that he only just has time to get from one point to the other—in such a case it may very well be that his contract must be deemed to be a contract to take himself by the quickest and

most expedient route from the one point to the other. However, on the facts of the present case, the contract appears to me to be of quite a different character, and during the interval between the 2 spells of duty he was a free man to do what he liked and go where he liked.

The appeal must be dismissed.

MACKINNON, L.J. : I agree. At the moment of the accident the man was proceeding along Church Street, Hendon. Counsel for the appellant says he was doing so in the course of his employment because that street was on the way from the garage, where his last shift of work had ceased at 7.25 p.m., to The Bell, where his next shift was to begin at 9.34 p.m. I do not think that conclusion from those facts is sound. If he was proceeding along that street in the course of his employment and pursuant to the obligations of his contract of service, the employer, if he happened to be present, would have been entitled to insist that he should so proceed. For instance, if the employer saw him stop to read the alluring advertisements of a cinema by the wayside and saw him take a turn as if to succumb to that allurements, he would have been entitled to say : "What are you doing ? You must not go in there. By your contract with me you are under a duty to go straight on to The Bell." In this case, if the chairman of the respondent Board had so addressed this man he could have politely replied : "Not so. I have no duty to you at this time. I have a duty to be at The Bell ready for my next work at 9.34 p.m. ; it is now only 7.40 p.m., and at this hour I am perfectly free to go into this cinema for an hour or more." In the result I think that he was not, when walking along Church Street at the moment when he was, doing so in the course of his employment.

The remarks made in the cases to which reference has been made all depend upon the particular facts of each particular case. The nearest statement of principle which I think is useful is that of LORD WRENBURY in *St. Helens Colliery Co. v. Hewitson* (1), at p. 95 :

The man is not in the course of his employment unless the facts are such that it is in the course of his employment, and in performance of a duty under his contract of service that he is found in the place where the accident occurs. If there is only a right and there is no obligation binding on the man in the matter of his employment there is no liability.

I think that this appeal fails.

DU PARCQ, L.J. : I agree. This man's duty was to be at The Bell at 9.34 p.m. He was in fact making his way to The Bell, but that is really an accidental circumstance. He was not making his way there in order to perform his duty but for purposes of his own ; and his position was no different from that of any man who has to report for duty at a particular place. Whether it be the garage or whether it be The Bell, he has to report at one of those places, according to the time, and, I think, on the facts of this particular case, he was in precisely the same position as any man who has to go to work at a particular time. One may say in a sense that he is doing his duty to his employer when he goes to the place of employment but nobody has ever thought that, if anything happens on his way there, it happens to him in the course of his employment. It is, in my view, reasonably plain, although the case is not without its difficulties, that he does not come within the section. I agree entirely with what has been said by LORD GREENE, M.R., and MACKINNON, L.J.

Appeal dismissed with costs.

Solicitors : *Pattinson & Brewer* (for the appellant) ; *R. McDonald* (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

WHITTEN v. ARMY & NAVY STORES, LTD.

[KING'S BENCH DIVISION (Wrotesley, J.), May 20, 1943.]

Factories—Dangerous machinery—Absolute duty—Circular saw—Guard impracticable in particular operation—Operator injured—Whether absolute liability under the Factories Act, 1937, s. 14, modified by the Woodworking Machinery Regulations, 1922, reg. 21—Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196), regs. 10, 21—Factories Act, 1937 (c. 67), ss. 14, 60.

The plaintiff, who was a skilled cabinet maker and for 20 years an

employee of the defendants, seriously injured his hand on a circular saw which he was operating in the defendants' factory. The nature of the process upon which the plaintiff was engaged made it impossible to use any sort of guard known at the time. The plaintiff brought an action to recover damages for his injury, contending that the defendants had neglected their common law duty to provide a safe system of working, and that they had committed a breach of the statutory duty imposed by the Woodworking Machinery Regulations, 1922, reg. 10, and the Factories Act, 1937, s. 14, to fence the dangerous parts of the saw. The defendants maintained that they had provided a safe system of working and that the absolute liability imposed by the Woodworking Machinery Regulations, 1922, and the Factories Act, 1937, was modified by reg. 21 of the former, and that, in the circumstances, they were not liable :—

HELD : (i) the defendants had provided a safe system of working.

(ii) reg. 21 of the Woodworking Machinery Regulations, 1922, modified the absolute liability imposed by reg. 10, but not the liability imposed by the Factories Act, 1937, s. 14. That section imposes an absolute liability except where the Secretary of State has chosen to modify that liability by regulations made under powers conferred by sect. 60.

[EDITORIAL NOTE. The Woodworking Machinery Regulations, 1922, reg. 10, requires a circular saw and similar dangerous machines to be effectively guarded. This was an absolute duty, but reg. 21 provides that, in operations where it is impracticable to use a guard, the work may be carried on without one. It is here held that the provisions of reg. 21 affect the duty to guard a dangerous machine only under those regulations and does not affect the duty arising under the Factories Act, 1937. Therefore the absolute duty under the Act remains and gives a right to damages to an injured party despite the provision in reg. 21.

AS TO FENCING DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, paras. 1130, 1131; and FOR CASES, see DIGEST, Vol. 24, pp. 908-911, Nos. 65-81.]

Cases referred to :

(1) *Hart v. Lancashire & Yorkshire Ry. Co.* (1869), 21 L.T. 261; 8 Digest 93, 634.

(2) *Lewis v. Denye*, [1940] A.C. 921; [1940] 3 All E.R. 299; Digest Supp.; 109 L.J.K.B. 817; 163 L.T. 249.

(3) *Davies v. Owen (Thomas) & Co.*, [1919] 2 K.B. 39; 24 Digest 908, 68; 88 L.J.K.B. 887; 121 L.T. 156.

ACTION to recover damages for injury caused by breach of statutory duty to fence dangerous machinery. The facts are fully stated in the judgment.

R. Edgedale for the plaintiff.

Montague Berryman for the defendants.

WROTTESELEY, J. : The Army & Navy Stores own and occupy a factory, consisting of wood, leather and metal working, perfumery and other departments. The plaintiff was an old and trusted servant who for 20 years or so had been in their employ, a skilled cabinet maker, and at the date of the accident was foreman or charge hand in charge of the woodworking department, including the 20 hands employed there before the war, now reduced to 6 or so. There was also a department which dealt with packing cases.

Owing to the exigencies of the war, it was found impossible to obtain wood for the manufacture of boxes to hold pots of jam, so the stores adopted the suggestion made to them, and purchased packing cases or boxes deeper than required, and which, therefore, needed to be cut down. The manager of the factory saw the plaintiff and asked him to do the necessary work in the woodworking department. The job entailed taking these boxes, consisting of 4 sides and a bottom but no top, and cutting down all 4 sides by about 4 ins., using for that purpose a circular saw which was in the department. This circular saw was mounted in a bench so that it protruded above the level of the bench. It could be adjusted so as to protrude as much as 4 ins. if required. However, it was able to do all that was necessary in order to saw off the top of each side of these boxes if adjusted so that it protruded rather less than 2 ins. The process was, of course, to lay the box on its side and to push it into contact with the saw, sliding it along until the side was sawn right through, then to repeat the process on the next side, and so on. As the top of each side was sawn off it fell away in a separate piece, called the "off-cut," and a careful workman would brush it aside so that it did not get involved in the saw which

revolved at about 2,000 revolutions a minute. For, if such a piece were to get so involved, it might fly off the table and damage the worker or bystander.

The plaintiff did not much like the job, he told me, and suggested it might be done in the packing case department where they had a horizontal saw which could do the job in 2, instead of the 4 processes necessary on the saw bench. However, he decided to do the job at the manager's request, and did not, I am satisfied, suggest to the manager that it was a dangerous or difficult job. Indeed, this saw had often been used for the similar work of "cutting open" tuck-boxes made for school-boys. These boxes were made in one, including the lid, and the lid had afterwards to be sawn off, and then hinged on. There was, however, this difference in such a job, that the lid when so sawn off came away in one piece and not in 4 pieces or more. A

The circular saw was provided with a combined riving knife and guard, which came forward over the exposed edge of the saw, acting to some extent as a guard and also to part and keep parted the board where it had already been sawn through. The scale model provided at the hearing was an accurate one of the actual guard in use generally. It is not one which complied with the specification laid down by the Woodworking Machinery Regulations, 1922, reg. 10. However, neither in the job of cutting down these packing cases, nor in that of cutting into a box could this guard be used, for the front part of it—the part which acted as a guard—would come into contact with the box and prevent it being pushed along the saw. For either of these purposes the guard and riving knife had to be dismounted, and the saw used naked and unguarded so far as the arc exposed above the bench was concerned. Nor could the work have been done if a guard of the kind specified in the regulations had been installed, and for the same reason. It is true that a guard of that pattern could have been installed, but in order to make room for the box to pass it would have needed a very much larger saw, and the part of the saw left unguarded in order that the box could be passed under the guard would have been very much larger, and, therefore, very much more dangerous. B C D

In the course of putting one of the packing cases along the saw the plaintiff's right hand came into contact with the saw and was seriously damaged. As a result he has been unable to work since May, 1942, and he will go through life with a maimed hand. He has suffered special damage agreed at £337 17s., and, though he might find work of a sort, he will never again be able to do his work as a cabinet maker properly, nor any other work demanding a sound pair of hands. I assess the general damage which he has suffered at £1,100, to include pain and suffering, past and present and future incapacity. E

He claims on 2 grounds that the defendants should make good this damage to him. One ground is that the defendants were guilty of negligence and fell short of the duty, which as his master they owed to him, to minimise the danger of the work he was given to perform, and to devise a safer system. The other ground is that the defendants committed a breach of the statutory duty imposed on them by the Factories Act, 1937, s. 14, to fence the dangerous parts of this saw. F

As regards the first ground, namely, the common law duty of the defendants to supply proper plant and a safe system of working, I do not think that the defendants neglected their common law duty, unless it can be said that in no event is an employee to be asked to use a tool or machine which is dangerous. The plaintiff was a skilled and highly experienced man who had seen this machine used and used it himself, if necessary, on and off for years, and knew well the necessity for caution. He made a mistake, was caught off his guard, and the result was this serious injury to his hand. Since the accident the defendants' engineer has invented a very ingenious device which prevents a worker from putting his hand on to the saw, but at the time this device had not been invented. It is now under consideration by the Secretary of State, and may well be introduced compulsorily by him under the Factories Act, 1937, s. 14 (2). In the meantime it is being used in the defendants' factory on this saw. H

It was suggested that the defendants ought to have introduced this device before the accident. Here, however, I am in agreement with what was said by BRAMWELL, B., in *Hart v. Lancashire & Yorkshire Ry. Co.* (1), at p. 263 :

... people do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident.

That leaves the other ground, namely, the admitted fact that this saw was not guarded in any way, neither in the manner laid down in sect. 14, nor by a guard as laid down by the Woodworking Machinery Regulations, 1922, which admittedly apply to this case. Sect. 14 provides :

A (1) Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced : Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard; the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part. (2) Where the Secretary of State is satisfied that there is available and suitable for use in connection with machinery of any class any type or description of safety device which (a) prevents the exposure of a dangerous part of machinery whilst in motion ; or (b) stops a machine forthwith in case of danger, he may make regulations directing that the type or description of device shall be provided for use in connection with such class of machinery as may be specified in the regulations : Provided that, in any proceedings in respect of a contravention of this subsection, it shall be a sufficient defence to prove that a device at least equally effective was being used in connection with the machinery in respect of which the contravention occurred.

B The relevant regulation of the Woodworking Machinery Regulations, 1922, C is reg. 10, and particularly (b) and (c) which read as follows :

(b) Behind and in a direct line with the saw there shall be a riving knife, which shall have a smooth surface, shall be strong, rigid, and easily adjustable, and shall also conform to the following conditions : (i) The edge of the knife nearer the saw shall form an arc of a circle having a radius not exceeding the radius of the largest saw used on the bench. (ii) The knife shall be maintained as close as practicable to the saw, having regard to the nature of the work being done at the time, and at the level of the bench D table the distance between the front edge of the knife and teeth of the saw shall not exceed half an inch. (iii) For a saw of a diameter of less than 24 inches, the knife shall extend upwards from the bench table to within one inch of the top of the saw . . . (c) The top of the saw shall be covered by a strong and easily adjustable guard, with a flange at the side of the saw farthest from the fence. The guard shall be kept so adjusted that the said flange shall extend below the roots of the teeth of the saw. The guard shall extend from the top of the riving knife to a point as low as practicable at the cutting edge of the saw.

E It is clear that the job which the plaintiff was doing could not have been done if the saw had been guarded in the manner prescribed by the regulation. Nor in the light of knowledge at the time was any guard shown to have been devised which could have been installed instead of that prescribed for doing this kind of work, so as to come within the proviso to sect. 14 (1) set out above.

F As regards the accident, it is clear that the defendants in allowing the plaintiff to use the circular saw unguarded were neither complying with sect. 14 nor with those parts of reg. 10 which prescribe guards. But they claim they are not in breach of their statutory duties by reason of the provision of reg. 21. That regulation is as follows :

G The guards and other appliances required by these regulations shall be maintained in an efficient state and shall be constantly kept in position while the machinery is in motion, except when, owing to the nature of the work being done, the use of the guards or appliances is rendered impracticable. The guards shall be so adjusted as to enable the work to be carried on without unnecessary risk.

H There is no doubt that here was an occasion when, owing to the nature of the work being done, the use of the guards required by the regulations was rendered impracticable. Therefore, say the defendants, we cannot be said to be acting in breach of the Woodworking Machinery Regulations. As to the provisions of sect. 14, the defendants say that the effect of the regulations, and particularly of reg. 21, is to modify that section so as to make it unnecessary to use a guard when the use of the guard prescribed by the regulations is rendered impracticable by the nature of the work to be done.

Under the Factories Act, 1937, the Secretary of State was empowered by special regulations to modify, among other parts of the Act, this section. Sect. 60 is as follows :

(1) Where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour, used in factories is of such a nature as to cause risk of bodily injury to persons employed in connection therewith, or any class

of those persons, he may, subject to the provisions of this Act, make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case. (2) Special regulations so made may, among other things, (a) prohibit the employment of, or modify or limit the hours of employment of, all persons or any class of persons in connection with any manufacture, machinery, plant, process, or description of manual labour; or (b) prohibit, limit, or control the use of any material or process; or (c) modify or extend with respect to any class or description of factory any provisions of Pt. I, Pt. II or this Part of this Act, being provisions imposing requirements as to health or safety; and may impose duties on owners, employed persons and other persons, as well as on occupiers.

Section 14 is in Pt. II of the Act. It is true that the Woodworking Machinery Regulations, 1922, were not made after this power was given to the Secretary of State, but before. However, the proviso to sect. 159 of the Act which repeals the former Factory Acts reads:

Provided that any . . . regulation . . . made under any enactment repealed by this Act which is in force at the commencement of this Act shall continue in force and shall have effect as though it had been made or given under this Act, and, in so far as it could have been made or given under a particular provision of this Act, shall be deemed to have been made or given under that provision, and any such order or regulation made by the Secretary of State under a power which is exercisable under a corresponding provision of this Act by a different class of instrument, shall be deemed to be an instrument of that class, so, however, that an order or regulation of the Secretary of State which continues in force by virtue of this proviso may, in so far as may be necessary to bring it into conformity with this Act, be varied or revoked by an order made by him under this Act.

If, therefore, there should be in the Woodworking Machinery Regulations provisions which purport to modify sect. 14 of the Act of 1937, which is practically the same as sect. 10 of the Act of 1901, a cloak is thrown over their validity, and the Secretary of State now has statutory sanction for doing that which it is doubtful whether he could do before. He can now, if he likes, make regulations, compliance with which will excuse the occupier who obeys them from the apparently absolute obligations contained in sect. 14, to fence securely every dangerous part of machinery. On the other hand, he can, when he makes regulations, make it clear that they do not supersede such absolute obligation. And my attention was drawn to regulations promulgated since the 1937 Act, in which he has done this.

It was argued on behalf of the plaintiff in this case that, notwithstanding the clear words of sect. 159 of the 1937 Act, it was repugnant to common sense that these words should be used to justify a modification of the Act so recently passed by a set of regulations which were made before the Act, and in respect of which Parliament has never had the opportunity afforded by sect. 129 of annulling them. That section provides under (1) (a) that:

. . . all regulations made under this Act shall be laid as soon as may be before Parliament, and if either House within the next twenty-eight days on which that House has sat after the regulations have been laid before it, resolves that the regulations be annulled, the regulations shall be of no effect; but without prejudice to the validity of anything done in the meantime thereunder or to the making of new regulations . . .

That, however, appears to me to be an argument which might with more propriety have been addressed to Parliament when the clause which became sect. 159 was under discussion, than to the court which has to construe that section.

If, therefore, I find in the regulations a clear intention to modify the provisions of sect. 14 of the Act, I must accept the position. In fact I find no such intention. Read carefully, reg. 21 excuses the defendants in this case from keeping in position the guards specified in reg. 10. If the plaintiff had been forced to rely on the absence of that guard as being the cause of his accident, the defendants would have had a good answer in the exception contained in reg. 21. However, the plaintiff is not obliged to rely on this: on his behalf it is claimed that the defendants had not complied with sect. 14; they had not, even by using the guards specified in the Woodworking Machinery Regulations placed themselves in the position of the defendants in *Lewis v. Denye* (2), that is to say, of providing the guards specified, or the best known guards. It is, at any rate, arguable that defendants who set up and maintain the guards specified in the Woodworking Machinery Regulations have complied with the obligation intended to be imposed by sect. 14, in the absence of some provision

in the regulations to indicate that the general obligation in sect. 14 was not to be regarded as superseded. Nevertheless, it is a long stride from that proposition to claim that the regulation which permits the occupier to dispose with the guards specified in the regulations where their use is impracticable, impliedly sets the occupier free from the obligations laid down in sect. 14. For this would apparently justify the provision of no guard at all wherever the specified guard is unsuitable. This cannot be right.

A It may be true that in the result the court is bound to hold something perilously near to the proposition underlying the decision in *Davies v. Owen (Thomas) & Co., Ltd.* (3), by SALTER, J., namely, that commercial considerations are irrelevant and that, in so far as a machine cannot be used so as to comply with sect. 14, it must not be used at all. And I have had it pointed out to me that in *Lewis v. Denye* (2) VISCOUNT SIMON, L.C., appeared to doubt the soundness of that proposition, and that the House of Lords must be taken to have reserved their opinion upon it. However, since then, by the Act of 1937, the legislature has apparently confided these matters to what must be regarded as the most suitable person—seeing that they are largely matters of policy and expediency—namely, to a Minister of the Crown answerable to Parliament; it did this doubtless in order to deal with the serious question to which VISCOUNT SIMON, L.C., alluded.

B Henceforward, it must, I think, be taken that Parliament has meant sect. 14 to stand as an absolute obligation, except in those cases where the Secretary of State has by regulation chosen to modify that obligation.

C As a result the plaintiff is, in my judgment, entitled to succeed, and there must be judgment for him for the amount of £1,100 and the agreed special damages of £337 17s., with costs.

Judgment for the plaintiff with costs.

D Solicitors: *Shoen, Roscoe & Co.* (for the plaintiff); *Blount, Petre & Co.* (for the defendants).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

COLLINS ARDEN PRODUCTS, LTD. v. MAYOR, ALDERMEN E AND BURGESSES OF THE BOROUGH OF BARKING.

[KING'S BENCH DIVISION (Charles, Stable and Hallett, JJ.), April 2, 1943.]

Food and Drugs—Nature of substance or quality demanded—"Cordial"—Evidence—Evidence must show what an ordinary purchaser expects to receive.

F The appellants were charged with selling Orange Citric Flavoured Cordial which was not of the nature, substance or quality demanded by the purchaser and also with giving a label calculated to mislead as to its nature, substance or quality. Before placing this cordial on the market the appellants had had a sample analysed by a public analyst and he had come to the conclusion that it was properly described and could properly be issued to the public with the label in question. At the hearing, a public analyst stated that non-alcoholic cordials in his opinion should contain a substantial quantity of sugar. Other analysts gave evidence totally disagreeing with that view:—

G HELD: this evidence was quite insufficient for a conviction, since it was not evidence that an ordinary person asking for a cordial expects to receive or means to demand a liquid containing a substantial quantity of sugar.

H [EDITORIAL NOTE. It may well be that different professional persons will ascribe a different meaning to the word "cordial" and experts, called to give evidence as to what, in their opinion, is a cordial, may well give quite divergent views. The criterion however, by which the question whether an offence under the Food and Drugs Act, 1938, ss. 3 and 6 has been committed by the vendor is the proper nature of the demand of the purchaser. The evidence must be directed to what it was that the purchaser demanded and expected to receive. Without proof of this and that the substance purchased was not of the nature demanded, a prosecution of the nature here undertaken cannot succeed.]

AS TO EVIDENCE IN SUCH PROSECUTIONS, see HALSBURY, Hailsham Edn., Vol. 15, pp. 154-157, paras. 247-250; and FOR CASES, see DIGEST, Vol. 25, pp. 83-91, Nos. 110-169.]

Cases referred to :

- (1) *Morton v. Green* (1881), 8 R.(J.) 36 ; 25 Digest 131, *case l.*
- (2) *Davidson v. M'Leod* (1877), 5 R.(J.) 1 ; 25 Digest 83, 110 (*ii*).

CASE STATED by the justices sitting as a court of summary jurisdiction at Stratford. The appellants were charged under the Food and Drugs Act, 1938, ss. 3 and 6 (1), with selling Orange Citric Flavoured Cordial which was not of the nature, substance and quality demanded and with issuing a label therewith calculated to mislead as to the nature, quality or substance of the food sold. A

It was admitted that, if the offence charged was committed, it was due to the act of the appellants and that they were properly proceeded against under sect. 83 of the Act. The public analyst for the borough of Barking gave evidence that the word cordial was originally used to describe an alcoholic liquid having a heartening or restorative action, but it had long been used to denote a flavoured syrup having a physiological effect which might be described as heartening due to the presence of a large proportion of sugar. The appellants contended that this meaning has been lost by usage and admitted that the liquid in question was non-alcoholic and contained no sugar. It was in fact sweetened with saccharin and had no heartening effect. The analyst expressed the view that non-alcoholic cordials should contain a substantial quantity of sugar. This view was disagreed with by three professional witnesses for the appellants who contended that a cordial was any pleasant beverage, sweetened or unsweetened, flavoured and needing dilution. It was proved that the Ministry of Health in 1924 published a report on the Commoner British Wines and Cordials (alcoholic and non-alcoholic) and that 95 samples of cordials reported on all contained a substantial quantity of sugar. It was also proved that the British Pharmacopoeia in 1941 had published a revised formula for a syrup substituting saccharin for sugar. B

Valentine Holmes and *R. L. Parry* for the appellants. C

A. T. Denning, K.C., and *Percy Lamb* for the respondents. D

CHARLES, J. : The first summons under the Food and Drugs Act, 1938, s. 3, alleged that the Orange Citric Flavoured Cordial, supplied to the purchaser "was not of the nature, substance or quality of the food demanded by the purchaser." The other summons, under sect. 6, is that the London United Grocers, Ltd., through the hands of their servant gave to the inspector "with the said food a label calculated to mislead as to the nature, substance or quality of the said food." E

The case took a very strange course and it was certainly very exceptional in every circumstance. The accused, Collins Arden Products, Ltd., were obviously infinitely desirous of doing all that was proper and in accordance with the law. Before they issued this Orange Citric Flavoured Cordial to the public, they asked the analyst of the borough in which their offices were situated if he would analyse it and see whether the label correctly described it. The analyst examined a sample and came to the conclusion that it was correctly described and that they could quite safely and properly issue the product with the label to the public. F

At the hearing before the magistrates (who differed in their conclusions, two of them being for a conviction and one against) a very strange course was taken. It is not unusual to call a public analyst in cases of this sort, and, by the Food and Drugs Act, 1938, s. 81, his certificate is *prima facie* evidence and can be used unless those accused demand his presence in court, and that he shall give his evidence upon oath. In this case he gave his evidence upon oath and the magistrates seem to have acted upon his evidence. How they could do so I cannot understand. I think that they clearly have not addressed themselves to the proper question which they had to consider. G

The evidence of the public analyst was as follows : he commenced with a little history ; he continued with some very vague statements as to the effect of alcohol and sugar and he goes on to say as a conclusion that non-alcoholic cordials, in his opinion, should contain a substantial quantity of sugar—how much no one knows. The case states : H

It was proved by Dr. Hamence [the public analyst who gave evidence] that the word "cordial", in its origin, was used to denote an alcoholic liquid having a heartening or restorative action, but for many years the word had been used to denote a flavoured syrup having a physiological effect which might be described as heartening due to the

presence of a large proportion of sugar. . . The drink before the court consisted of a coloured flavoured solution of citric acid containing 95.5 per cent of water and sweetened with saccharin. The liquid contained no sugar or alcohol to give it a heartening effect and, therefore, could not properly be described as a cordial . . . Non-alcoholic cordials should contain a substantial quantity of sugar.

A One very distinguished public analyst from the city of Westminster, and two other consulting analysts were called who totally disagreed with that very vague and indeterminate conclusion. The magistrates propound this question to us :

Whether we came to a correct determination in holding that offences had been committed under both sect. 3 and sect. 6, (1), of the Food and Drugs Act, 1938, by reason only of the fact that the liquid in question contained no sugar or alcohol.

I stop there, because I think that the rest of it is surplusage.

B My answer to that is unhesitatingly that they came to an incorrect determination. They did not address themselves to the proper question to be considered. You cannot convict on indeterminate evidence in cases of this sort. It might have been different, although I am not going to say one way or the other which way I should have been inclined myself to find had it been so, if Dr. Hamence had said : " Non-alcoholic cordials, in my opinion, must contain a substantial quantity of sugar or they are not cordials " ; but he says nothing of the sort. He simply gives a vague and indeterminate conclusion that, in his opinion they ought to contain sugar. Other people think that they should not. He goes no further than that.

C I do not consider that there was any evidence in the facts so found upon which the magistrates could come to the conclusion that these people had been guilty of the offences charged against them and the appeal must be allowed, and allowed with costs.

D STABLE, J. : I agree and I wish to add only a few words. The Food and Drugs Act, 1938, s. 81 (1) makes the certificate of the public analyst in the prescribed form sufficient evidence of what is stated therein, unless the other party requires that the analyst should be called as a witness. In the present case the other party did require that the analyst should be called as a witness, with the result that, though that part of his certificate which set out the actual constituents of this liquid was admitted, the remainder of this piece of paper ceased to be evidence in the case.

E In order to support the finding of the magistrates there must have been evidence before them that the word " cordial " meant a liquid containing alcohol or sugar and nothing else. It is insufficient to adduce evidence that the word " cordial " comprises liquids containing alcohol and non-alcoholic liquids containing sugar. In my view, it was essential as a matter of law to support the conclusion of fact at which the magistrates arrived with some evidence that those were the only meanings that the word " cordial " could bear.

F When one looks at the evidence that was given by the public analyst called on behalf of the public authority, he, after a description of the historical origin of the word, went on to say that " for many years the word had been used to denote a flavoured syrup having a physiological effect." That statement may be perfectly true ; but what he did not say was that those were the only meanings which could properly be attributed to the word " cordial." It is true that later on in the case this sentence appears :

G Non-alcoholic cordials, in his opinion, should contain a substantial quantity of sugar. It may be that he does entertain that opinion. Other people may entertain all kinds of opinions as to what it is desirable that non-alcoholic cordials should contain ; but that is not evidence that when the ordinary person goes into a shop and asks for cordial what he means and the only thing that he means is either a liquid containing alcohol or a liquid containing a substantial quantity of sugar.

H On that short ground, in addition to the grounds stated by my Lord, in my view this appeal succeeds.

HALLETT, J. : I agree. If it appeared from the case that the justices had directed their minds to the right question and, in so directing their minds, had found facts which justified their determination, I should not have thought it right that this court should interfere ; but I am not satisfied, having perused

the case, upon either of those points. As my Lord has pointed out, there are here convictions under two sections and of two offences: one under sect. 3 of the Food and Drugs Act, 1938, and the other under sect. 6. It seems to me that it is necessary to look at those sections. Under sect. 6 a person commits an offence who sells food with a label which is calculated to mislead, but the section goes on to say:

... unless he proves that he did not know, and could not with reasonable diligence have ascertained, that the label was of such a character as aforesaid.

In the present case it is quite plain that the present appellants were relying upon the defence that, even if they had sold this substance with a misleading label, they did not know and could not with reasonable diligence have ascertained that the label was misleading; and they adduced certain evidence, which is set out in the case and which, for my own part, I think was of a formidable character, in support of that defence. Yet, when one comes to the conclusion of the case, one finds that the justices have never addressed their minds to that defence at all. There is no finding upon it; there is no determination upon it and there is no reference to it. All that they say about sect. 6 (1) is:

The questions for the opinion of the court are ... (b) Whether we came to a correct determination in convicting the appellants of an offence under the Food and Drugs Act, 1938, s. 6 (1).

As regards that section, I am far from satisfied that they directed their minds to the proper question and I am far from satisfied that, if they had directed their minds to the proper question, there are any facts found by them to justify their determination.

However, a more important point is the point with which the other judgments have dealt, namely, the question whether the conviction under sect. 3 should be upheld. The section renders it an offence:

If a person sells to the prejudice of the purchaser any food or drug which is not of the nature, or not of the substance, or not of the quality, of the food or drug demanded by the purchaser.

It is the demand by the purchaser which is, to my mind, the determining factor in deciding what ought to have been supplied. Looking at the case, it seems to me that the justices have not directed their minds to that question; nor have they found the facts to justify their determination, if it be a determination, that what was sold was not of the nature, substance or quality demanded by the purchaser. I desire only to refer to one or two sentences in *Morton v. Green* (1), a decision of the Court of Justiciary in Scotland, because it expresses better than I can express what I feel about the matter. That case deals with the sale of cream and the prosecution was there brought under the Sale of Food and Drugs Act, 1875, s. 6, which corresponds, so far as is material, with sect. 3, which we have to consider in this case. LORD YOUNG, who presided and who was one of the judges in *Davidson v. McLeod* (2) said this, at p. 39:

I cannot hold that there are here facts found proved to justify the conclusion that was arrived at. The sheriff has told us what the facts are which he has found proved, and the inference that he has made from these facts, viz., that but for the fact that the purchaser was here the sanitary officer he would have been prejudiced. I cannot hold that this inference which the sheriff made upon the question of prejudice is a question of fact. I think it is a question that we are entitled to deal with, and to say whether on the facts which the sheriff has stated there was such prejudice in the sale made as warranted a conviction. I am of opinion that these facts did not justify the inference of prejudice, or warrant the conviction. I adhere to what I said in the case of *Davidson v. McLeod* (2). . . I am of opinion that upon the right view of the law applicable to the facts, which are as I have stated, the conclusion that the purchaser but for the circumstance that he happened to be a sanitary inspector—was prejudiced was not justified, and that therefore the conviction cannot be sustained.

I adopt that language as my own. In the third judgment, that of the LORD JUSTICE CLERK, it is said, at p. 40:

The vendor, believing that this was what he wanted, gave it to him, and I see nothing to satisfy me that he [the purchaser] expected the vendor to construe his demand in any other sense. I cannot approve of this proceeding. It is too like a catch. The "article demanded" must be held to be the article meant by an ordinary purchaser to be obtained—not in any scientific definition. . . I think, looking to the aspect of this case, that it seems a rather obtrusive interference with what, as far as I can see, is an honest trade.

Again, I desire to adopt those words as my own in this judgment.

Appeal allowed with costs. Conviction quashed.

Solicitors: *Lieberman, Leigh & Co.* (for the appellants); *Lees & Co.*, agents for *E. R. Farr*, Town Clerk, Barking (for the respondents).

[*Reported by C. St. J. NICHOLSON, Esq., Barrister-at-Law.*]

KING v. KING.

[COURT OF APPEAL (Scott, MacKinnon, Luxmoore, Goddard and du Parcq, L.J.J., and Bucknill, J.), **June 22, July 7, 1943.**]

Divorce—Procedure—Security for wife's costs—Appeal by unsuccessful husband petitioner—Court's jurisdiction to grant wife security for costs of appeal.

Husband and Wife—Necessaries—Wife's implied authority to pledge husband's credit for costs in divorce proceedings—Court's jurisdiction to grant wife security for costs in husband's appeal.

The applicant asked for an order for security for costs against her husband who was appealing from the dismissal of his petition for divorce on the ground that the alleged adultery between his wife and the co-respondent had not taken place. It was contended for the applicant that an order should be made on the ground that legal assistance in such circumstances came within the common law rule as to a husband's liability for his wife's necessities:—

HELD: the court has jurisdiction to order security for costs where the husband is appealing against the dismissal of the petition.

[**EDITORIAL NOTE.** An order for security for costs in a case of this nature is based upon the legal rule that a wife may during the marriage pledge her husband's credit for necessities. Where the petition has been dismissed, the reason for the rule will continue to exist upon an appeal, but, where the petition has been granted and a decree made, it would seem that this reason for granting security no longer exists. However, it may be that the interest of the state in the efficient conduct of divorce proceedings would give the court jurisdiction in all cases on the grounds of public policy. This question, however, is reserved and is expressly left open by this decision of the full court.]

AS TO SECURITY FOR WIFE'S COSTS OF APPEAL, see HALSBURY, Hailsham Edn., Vol. 10, pp. 780, 781, para. 1234; and FOR CASES, see DIGEST, Vol. 27, pp. 206, 207, Nos. 1787-1797.]

Cases referred to:

(1) *Shufflebotham v. Shufflebotham* (1923), 128 L.T. 642; 27 Digest 488, 5197.

(2) *Vidal v. Vidal and Wilson* (1921), Times, Oct. 13.

(3) *Ottaway v. Hamilton* (1878), 3 C.P.D. 393; 27 Digest 207, 1796; 47 L.J.Q.B. 725; 38 L.T. 925.

(4) *Williams v. Williams*, [1929] P. 114; Digest Supp.; 98 L.J.P. 40; 140 L.T. 383.

(5) *Johnstone v. Johnstone*, [1929] P. 165; Digest Supp.; 98 L.J.P. 76; 140 L.T. 451.

APPLICATION by the respondent for security for costs against her husband who was appealing from a judgment dismissing his petition for divorce. The facts are stated in the judgment.

Serjeant Sullivan, K.C., and *Guy W. Willett* for the applicant.

Hon. Victor Russell for the husband.

SCOTT, L.J. [delivering the judgment of the court]: This is the unanimous judgment of the full court.

In this original motion the applicant, Mrs. King, asks for an order for security for costs against her husband, who is appealing from the judgment of HENN COLLINS, J., dismissing with costs his petition for divorce, upon the ground that the alleged adultery between her and the co-respondent had not taken place. When the motion came before this court last term, Mr. Willett, for the wife, properly drew our attention to a decision of this court in the case of *Shufflebotham v. Shufflebotham* (1), in which the court, consisting of LORD STERNDAL, M.R., WARRINGTON and YOUNGER, L.J.J., had refused the wife's application for security for costs. In that case the wife had been the petitioner, and had obtained a decree for dissolution of the marriage with costs, after a trial which had lasted four days. She had obtained below an order for security for costs

of £150, and she asked this court (i) for security for the balance of costs in the court below not covered by the £150 security, and (ii) for security for costs of the appeal. In regard to the latter, LORD STERNDALE, M.R., giving judgment, said that it raised a very difficult question, but that no ground had been stated for the application, nor was it suggested that the husband would be unable to pay the costs. He added that counsel had been unable to produce any authority in support of the contention that a wife's costs should be secured in this court on the same principle as in the Divorce Division, and ended by pointing out that since the passing of the Matrimonial Causes Act, 1857, there had been no precedent for any such order. He consequently thought that the court ought not to make one. Having regard to that decision, we felt it desirable that the present application should be heard before the full Court of Appeal, and adjourned the hearing to the first day of this term.

Serjeant Sullivan, in opening the motion, informed us that there had in fact been an earlier case in which this court had made an order for security for the wife's costs in a husband's appeal—that of *Vidal v. Vidal* (2). The motion in *Vidal's* case (2) was heard on Oct. 12, 1921, before a full Court of Appeal including LORD BIRKENHEAD, L.C. In *Vidal's* case (2), as in the present, the petitioner was the husband alleging adultery against the wife, and his appeal was against the decision on that issue in his wife's favour. On the motion for security for costs in *Vidal's* case (2) the respondent wife and the co-respondent were represented by counsel, and the husband appellant appeared in person. The Court of Appeal ordered the husband to pay £50 into court as security for the wife's costs, and a like sum in respect of the co-respondent. The report does not state the reasons given by the Court of Appeal when ordering security for the wife's costs, and the case, therefore, does not establish the proposition that security in this court will be ordered as a matter of course merely because the wife has no means of her own for financing her costs of the appeal, but the case is a clear authority for the proposition that this court has jurisdiction to make such an order and will do so in appropriate circumstances.

Serjeant Sullivan made two submissions before us. The first was that the principle underlying the practice of the Divorce Division to make orders for securing the wife's costs is that the common law regards the assistance of solicitor and counsel and the payment of court fees as necessities for which the wife is entitled, as of right, to pledge the husband's credit. The second, which he called his major proposition, was that the protection of the marriage status is an interest of the state, and that the state is therefore concerned in the efficient conduct of divorce litigation in the courts, which considerations are sufficient to justify the practice of security for the wife's costs, apart from the common law agency of necessity.

We do not think it necessary to discuss the second proposition, as the first was plainly enunciated in 1878 by the Court of Appeal (consisting of BRAMWELL, BAGGALLAY and THESIGER, L.J.J.) in *Ottaway v. Hamilton* (3), an action in which a wife's solicitor sued the husband for her costs in obtaining her divorce. That decision is sufficient to establish the common law rule that the wife has authority to employ legal help at the expense of the husband in such a case as the present. It is true that the reason for the rule of practice giving the wife security for her costs was evolved in the old ecclesiastical court and continued by the court created by the Act of 1857 at a time when the wife had no property (other than settled property) of her own out of which to defray such expenditure, and that, as HILL, J., said in *Williams v. Williams* (4), at p. 116, the Married Women's Property Acts have greatly modified the position of the wife.

The practice, however, both before and after the Acts of 1857 and 1873, has always been only to give the wife security in cases where she has not sufficient estate to pay her own costs. This practice was recently recognised as still right and proper by the Court of Appeal in *Johnstone v. Johnstone* (5) where, at p. 172, LORD HANWORTH, M.R., said :

The old rules of the Ecclesiastical Courts were preserved by sect. 22 of the Matrimonial Causes Act, 1857 (20 and 21 Vict., c. 85), and are now reproduced by sect. 103 of the Supreme Court of Judicature (Consolidation) Act, 1925. The result is that the old rule as to the costs of the spouses is still applicable to costs in the Divorce Division and the husband has to make provision for costs of the wife to enable her to contest the issue.

We expressly limit our decision to cases like the present because, where the judge, exercising divorce jurisdiction, makes a decree of dissolution on the ground of the wife's adultery against the wife, the doctrine of a common law agency of necessity would seem to be excluded. On the other hand, if a decree which terminates the married status excludes the rule, a solicitor might hesitate to undertake the conduct of an impecunious wife's case if he had only the common law principle of agency upon which to rely to get his costs and were driven to sue the husband; and it may be that, for the sake of public policy in relation to the protection of the married status, the rule of ordering security should be regarded as, for that very reason, equally enforceable in the case of a wife seeking to appeal from an adverse decision against her. That question we keep open.

In this case we have directed the registrar of the court, who is also a registrar of the Probate and Divorce Registry, to fix the amount of the security to be provided by the husband. We think that this procedure is more satisfactory than would be the case if this court itself attempted to fix the security. The Matrimonial Causes Rules, 1937, r. 74 prescribes the procedure to be adopted where the wife obtains security for her costs of the hearing, and it appears to us that in such a case as the present this procedure, so far as it is applicable to an appeal, should also apply. The amendment of this rule on Feb. 16, 1943, is not material for present purposes.

The motion is allowed, the amount of the security to be fixed by the registrar. The husband will pay the wife's costs of her motion.

Motion allowed.

Solicitors: *Ernest Bevir & Son*, agents for *Pinniger, Finch & Co.*, Westbury, Wilts (for the applicant); *Shaen, Roscoe & Co.*, agents for *Wansbroughs, Robinson, Tayler & Taylor*, Devizes (for the petitioner husband).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

LOMAX (H.M. INSPECTOR OF TAXES) v. PETER DIXON & CO., LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.),
June 1, 2, 3, July 8, 1943.]

Income Tax—Discount—Refunding of debt—Commercial transaction—Notes issued at a discount and redeemable at a premium—Whether discount and premium taxable—Distinction between capital appreciation and interest—Income Tax Act, 1918 (c. 40), Sched. D, case III.

A Finnish company had been formed by the appellants for the purpose of manufacturing and supplying to the appellants the wood pulp required by them in their business of manufacturers of newsprint. Previously to 1933 the appellants had advanced to the Finnish company (whose whole issued share capital belonged beneficially to the appellants) sums amounting to £319,600. On Nov. 11, 1933, the two companies entered into an agreement for funding this indebtedness. Its essential features were as follows.

(i) The Finnish company agreed to issue to the appellants 680 notes (which were freely assignable) of £500 each amounting in all to £340,000, which was £20,400 more than the amount outstanding in respect of principal. That is to say, these notes were issued at a discount of 6 per cent. (ii) The notes were to bear interest at 1 per cent. above the lowest discount rate of the Bank of Finland during each year but in no case higher than 10 per cent per annum. (iii) The notes were to be repaid over a period of 21 years. (iv) Each note was to be redeemed at a premium of 20 per cent. in a certain event. The question for decision was whether the discount and the premium were to be treated as income or capital payments for the purpose of the Income Tax Acts:—

HELD: the discount and the premium were capital sums and the appellants were not assessable to income tax thereon.

[**EDITORIAL NOTE.** Interest on a loan is properly speaking payable for the use of the money or as a recompense to the lender for being kept out of his money. A payment or recompense made to the lender because there is a risk that the money lent or some part of it may never be repaid is a consideration of a different kind and is, in fact, a provision for capital depreciation. It seems to be clear that interest properly so called is taxable, whereas a provision against capital depreciation is not

taxable. However, borrowers and lenders seldom express their contracts in clear terms in this respect and it is a matter of difficulty to decide what in fact is interest properly speaking and what is a provision against the risk of capital depreciation. Where there is a great risk of the borrower failing to repay the money lent, a high rate of interest may be charged and this, it seems, will, in practice, generally be taxable. On the other hand, where the risk of the borrower failing to repay is negligible, the rate of interest may be much lower because the loan is made at a discount or is redeemable at a premium. In this case, it seems that the discount or premium will not generally be taxable, although, in theory, a proper account should in all cases be taken of what is interest properly speaking and what is provision against capital depreciation. The Court of Appeal have safeguarded the position by saying that every case must depend upon its own particular facts and, if it can be shown that the interest payable is less than the commercial rate by reason of the discount or premium, presumably the latter has to be brought into account. Now that the rate of tax is so high, it would be advisable to state in terms what is interest in the true sense and what is a provision against capital depreciation, but in many cases this may not be commercially practicable.

AS TO TAXATION OF DISCOUNT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 183, 184, para. 381; and FOR CASES, see DIGEST, Vol. 28, pp. 69-72, Nos. 368-380.]

Cases referred to :

- * (1) *Commissioners of Inland Revenue v. Nelson (Thomas) & Sons, Ltd.*, [1938] S.C. 816; Digest Supp.; 22 Tax Cas. 175.
- (2) *Ruskin Investments, Ltd. v. Copeman*, [1943] 1 All E.R. 378; Digest Supp.
- (3) *Lord Howard de Walden v. Beck* (1940), 23 Tax Cas. 384; Digest Supp.
- (4) *Bennett v. Ogston* (1930), 15 Tax Cas. 374; Digest Supp.
- (5) *Wilson v. Mannooch*, [1937] 3 All E.R. 120; Digest Supp.; 21 Tax Cas. 178.
- * (6) *Brown v. National Provident Institution*, [1921] 2 A.C. 222; 28 Digest 62, 316; 90 L.J.K.B. 1009; 125 L.T. 417; 8 Tax Cas. 57; on appeal from, [1920] 3 K.B. 35 and [1919] 2 K.B. 497.
- (7) *Re Compagnie Generale de Bellegarde, Campbell's Case* (1876), 4 Ch.D. 470; 9 Digest 492, 3229; 35 L.T. 900.
- (8) *Re Oppenheim, Oppenheim v. Oppenheim*, [1917] 1 Ch. 274; 40 Digest 676, 2130; 86 L.J.Ch. 193; 116 L.T. 7.
- (9) *Rowell v. Inland Revenue Comrs.*, [1897] 2 Q.B. 194; 39 Digest 290, 714; 66 L.J.Q.B. 528.
- (10) *Knights Deep, Ltd. v. Inland Revenue Comrs.*, [1900] 1 Q.B. 217; 39 Digest 290, 715; 69 L.J.Q.B. 66; 81 L.T. 625.
- (11) *Fattorini, Ltd. v. Inland Revenue Comrs.*, [1942] A.C. 643; [1942] 1 All E.R. 619; Digest Supp.
- (12) *Sherwin v. Barnes* (1931), 16 Tax Cas. 278; Digest Supp.
- (13) *Colquhoun v. Brooks* (1889), 14 App. Cas. 493; 28 Digest 79, 433; 59 L.J.Q.B. 53; 61 L.T. 518; 2 Tax Cas. 490.

APPEAL by the taxpayers from an order of MACNAGHTEN, J., dated Jan. 25, 1943. The facts are set out in the judgment of LORD GREENE, M.R.

Roland Burrows, K.C., and *J. Scrimgeour* for the appellants.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), and *Reginald P. Hills* for the respondent.

Burrows, K.C. : The appellants are not financiers. They are manufacturers of newsprint. Where debentures are issued at a discount, there is no authority for saying that as between tenant for life and remainderman the discount would be income to which the tenant for life would be entitled. In *Re Compagnie Generale de Bellegarde* (7), where debentures had been issued at a discount and it was suggested that a director who had taken them was liable for the difference between the issue price and the par value, the court held that he had not received a profit. Applying that case to the present one, there is a company which owed £319,600 and it was agreed that a debt of £340,000 should be substituted therefor. That is a capital transaction. It is not the business of the appellants to discount bills. This is a commercial transaction of a special kind whereby the appellants were enabled to secure a supply of their raw material. If the appellants may have lost a large part of what they advanced, they could not ask for any credit in respect thereof because it would be a capital loss. *Re Oppenheim, Oppenheim v. Oppenheim* (8) is an indication that, where a premium is paid on the repayment of a loan, that premium is capital. That view is reinforced by two stamp cases, namely, *Rowell v. Inland Revenue Comrs.* (9) and *Knights Deep, Ltd. v. Inland Revenue Comrs.* (10). *Lord Howard de Walden v. Beck* (3) has no relation to the present case because the transaction was not a commercial one. In *Nelson's* case (1), the premium was a percentage on the capital calculated on a time basis. In other words, it was so much per

cent. per annum. *Bennett v. Ogston* (4) is not an authority against the appellants. [Counsel referred to *Thomas Fattorini (Lancashire), Ltd. v. Inland Revenue Comrs.* (11) and *Brown v. National Provident Institution* (6).]

A *Hills* : Anyone who receives under a legal contract remuneration for a loan or for the provision of money is receiving what is *prima facie* income. It has been suggested for the appellants that in the *National Provident* case (6) the taxability of the persons there concerned was affected by the fact that it was their business to earn interest. It would make no difference, however, if a private person tendered for a treasury bill. In the present case there was a loan of money for which a larger sum was to be repaid to the lenders. The difference is very like interest and it is in the nature of interest. The Act provides that interest and money payments which are like interest are to be taxed. [Counsel referred to *Sherwin v. Barnes* (12), *Brown v. National Provident Institution* (6), *Wilson v. Mannooch* (5) and *Inland Revenue Comrs. v. Nelson (Thomas) & Sons, Ltd.* (1).]

B *The Solicitor-General*, on the same side : It is the practice not to attempt to tax the difference between the issue price of debentures and the redemption price. In the vast majority of cases debentures purport to carry a commercial rate of interest. As a working rule, the interest can be equated with the price paid and the attractiveness of a particular investment. Here, however, discount and premium are intermingled, and, on the authorities, C are taxable. [Counsel referred to *Colquhoun v. Brooks* (13) and *Brown v. National Provident Institution* (6).]

Burrows, K.C., in reply.

D LORD GREENE, M.R. : For the purposes of this judgment the following short statement sufficiently explains the facts of the case. Previously to 1933 the appellants had advanced to a Finnish company (whose whole issued share capital belonged beneficially to the appellants) sums amounting to £319,600. The Finnish company had been formed by the appellants for the purpose of manufacturing and supplying to the appellants the wood pulp required by them in their business of manufacturers of newsprint. In the absence of any finding to the contrary it must be assumed that these advances were repayable on demand. In these circumstances the two companies entered into an agreement for funding the outstanding indebtedness. This agreement was dated E Nov. 11, 1933, but it operated in effect as from Jan. 1, 1933. Its essential terms may for present purposes be thus summarised : (i) The Finnish company agreed to issue to the appellants 680 notes (which were freely assignable) of £500 each amounting in all to £340,000, *i.e.*, £20,400 more than the £319,600 outstanding in respect of principal : in other words, these notes were to be issued at what is commonly called a "discount" of 6 per cent. (ii) The notes F were to bear interest at 1 per cent. above the lowest discount rate of the Bank of Finland during each year but in no case higher than 10 per cent. per annum. (iii) The notes were to be repaid as to Nos. 1 to 100 on Nov. 15, 1933, and thereafter as to 29 notes in consecutive order of numeration on Apr. 6 in each following year. (iv) Each note was to be redeemed at a premium of 20 per cent. if in the year next before the year of its redemption the net profits of the Finnish company G reached a specified level.

There is no suggestion that this agreement was other than a *bona fide* commercial transaction. The business object of it is apparent from the terms of the agreement and the circumstances in which it came to be made as set out in the stated case. The fact that the appellant company owned all the shares in the Finnish company cannot affect the situation one way or another once it is conceded that the making of the agreement was a perfectly *bona fide* affair.

H One or two points may here be noted. The rate of interest provided for by the notes is on the face of it what appears to be an ordinary commercial rate—in fact it worked out at about 5 per cent. during the years in question. The provision for repayment of the first 100 notes on Nov. 15, 1933, *i.e.*, 4 days after the date of the agreement was a natural condition to be imposed by the appellants in the circumstances. They were consenting to the funding of a loan which was repayable on demand by making it repayable over a period of 20 years. The immediate payment of the first 100 notes left 580 to be redeemed in annual batches of 29, a process for which 20 years would be required. It is not un-

natural that the appellants should have stipulated for payment down of a substantial amount.

The secretary of the appellants gave evidence which was accepted by the Special Commissioners to the effect that as to the repayment of the advances the appellants had always had in mind "the element of risk which might arise through trouble between Finland and Russia." In view of the manner in which that apprehension has justified itself, it can scarcely be suggested that on a contract for funding a loan at a reasonable commercial rate of interest the appellants were taking excessive precautions by insisting on the notes being issued at a discount and redeemable at a premium. It is stated in the case that the interest discount and premiums taken together represented a return of about $7\frac{3}{4}$ per cent. on the amount outstanding. The fact that such a calculation can be made is, of course, no justification for asserting that the discount and the premium ought to be treated as income for the purposes of the income tax Acts. Whether they should be so treated is the question which arises for decision. The Special Commissioners answered it in favour of the appellants, holding that these amounts were capital sums. MACNAGHTEN, J., took the opposite view and reversed their decision. A

It is sometimes said that the question whether a receipt is to be regarded as capital or as income is to be answered by the terms of the contract as properly interpreted in the light of all admissible extrinsic evidence. In some cases this is no doubt so. Examples are to be found in two cases which were cited to us. In a Scottish case, *Comrs. of Inland Revenue v. Thomas Nelson & Sons, Ltd.* (1), a loan was made to an Indian company repayable in 10 years or earlier on the happening of certain specified events with a power to the company to repay one-tenth of the principal on three months' notice, the rate of interest being 3 per cent. The agreement provided (and this is the important matter) that on payment of the principal sums or any part thereof there should be paid a premium varying with the date on which such principal sums or any part thereof should become payable. From this it appears that the amount to be paid by way of premium must have been calculated by reference not to any element of capital risk, but to the period of the loan whatever it might turn out to be, a circumstance which, *prima facie* at any rate, stamped the premium with a revenue character. The LORD PRESIDENT in his judgment placed great reliance on the fact that the rate of interest (3 per cent.) was for a loan of that character a remarkably low one. He also pointed out that, under the power given to the borrower to make yearly repayments if it had been exercised, the lenders would have received in the form of interest plus premium a return varying between 5 and something over $5\frac{1}{2}$ per cent., and this he said could only be regarded as a reasonable return on the capital lent. He also pointed out that there was no resemblance between the case before him and that of a debenture issued at a discount. The case before him turned on "the specialties of the contract" and forms a good example of a case where the contract itself gives the answer to the question. The other example is *Ruskin Investments, Ltd. v. Copeman* (2), a recent decision of this court. There the argument on behalf of the taxpayer was that the transaction was one of purchase and not of loan, and the judgments of SCOTT, L.J., and myself are devoted to an examination of this question. It was not seriously suggested that, if that were not so, the profit in question would be anything but income. The loan was a loan at interest and the assignment of the ground rents was to operate as satisfaction of both principal and interest. In these circumstances it would have required some courage to argue that the value of the ground rents ought not to be treated as being made up of the principal advanced plus interest. This again was a case where the answer to this particular question was to be found in the contract itself. C D E F G

But in many cases mere interpretation of the contract leads nowhere. If A. lends B. £100 on the terms that B. will pay him £110 at the expiration of 2 years, interpretation of the contract tells us that B.'s obligation is to make this payment; it tells us nothing more. The contract does not explain the nature of the £10. Yet who could doubt that the £10 represented interest for the 2 years? The justification for reaching this conclusion may well be that as the transaction is obviously a commercial one the lender must be presumed to have acted on ordinary commercial lines and to have stipulated for interest on his money. In the case supposed, the £10, if regarded as interest, is obviously H

interest at a reasonable commercial rate, a circumstance which helps to stamp it as interest.

In *Lord Howard de Walden v. Beck* (3), the appellant became entitled to receive sets of promissory notes payable without interest at three-monthly intervals. The consideration moving from the appellant was an amount which represented the present value of the promissory notes calculated in the case of one set of notes on a 4 per cent. basis and in the case of the other sets at a rate approximating to 4 per cent. WROTTESLEY, J., pointed out that the documents threw no light on the problem whether or not the difference between the present value and the nominal amounts of the notes represented capital or income. Nor did he find any assistance in the surrounding circumstances. He rejected the view that the appellant had purchased an annuity (a view which was not pressed by the Crown) and held that the appellant had stipulated for the return of his capital. This at once stamped the transaction as one of loan and on that basis it does not seem to have been seriously argued that the difference between the present and the nominal value of the notes ought not to be regarded as interest. It is to be noted (i) that the contracts did not in terms provide for payment of interest; (ii) that 4 per cent. was a reasonable commercial rate. These facts led really as a matter of common sense to the inference that the 4 per cent. was interest.

A rather different case is that of a moneylender who stipulates for payment by instalments of a sum very much larger than that which he lends. From a business point of view, the excess, one would have thought, is referable largely, if not mainly, to the capital risk. So long as the moneylender is carrying on his business this is immaterial since he will be assessed under Sched. D, case 1. It is part of his business to take capital risks. But in *Bennett v. Ogston* (4), the moneylender had died and the question arose in relation to instalments collected by his administrator. The substantial argument for the administrator was that, as the moneylender had been taxed under case 1, the assessment for the last year of his life must be taken as covering the amounts got in by his administrator. Once this argument was rejected (as ROWLATT, J., rejected it), it does not seem to have been seriously argued that the difference between the amount of the loan and the amount of the instalments did not represent interest. As ROWLATT, J., said, at p. 378:

Each of these instalments is found in the case to contain principal and interest and we know, of course, that it is so, and we are familiar with the way in which these instalments are broken up into principal and interest.

On this basis the insurance against capital risk was provided for by means of a high rate of interest; and, where this is the case, interest it is and not capital. In saying that the case was one of interest, ROWLATT, J., apparently based himself on the well-known practice of moneylenders; and, if the deceased had been alive, he would no doubt have admitted that he fixed the amount of instalments by reference to an interest table, a circumstance which would be sufficient to stamp the whole excess as interest. Moreover, under the Moneylenders Act, 1927, s. 8, a moneylender is bound to supply to the borrower a signed statement showing the amount of principal and the rate per cent. per annum of interest charged. In such a statement the excess would necessarily appear as interest.

The position is more complicated when A. lends £100 to B. at a reasonable commercial rate of interest and stipulates for payment of £120 at the maturity of the loan. In such a case it may well be that A. requires payment of the £20 as compensation for the capital risk, or it may merely be deferred interest. If it be proved that the former was the case by evidence of what took place during the negotiations, it is difficult to see on what principle the £20 ought to be treated as income. In the absence of such proof what inference ought to be drawn? Something may, perhaps, depend on the length of time for which the money is lent. If the period is short, it is, perhaps, easier to treat the £20 as deferred interest. The longer the period the greater the element of risk, and, if it was (say) 10 years, the probability that the £20 was not intended to be deferred interest would seem to be greater. A good example of the difficulty is to be found in the contracts of loan which used to be made on a gold basis when the currency had left or was expected to leave the gold standard. In such contracts the amount to be repaid was fixed by reference to the price of gold ruling at the repayment date and, if the currency depreciated in terms of

gold, there was a corresponding increase in the amount of sterling to be repaid at the maturity of the loan. It could scarcely be suggested that this excess ought to be treated as income when the whole object of the contract was to ensure that the lender should not suffer a capital loss due to the depreciation of the currency.

I refer to these problems not for the purpose of attempting to solve them, but in order to show that there can be no general rule that any sum which a lender receives over and above the amount which he lends ought to be treated as income. Each case must, in my opinion, depend on its own facts and evidence *dehors* the contract must always be admissible in order to explain what the contract itself usually disregards, namely, the quality which ought to be attributed to the sum in question.

I will now consider the case of an ordinary issue of debentures by a limited company. If the credit of the company is good and the security an ample one, the issue can be made at par at a normal reasonable rate of interest. If the company's credit and the security offered are exceptionally good, the issue can be made at a premium. In such a case the calculation of the rate of interest which the subscriber will receive on the capital which he invests is a simple matter. It will be less than the nominal rate, but this does not entitle the subscriber to avoid taxation on the difference between the nominal rate and the actual rate. He is taxed on what he in fact receives. The premium which he pays is capital. He pays it because the security which he is getting is a particularly good one. Here the excellence of the security is expressed in terms of capital. Such a company, however, may prefer to issue its debentures at par but at a lower rate of interest. Here the excellence of the security is expressed in terms of interest. The subscriber receives less interest but does not pay a premium. Actuarially the result is the same in both cases, but the subscriber pays less tax in the latter case than he does in the former because his income is less.

Now let me take the opposite case where the credit of the company and the security which it offers are not such as to enable it to offer its debentures at par at a normal rate of interest applicable to sound securities. The object of the company is to make its issue attractive and various alternatives are open to it. It may make the issue at par but give a high rate of interest. Here the defect in the security is expressed in terms of interest. The whole of the interest is unquestionably income and is taxable as such although the high rate of interest is in part attributable to the capital risk. Another course which the company may take and for commercial reasons probably will take is to fix the rate of interest at a more normal level and make the issue at a discount; or it may make the issue at par and offer a premium on redemption; or it may combine both methods. Here the defect in the security is expressed in terms of capital. I venture to think that no business man would regard the discount or the premium as anything but capital matters. In each case the result is the same—the subscriber is paying for a more or less hazardous investment less than the figure at which it is to be redeemed and in exchange has to be content with a lower rate of interest. Another way of making good the defect in the security would be for the company to take out a guarantee policy. In such a case the issue might be at par. The subscriber would be paying more for a safer investment than he would have paid if the guarantee policy had not been taken out. No one would suggest that the premiums paid by the company were part of the subscriber's income. Yet the policy would be playing exactly the same part as would have been played by a reduction in the issue price or the offer of a premium on redemption or a combination of the two.

The amount by which the issue price falls short of par or the redemption price exceeds par can, of course (as has been done in the present case), be reduced to terms of income if any one chooses to make the calculation; and this is often done by a stockbroker advising a client, particularly when the redemption date is drawing near. But this does not mean that these amounts are income. If they were income and taxable as such when received on redemption, it would appear to follow that in the case of a debenture issued at a premium and redeemable at par, the amount of the premium ought to be treated as an income loss. A premium on redemption and a premium on issue are in their nature precisely the same and come into existence for the same reason, viz., the desire to express

in the former case the greatness, in the latter the smallness, of the risk in terms of capital rather than in terms of interest.

A I have for simplicity considered only the case where the variations in issue price and rates of interest are due only to differences in the security offered. This, of course, is not necessarily always the case. The precise terms of an issue may be affected by a variety of other considerations, the taste of the market, the terms of previous issues by the company, the political or international situation, the expectation of changes in money rates, the instability of the currency, etc. But these matters do not affect the principle. It is perfectly true that a company may be able to obtain subscribers by issuing debentures at par at a high rate of interest just as well as it can by issuing them at a lower rate of interest below par or with a premium on redemption. The two methods are, however, essentially different although actuarially they will normally produce the same result. But for income tax purposes the result is, B I think, different according as the company chooses the one method rather than the other. The Crown is, in my opinion, bound by the company's choice and cannot go behind it.

C The inland revenue authorities have never sought to tax the amount by which the redemption price of debentures exceeds the issue price. We were informed by the Solicitor-General that these amounts are regarded not as income but as capital sums which the company bears in consideration of the risk attaching to the investment which is borne by the investor. In my opinion, this view is undoubtedly correct. In passing, I may point out that the reason given by the then Solicitor-General in *Wilson v. Mannooch* (5) for not claiming tax on discounts or premiums in the case of debentures was quite different from that given by the present Solicitor-General in this case.

D I can find no ground for distinguishing the present case from that of an ordinary issue of debentures by a trading company. If at the date of the agreement the appellants had lent to the Finnish company £319,600 to be secured by an issue of notes at 94 repayable over 20 years at 120 and bearing interest at a rate fixed by reference to bank rate in the usual way, the revenue authorities would not have claimed tax on the discount or the premium. The element of capital risk was quite obviously a serious one and the parties were entitled to express it in the form of capital rather than in the form of interest if they *bona fide* so chose. E It is said, however, that there is a difference between the case of a security issued for a present loan and that of a security issued to cover an existing loan. This argument found favour with MACNAGHTEN, J., but, with all respect to him, I cannot follow it. The parties to the transaction, faced with an existing debt which the Finnish company was obviously not in a position to repay there and then, did what in effect amounted to writing down the capital value of the debt which by the terms of the agreement was now to be repaid over a long period of years bearing interest in the meantime at a normal commercial rate. F I can see no difference between writing down the capital value of an existing debt and writing down the capital value of a new debt, which is what is done where a company makes an ordinary issue of debentures at a discount or repayable at a premium. Moreover, it is quite common for a company to issue debentures as security for an existing loan. This is often done when the company's bankers call for security and also not infrequently under schemes of arrangement when debentures are issued to existing creditors of the company. G In such cases circumstances may well call for a writing down of the value of the debts.

H An additional argument was presented on behalf of the Crown to the effect that the difference between the price at which the notes were issued and the redemption price or at any rate the difference between the issue price and the nominal par value of the notes was income from "discounts" within the meaning of case III, r. 1 (b); but, in my opinion, the word "discounts" in that paragraph does not cover such a case as the present. I agree with what was said by ROWLATT, J., in *National Provident Institution v. Brown* (6) ([1919] 2 K.B. 506):

... it is clear that it is not every difference in amount between a sum payable in future and the same sum represented by cash down which is an annual profit or gain by way of discount, even though popularly the word "discount" may be used to describe it.

It was conceded (and, in my opinion, rightly) that, in the case of a debenture

the difference between issue price and redemption price when received by the holder is not income from "discounts" within the meaning of the paragraph. It is impossible to suppose that the legislature intended to include under the one word "discounts" two such entirely different commercial transactions as the discounting of a bill of exchange or a Treasury bill (which normally are short-dated and carry no interest) and subscription for debentures issued at a discount. The issue of debentures or other obligation by companies was unknown in 1805 when "profits on discounts" were for the first time expressly subjected to income tax (Income Tax Act, 1805, s. 93, Sched. D, case III, r. 2). In *Brown v. National Provident Institution* (6), LORD SUMNER says, at p. 254, that there is no restriction of the word "discount" in the statutes to transactions in use in the year 1842—he might have said 1805—and that the rule relates to profits on all discounts from whomsoever made. This observation does not, however, throw much light on the question whether any particular transaction is one of "discount" within the meaning of the rule. If the case of the debenture fell under the word "discount," it would follow from the *National Provident* case (6) that profits realised by selling debentures on the market would be taxable as income as well as those made by an original subscriber who holds his debenture until maturity. The storm which would be aroused in the city of London if this were found to be the law is perhaps the best proof that it cannot be the law, since it shows at once the fundamental difference from the business point of view between the case of the debenture and the case of the discounted bill. It is conceded that the word would not cover the "discount" in the case of a debenture issued "at a discount" and, as I have already said, for present purposes I can see no difference between that case and this. In the discounting of bills of exchange, Exchequer bills, etc., the discount is the reward and in the normal case (since such bills do not as a rule carry interest) the only reward which the person discounting the bill obtains for his money.

In the *National Provident* case (6), LORD SUMNER pointed out, at p. 255, that, in the case of a "discount" two economic elements are present :

... one the value of the usufruct foregone, as measured by interim interest, and the other the risk that the money will never be repaid at all . . . Furthermore, there is nothing to show that under this section profits on discounts have to be analysed into a return for the use of money by way of income and a possible accretion to capital.

If I may add my own gloss on this latter observation, if the bill of a solvent debtor is discounted at a low rate and the profit from the discount is regarded as interest, it seems logical to regard as interest also the profit from the discount where the bill of a debtor in poor credit is discounted as a high rate. In the former case the capital risk is very small or perhaps negligible and, in the case of a Treasury bill, to use LORD SUMNER's words, reaches its vanishing point. In the latter case the capital risk may, as LORD SUMNER says, be the most important factor in the transaction, but it is nevertheless to be regarded as expressed in terms of interest and, if the parties choose to express a capital risk in terms of interest, it must normally be so treated and no apportionment can be made.

It is interesting to see the official reasons given by counsel for the Crown in the *National Provident* case (6) ([1920] 3 K.B. 43), for distinguishing the profit made on Treasury bills issued at a discount and 4 per cent. Victory Bonds issued at 85. The latter :

... were an investment at the market rate of interest. The increased amount receivable when drawn for payment at par . . . is an additional capital sum bargained for to meet the probable fall in capital value likely to take place under present conditions.

It may be convenient to sum up my conclusions in a few propositions. (i) Where a loan is made at or above such a reasonable commercial rate of interest as is applicable to a reasonably sound security there is no presumption that a "discount" at which the loan is made or a premium at which it is payable is in the nature of interest. (ii) The true nature of the "discount" or the premium (as the case may be) is to be ascertained from all the circumstances of the case and apart from any matter of law which may bear upon the question (such as the interpretation of the contract) will fall to be determined as a matter of fact by the Commissioners. (iii) In deciding the true nature of the "discount" or premium, in so far as it is not conclusively determined by the contract, the

following matters together with any other relevant circumstances are important to be considered, viz., the term of the loan, the rate of interest expressly stipulated for, the nature of the capital risk, the extent to which, if at all, the parties expressly took or may reasonably be supposed to have taken the capital risk into account in fixing the terms of the contract.

In this summary I have purposely confined myself to a case such as the present where a reasonable commercial rate of interest is charged. Where no interest is payable as such, different considerations will, of course, apply. In such a case, a "discount" will normally, if not always, be a discount chargeable under case III, r. 1 (b). Similarly, a "premium" will normally, if not always, be interest. But it is neither necessary nor desirable to do more than to point out the distinction between such cases and the case of a contract similar to that which we are considering.

For these reasons I am of opinion that the Special Commissioners came to the right conclusion and that their decision ought to be restored.

MACKINNON, L.J. : I agree.

DU PARCQ, L.J. : I agree and have nothing to add.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors : *Jaques & Co.*, agents for *Albert Peace*, Batley (for the appellants) ;
Solicitor of Inland Revenue (for the respondents).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

Re JOEL, ROGERSON v. JOEL.

[COURT OF APPEAL (Lord Greene, M.R., Luxmoore and Goddard, L.JJ.),
December 9, 1942, March 10, 11, June 9, July 5, 1943.]

Estate and Other Death Duties—Death on war service—Remission of duties—Apportionment of remitted duty—Finance Act, 1900 (c. 7), s. 14—Death Duties (Killed in War) Act, 1914 (c. 76), s. 1—Finance Act, 1918 (c. 15), s. 44—Finance Act, 1924 (c. 21), s. 38.

Wills—Construction—Bequest of leasehold house together with contents—Whether joint gift or two independent gifts.

The testator by his will left his residuary estate as to two-fifths to one of his brothers as to a further two-fifths to one of his sisters and as to the remaining one-fifth to the appellant, the eldest son of his late wife's brother, in each case absolutely. He also bequeathed his leasehold house together with certain of its contents to his sister, Mrs. Rogerson. The testator died on war service and part of the estate duty was remitted. Two questions arose for decision : (i) whether the benefit of the remission of estate duty should be shared by the first 2 residuary legatees to the exclusion of the appellant who did not come within the class of specified relatives, that is, persons standing in certain specified relationship to the deceased in respect of property passing to whom there is a remission of duty; and (ii) whether the bequest of the house and its contents constituted 2 separate gifts so that the legatee could disclaim the one without the other :—

HELD : (i) the net fund after providing for payment of the reduced duty should be distributed among the residuary legatees in the proportions stated in the will, whether or not they were specified relatives.

(ii) the bequest of the house together with the contents was one gift and the legatee could not disclaim part of it without disclaiming the whole.

Decision of FARWELL, J., ([1942] 2 All E.R. 365), varied.

[EDITORIAL NOTE.] The remission of death duties in the case of death on war service is obviously intended to benefit only near relatives of the testator. The legislature, however, seem to have overlooked the fact that estate duty on free personalty is payable out of residue and that, therefore, the remission will benefit all residuary legatees. It was argued that only residuary legatees who are relatives within the statutory definition could benefit, but this argument is rejected and it is decided that the remission must operate for the benefit of all residuary legatees. On the second question, FARWELL, J., felt bound by the decision in *Re Lysons* (2) to come to the decision that what appeared to be only one gift was in fact two independent gifts. That authority is not binding on the Court of Appeal, who take the view that there

is nothing in *Syer v. Gladstone* (3), upon which the decision in *Re Lysons* (2) was founded, that compels them to hold that the gift in question was two independent gifts, even though the gift is made up of onerous leaseholds on the one hand and furniture on the other.

AS TO REMISSION OF DUTIES, see HALSBURY, Hailsham Edn., Vol. 13, p. 230, para. 220; AS TO DISCLAIMER OF BLENDED GIFTS, see HALSBURY, Hailsham Edn., Vol. 34, p. 125, para. 159; and FOR CASES, see DIGEST, Vol. 44, pp. 400-403, Nos. 2330-2354.]

Cases referred to :

- (1) *O'Grady v. Wilmot*, [1916] 2 A.C. 231; 21 Digest 31, 186; 85 L.J.Ch. 386.
- * (2) *Re Lysons, Beck v. Lysons* (1912), 107 L.T. 146; 44 Digest 401, 2337; 56 Sol. Jo. 705.
- * (3) *Syer v. Gladstone* (1885), 30 Ch.D. 614; 44 Digest 401, 2334; 34 W.R. 565.
- (4) *Re Kensington, Longford (Earl) v. Kensington*, [1902] 1 Ch. 203; 44 Digest 402, 2344; 71 L.J.Ch. 170; 85 L.T. 577.
- (5) *Re Holchkys, Freke v. Calmady* (1886), 32 Ch.D. 408; 44 Digest 401, 2335; 55 L.J.Ch. 546; 55 L.T. 110.
- (6) *Guthrie v. Walrond* (1883), 22 Ch.D. 573; 44 Digest 402, 2339; 52 L.J.Ch. 165; 47 L.T. 614.

APPEAL by the defendant G. A. Oldham from an order of FARWELL, J., dated June 25, 1942, reported [1942] 2 All E.R. 365. The facts are fully set out in the judgment.

R. F. Roxburgh, K.C., and *Geoffrey Cross* for the appellant.

Hon. R. R. Romer, K.C., and *H. Hillaby* for two respondents interested in residue.

C. E. Harman, K.C., and *Frederick Grant, K.C.*, for a pecuniary legatee.

J. H. Stamp for the Inland Revenue Commissioners.

A. H. Droop for the respondent trustees.

LORD GREENE, M.R. : The judgment which I am about to read is the judgment of the court.

The first question raised by this appeal relates to remission of estate duty upon the death of the testator, Dudley Jack Barnato Joel, who died on war service during the present war. Under the relevant legislation now in force, to which we will refer in more detail later in this judgment, remission of death duties is granted in the case of members of the armed forces who die on war service. This remission is granted in respect of property passing on the death to persons standing in certain specified relationships to the deceased (conveniently described as "specified relatives") and amounts to the whole of the duties leviable in respect of the first £5,000 of the property so passing and to such part of the duties on the remainder as exceeds what may for brevity be described as the value at the death, of the duties which would have been payable if the deceased had lived to reach the normal expectation of life.

By his will dated Oct. 1, 1939, the testator among other legacies bequeathed specific legacies to his brother, the respondent Stanhope Henry Joel Joel, and to his sisters the respondents Mrs. Eileen Daphne Solna Rogerson and Mrs. Doris Walter, and pecuniary legacies to his sister Mrs. Doris Walter and his nieces Solna Joel and Valia Rogerson. He bequeathed his leasehold house, No. 74, Brook Street, together with certain of its contents, to the respondent Mrs. Rogerson. Cl. 9 of his will was as follows :

Subject to the payment of my funeral and testamentary expenses death duties debts and legacies I devise and bequeath all the real and personal estate not hereby or by any codicil hereto otherwise specifically disposed of and which I can dispose of by will in any manner I think proper either as beneficially entitled thereto or under any general power including the statutory power to dispose of entailed property as to two-fifth parts thereof to my said brother Stanhope Henry Joel Joel as to another two-fifth parts thereof to my said sister Eileen Rogerson and as to the remaining one-fifth part thereof to Gerald Oldham my late wife's brother's eldest son absolutely.

All the beneficiaries whom we have named, with the exception of the appellant, are within the class of specified relatives.

The testator had a general power of appointment over a settled share of the residuary estate of his father. He also owned real estate provisionally estimated to be worth £20,000.

The testator died on war service on May 28, 1941 and his will was proved on Oct. 7, 1941. The value of his estate has not been precisely ascertained, but

this does not affect the present question which is one of principle. Upon the basis of certain provisional valuations the estate duty (excluding interest) upon the testator's personal estate (including the property subject to his general power of appointment) would have amounted to £520,744. The remission of estate duty allowed or proposed to be allowed by the Inland Revenue authorities as provisionally fixed amounts to £245,324.

A The manner in which the Inland Revenue authorities have calculated the remission to be allowed is set out in a document of quite exceptional obscurity. Fortunately, there is no need to examine or explain it. It is enough to state the principle upon which the calculation is made. Broadly, it is that remission is to be granted in respect of so much of the total estate as is required to provide all the benefits given by the will to specified relatives whether by way of specific or pecuniary bequest, or by way of residuary gift, the remission being on the first £5,000 a total one and at the appropriate rate on the remainder.

B The question raised by the originating summons was whether the remission of estate duty thus allowed ought to be regarded as enuring for the benefit of all three residuary legatees or as enuring for the benefit of the two of them who are within the class of specified relatives, viz., Stanhope Joel and Mrs. Rogerson to the exclusion of the appellant Gerald Anthony Oldham. This question was framed on two assumptions, namely, that the remission allowed was correctly allowed and that no one but a residuary legatee could claim to benefit by it. C FARWELL, J., declined to deal with the question in so far as it related to estate duty remitted on the value of specific and pecuniary legacies to specified relatives other than the defendants Stanhope Joel and Mrs. Rogerson. Subject to this he declared that these two respondents ought to be credited in equal shares with the amount of the remission. He gave no reasons for his decision. By his notice of appeal the appellant Gerald Anthony Oldham asks for a declaration D that the whole of the remission (including so much thereof as was not dealt with in the order of FARWELL, J.) enures for the benefit of all three residuary legatees in proportion to their shares in residue.

In the course of the argument a question arose as to the correctness of the basis upon which the authorities had allowed the remission. It appeared to us that, if that basis were correct, the result would necessarily be that the statutory remission in the case of estate duty would in every case enure for the E benefit of the residuary legatee or legatees whether or not they were within the class of specified relatives. Thus, to take a simple case, if a testator bequeathed £5,000 to his widow and his residuary estate to a stranger, the benefit of the remission would go to the stranger since there seemed to be no ground upon which the widow could claim it. This appeared to us to be a remarkable result of legislation which, upon the face of it, would appear to be aimed, and aimed F only, at benefiting specified relatives. We considered that there were grounds for arguing that the remission ought only to be granted in respect of gifts to specified relatives which would otherwise be diminished by the exaction of estate duty. This view, if correct, would lead to the result that, in the present case, the only remission would be in respect of the gifts of two-fifths of the residue to each of the respondents Stanhope Joel and Mrs. Rogerson and the substantial question raised by this part of the summons would not arise.

G These doubts having been raised, we did not think it convenient to deal with the matter in the absence of the Crown. Accordingly, we adjourned the hearing of the appeal in order that counsel for the Crown might be given the opportunity of appearing before us and explaining the reasons upon which the remission had been based. On the adjourned hearing, Mr. Stamp appeared for the Crown and gave us the benefit of a full explanation of the reasons for the official view for which we are much indebted to him. On consideration of the arguments H and explanations placed before us upon this aspect of the matter, we intimated at an adjourned hearing that the remission allowed or proposed to be allowed was, in our opinion, in order, and, as the parties to the appeal desired to present additional arguments on that basis, we gave another hearing. At that hearing counsel appeared for an additional party, the testator's sister Mrs. Doris Walter, whom we directed to be added as a respondent to the summons and to the appeal in order that we might have before us a specified relative who was a pecuniary legatee but took no share in residue.

It is now necessary to refer in rather more detail to the legislation under

which estate duty is remitted in the case of members of the forces who die on war service. Apart from the case of common seamen, marines or soldiers which was dealt with in the Finance Act, 1894, s. 8, the remission was first introduced during the Boer War by the Finance Act, 1900, s. 14. This section empowered the Treasury on the recommendation there stated to remit or repay up to the sum of £150 :

... the whole or any part of the death duties ... leviable in respect of property passing upon the death of the deceased to his widow or lineal descendants if the total value for the purpose of estate duty of the property so passing does not exceed £5,000. A

Shortly after the outbreak of the last war, the remission was extended by the Death Duties (Killed in War) Act, 1914, in two ways. First, the class of specified relatives was extended so as to include lineal ancestors ; secondly, the amount of duty to be remitted or repaid was increased. The amounts so fixed were as follows :

(a) Where the value for the purpose of estate duty of the property passing to the widow, lineal descendants, or lineal ancestors does not exceed £5,000, the whole of the death duties leviable in respect of that property ; and (b) Where the said value exceeds £5,000 (i) in respect of the first £5,000, the whole of the death duties ; and (ii) so much of the duties leviable in respect of the remainder as exceeds' ... B

what I have described as the present value of the duties which would have been payable if the deceased had reached the normal expectation of life. Sect. 1 (2) and (3) of the Act are as follows : C

(2) The benefits of the relief given by this section as respects the first £5,000 shall be apportioned rateably among the several persons who would otherwise bear the duties remitted or repaid according to the amounts which they would so bear and without regard to their respective rights of priority. (3) Where the relief in respect of estate duty afforded to the widow, lineal descendants, or lineal ancestors by the Finance Act, 1914, s. 15, would be greater than that afforded to them in respect of estate duty by this section, the relief in respect of estate duty shall be that under the said sect. 15 and not that under this section, but in other cases the relief afforded by the said sect. 15 shall not apply to any estate duty to which this section applies. D

The Finance Act, 1914, s. 15, which is referred to in subsect. (3), provides for a reduced scale of estate duty in the case of "quick successions" where the property consists of land or a business.

By the Finance Act, 1918, s. 44, the scope of the remission was further extended by adding brothers and sisters and the descendants of brothers and sisters of the deceased to the list of specified relatives. The Finance Act, 1924, s. 38, provided that the relief which might have been given under the earlier provisions summarised above : E

... shall be given in respect of the death duties payable on the death ...

of the persons specified in the section (sc. members of the armed forces) who die on active service or in certain other circumstances there stated. F

In framing these provisions the legislature appears to have fallen into a trap in that it has endeavoured by one and the same set of words to deal with duties so radically different in character and incidence as legacy duty and succession duty on the one hand and estate duty on the other. Estate duty upon the free personal estate of a deceased person falls upon residue and if, pursuant to a statutory provision for remission of estate duty, the amount of duty is reduced, the person to benefit by the remission will *prima facie* be the person entitled to the residue. We say *prima facie* since such a statute might, of course, expressly or by implication direct that the benefit of the remission should go to the specified relatives the gifts to whom were the occasion of the remissions. Moreover, a testator might himself give directions to that effect, but he has not done so in the present case. In the first instance, however, residue alone is affected. Accordingly, if the statute provides that a remission is to take place in respect of any benefit given by the will to a specified relative and the benefit takes the form of a pecuniary or specific legacy, *prima facie* the legatee is not benefited by the remission. As we have already pointed out, the apparent purpose of the legislation is to benefit specified relatives and it does so operate in the case of legacy and succession duties, but in the case of estate duty, if the Crown's view be right, as, in our opinion, it is, the mere presence of a specified relative among the beneficiaries leads to a remission the benefit of which, unless the residuary legatee is a specified relative, will enure to a stranger. Moreover, if a legacy G
H

is given to one specified relative and the residue to another, the latter will enjoy the benefit of the remissions granted both in respect of the legacy and in respect of the residuary gift.

There appears to us to be no escape from these remarkable conclusions unless on the true construction of the legislation either (a) the remission is only to be granted in cases where a specified relative will in fact benefit by it, i.e., cases where a specified relative is a residuary legatee or (b) the benefit of the remission is to be adjusted in such a way as to confer it upon the specified relatives the gifts to whom under the will have led to its being granted.

We find ourselves driven to the conclusion that alternative (a) is inadmissible. Under sect. 14 (1) of the Act of 1900 the remission was not compulsory, but it might be granted as a matter of grace on the death duties :

... leviable in respect of property passing upon the death of the deceased to his widow or lineal descendants.

Now in the case of a specific legacy to a widow there can be no question that estate duty is leviable in respect of the property comprised in the bequest. In such a case, therefore, remission could be granted. *Prima facie*, therefore, the residuary legatee will be the sole person to benefit. It seems to us impossible to say that no remission could lawfully be granted in such a case because the widow could not benefit by it. The Crown could, of course, have refused to grant the remission in such a case, but that it could lawfully have granted it is, we think, indisputable. The phrase "leviable in respect of property passing . . . to his widow" is not so apt to describe the case of a pecuniary legacy, but it is justly observed by counsel for the Crown that the phrase "property in respect of which estate duty is leviable" is used elsewhere in the Finance Acts to cover the case of a pecuniary legacy (see the Finance Act, 1894, s. 5 (1), which imposed settlement estate duty and clearly includes the case of a legacy settled by will).

We do not think it possible to construe the phrase in its present context as being applicable to specific but not to pecuniary legacies.

The subsequent legislation is all built up upon sect. 14 of the Act of 1900, and under the Finance Act, 1924, s. 38, remission which had previously been a matter of grace is, apparently, made compulsory. We can find nothing in this subsequent legislation which justifies us in saying that the basis laid down in the Act of 1900 has been altered. It is true that there are expressions in sect. 1 of the Act of 1914 which seem to suggest that the legislature may have been under a misapprehension. Thus in subsect. (3) reference is made to the relief in respect of estate duty afforded to "specified relatives" by this section. Again, subsect. (2), if it is to be read as applying to estate duty, might be thought to be unnecessary or even meaningless if the benefit of the remission goes in any event to residue. But, if the legislature had intended to substitute a new basis of remission for that laid down by the Act of 1900, it would surely have said so in clear terms and would not have left its intention to be collected from such language as is used in these subsections.

We have explained as succinctly as we can our reasons for agreeing with the view put forward by the Crown. It only remains to consider the consequences. As we have said, the result of this view is *prima facie* to give the benefit of the remission to the residuary legatees (since by virtue of the remission the residue is larger than it would have been if the remission had not taken place) whether or not they be specified relatives. Is there anything in the legislation to take it away from them? In our opinion, there is not. Counsel for Mrs. Walter argued that the benefit of the remission granted in respect of a legacy given to a specified relative goes to that specified relative so as to increase the value or amount of the legacy. It is with no disrespect to the argument that we say no more than that there appears to us to be no shred of justification for it.

Counsel for Stanhope Joel and Mrs. Rogerson agreed (and, in our opinion, rightly agreed) that, once the official view was held to be correct, he could not argue that the benefit of the remission in respect of the free personality, whether given in the form of legacies or under the residuary gift, did not go to all three residuary legatees in the proportions in which they shared in the residue. He argued, however, that, in the case of the remission referable to the property appointed under the general power of appointment, the brother and sister between them were entitled to the whole benefit of it. He pointed out that, although the executors are bound to pay the duty on appointed property, it is

a charge on that property (*O'Grady v. Wilmot* (1)). The result of this, he said, was that, in the present case, two-fifths of the charge ought to be attributed to each of the two shares of Stanhope Joel and Mrs. Rogerson and the remaining one-fifth to the share of the appellant so that the appellant would not be entitled to any remission. This argument is, in our opinion, based on a false hypothesis, since it treats the case as if there were three separate charges of duty, not one. The whole charge is on the whole of the appointed fund and, if a remission is granted in respect of part of it, the net fund after providing for the reduced duty exigible is so much larger than it would have been without the remission. It is this net fund which is distributable among the appointees in the proportions stated in the will and we find nothing to justify us in saying that a subsequent adjustment ought to be made so as to give to the brother and sister more and to the appellant less than their stated shares of the net fund. A

This is, in our opinion, sufficient to dispose of the argument. Counsel for the appellant, however, took a further point. He said that the direction in cl. 9 of the will is to divide the residue including the appointed fund after payment of "my death duties." This phrase, he said, covers the duties on the appointed fund as well as those on the testator's own property and amounts to a direction to pay all duties exigible (which on the facts means the actual amount payable after taking account of all remissions granted) out of the whole of the property disposed of before any distribution is made. The three residuary legatees, therefore, share in the net funds in the proportions stated and thus all three enjoy their proportionate share of the benefit of the remission. This argument is, in our opinion, correct and affords an additional answer to Mr. Romer's claim. B C

No special point arises in respect of the remission referable to the real estate.

The appeal on this question will be allowed and for that part of the order of FARWELL, J., which deals with this part of the case there must be substituted a declaration in the form asked for by the notice of appeal. D

The second question raised by the notice of appeal relates to the bequest to Mrs. Rogerson of the testator's leasehold house, No. 74, Brook Street, together with the contents contained in cl. 5 of the testator's will. FARWELL, J., held that this constituted two separate and independent gifts, viz. (a) a gift of the house and (b) a gift of its contents and that consequently Mrs. Rogerson was entitled to disclaim either of the gifts without disclaiming the other. The appellant challenges the correctness of this decision. E

The answer to the question depends on the ascertainment of the true construction of cl. 5 of the testator's will. Cl. 5 is in the following terms:

I devise free of duty my house at 74, Brook Street, together with the contents except such as I have herein specifically bequeathed some of which in the event of my death during the present war will be at Moulton Paddocks except money and securities for money to my sister Eileen Rogerson. F

There is nothing further in the will to be considered in connection with this question. Apart from authority the bequest appears to constitute one gift—for the bequest is of the house together with its contents. The ordinary meaning of the words "together with" as stated in the Imperial Dictionary is "in union with," "in company with." Apart from any other context when a testator makes a gift of a house and the furniture in it, he would seem to be giving the furniture because it is situated in the house and goes to make up one whole which the testator knows as his furnished house. G

We gather from his judgment that FARWELL, J., would have so decided the case had he not felt constrained by authority to come to a contrary conclusion. The authority by which he felt bound is the decision of JOYCE, J., in *Re Lysons* (2). In that case the testator bequeathed to her step-son:

... my leasehold messuage with the appurtenances belonging thereto situate and being No. 11, Wilton-street ... wherein I now reside ... together with all articles of personal or domestic or household or stable or garden use or ornament and all the horses, carriages, harness, and saddlery belonging to me and not hereby otherwise disposed of. H

JOYCE, J., said that he thought there was one gift and that it was in the natural fitness of things that the house and furniture and contents should be given together to the same person. He referred to *Syer v. Gladstone* (3), as having been cited to him as an authority for the proposition that, where a testator

gives to any person a leasehold house and the furniture it contains the legatee is entitled to take the furniture and disclaim the gift of the house and he proceeded to say, at p. 147 :

There are very few cases that have been so much observed upon as this of *Syer v. Gladstone* (3). Whatever else, however, it may be an authority for, it cannot, I think, be any authority for that proposition that I have mentioned . . .

A We respectfully agree with this statement. JOYCE, J., continued by referring to *Re Kensington, Longford v. Kensington* (4), and commenting upon SIR GEORGE FARWELL's interpretation in that case of the decision in *Syer v. Gladstone* (3), and concluded by saying :

B But undoubtedly, speaking of *Syer v. Gladstone* (3) COTTON, L.J., in *Re Hotchkys* (4), at p. 418, says : "In that case there was a gift of property and of certain things on the property." That was a case where there were two bequests, one of land or houses and the other of chattels. In my opinion those were two separate gifts of which the legatee might accept one and might reject the other." In the same case LINDLEY, L.J., says, at p. 419 : "I agree with COTTON, L.J. *Guthrie v. Walrond* (5) is more applicable to this particular devise than the case of *Syer v. Gladstone* (3), which is to be explained by the fact that according to the proper construction of the will in that case there were two gifts."

C It was in deference to those opinions that JOYCE, J., held that there were two separate and independent gifts in *Re Lysons* (2), although it is plain that, had it not been for these opinions he would have come to the conclusion there was but one gift. In the judgment of PEARSON, J., in *Syer v. Gladstone* (3) there is no mention of the furniture and contents of the freehold house. What he seems to be dealing with is a devise of real property subject to a mortgage coupled with other property and a gift in the same clause of several leaseholds some of which are onerous and some profitable, for he starts his judgment with a statement—
D in *Re Hotchkys* (4) quoted by JOYCE, J., seem to us to be inaccurate : but, in any view, they are not binding on this court. In our judgment, there is nothing in *Syer v. Gladstone* (3) or *Re Lysons* (2), which compels this court to construe the bequest in the present case contrary to what seems to us to be the *prima facie* and ordinary meaning of the words used by the testator as constituting, not two independent gifts, but one joint gift. We, therefore, think that the judgment
E of FARWELL, J., on this point should be discharged and a declaration in accordance with the latter part of the appellant's notice of appeal substituted for it.

Appeal allowed. Declaration accordingly. Costs of all parties to be paid out of the estate.

Solicitors : *Slaughter & May* (for the appellant) ; *Gery & Brooks* (for the pecuniary legatee) ; *Solicitor of Inland Revenue* (for the Crown) ; *Allen & Overy* (for the other respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

Re HUGHES, REA v. BLACK.

G [CHANCERY DIVISION (Simonds, J.), **June 23, 1943.**]

Settlements—Name and arms clause—Determination of interest on "neglect" for 12 months to take name and arms of testator—Non-compliance with condition owing to ignorance of terms of will—Whether breach of condition.

H The testator, by his will, settled his real estate and directed that, if any person should for 12 months after becoming entitled in possession to the property neglect to assume and take the name and arms of the testator, his estate and interest should determine. On the death of the life tenant on Feb. 28, 1940, the defendant became entitled to the estate in tail male, but he had no means of becoming acquainted with the terms of the will until July 16, 1941. On July 25, 1941, the defendant executed a disentailing deed. The question to be decided was whether the estate tail determined by virtue of the name and arms clause in the will :—

HELD : the word "neglect" in the will related only to a conscious omission to comply with the condition laid down by the testator. The defendant did not, therefore, within the meaning of the will, neglect to

assume and take the name and arms of the testator and he was competent to execute the disentailing deed.

[EDITORIAL NOTE.] In the construction of the name and arms clause certain words have been given a wider or narrower meaning. The words "omit" or "fail" have the widest meaning and cover every form of non-compliance. The word "refuse," however, has been given a narrower meaning since it has been held to imply an act of conscious volition. "Neglect" *prima facie* only includes a negligent non-compliance, but this word may be controlled by the context. There being no controlling context in the present case, the estate could only be defeated by a negligent non-compliance since the facts did not support such a finding, the estate was not defeated.

AS TO WHAT AMOUNTS TO BREACH OF NAME AND ARMS CLAUSE, see HALSBURY, Hailsham Edn., Vol. 29, pp. 790-792, para. 1098; and FOR CASES, see DIGEST, Vol. 35, pp. 705-709, Nos. 55-80.]

Cases referred to:

* (1) *Re Quintin Dick, Cloncurry (Lord) v. Fenton*, [1926] Ch. 992; 35 Digest 706, 64; 42 T.L.R. 681.

SUMMONS to determine whether an assent should be executed vesting property in the defendant who had executed a disentailing deed. The facts are fully set out in the judgment.

G. D. Johnston for the applicant.

C. L. Fawell for the defendant.

H. A. Rose for remaindermen.

SIMONDS, J.: The testator in this case made his will on Jan. 16, 1858, and it contained a name and arms clause. First of all, he devised his real estate, referred to as the Middleton Hall Settled Estates, unto George Rea and Charles Selby, their heirs and assigns, to the use of certain trustees for the term of 99 years upon trusts which have long since been fully performed and subject thereto to the use of his son George Pringle Hughes during his life, and from and after his decease to the use of his first and every other son according to their respective seniorities in tail male. He then gave successive life interests with remainders to their sons in tail male to his sons Joseph William Hughes, Pringle Hughes, Francis Humphrey Hughes and Charles Pringle Hughes; and in default he gave the Middleton Hall Settled Estates for life estates with remainder to their respective sons in tail male to his daughters, Jane Elizabeth Hughes, Isabella Margaret Hughes, Caroline Emma Hughes, Georgina Hughes and Charlotte Louisa Hughes. The testator made two codicils, in 1862 and 1867, which do not affect the question I have to consider. The testator died on Nov. 4, 1869.

Eventually, in 1934, the son Charles succeeded to the estate, and died, a bachelor, in 1940. Thereupon his nephew, the first defendant, Archibald George Hughes Black, a son of the testator's daughter Isabella, became entitled to the estate in tail male. The only question is whether, by virtue of the name and arms clause in the will, that estate tail determined. The life tenant, the testator's son, Charles, having died on Feb. 28, 1940, it was proved to my satisfaction that the nephew of the life tenant, the testator's grandson, the first defendant, did not until July 16, 1941 (that is, more than 12 months thereafter) become acquainted with the provisions of the will and the clause contained therein. He was living in Tasmania, had for many years lived there and had no reasonable means of obtaining the knowledge which he did not acquire until then. 9 days after he became acquainted with the terms of the will he executed a disentailing deed.

The name and arms clause in the will provides that:

... in case the survivor of my said daughters or her heirs male or any person who shall become entitled to the said hereditaments shall not as and when they shall severally become and be entitled in possession to the said hereditaments assume and take upon themselves respectively the surname of "Hughes" and thenceforth thereafter continue to use the said name and bear and use the arms which I bear and use and endeavour to procure the royal licence and authority for so doing or neglect so to do for the space of 12 calendar months after they shall severally be so entitled and be of the age of 21 years or upwards then the estate and interest of him her or them so neglecting as aforesaid of and in the said hereditaments shall thenceforth determine as if he she or they were actually dead without issue.

That provision differs materially from the common form clause; it does not

contain the initial direction that the person becoming entitled to the estate shall within a limited time take the name and arms and in default of so doing shall forfeit the estate. There is no such direction but there is an unqualified condition—if the person becoming entitled shall not assume and take the name and arms or shall neglect to do so, there is this additional and rather strange condition. That somewhat obscure clause I think I must construe in this way : I must construe it as if it were no more than a direction to take within the specified time and a gift over in the event of the person becoming entitled neglecting to do so.

That reduces this question to the somewhat narrow one : in what circumstances can a person becoming entitled be said to have neglected to assume and take the name and arms ? The question is this : does the word “ neglect ” in the context include every failure to take, whether or not the person becoming entitled is aware or ought to have been aware of the condition upon which the benefits can be taken and retained, or does it apply only to the case of a person becoming entitled being aware of what he must do under the terms of the will in order to acquire or retain the benefit and then failing to do so ? There is a third possibility, that is, whether it covers the case of a person who ought to know but does not know the condition upon which he is entitled to acquire and retain the benefit. We are not here concerned with the third possibility because it cannot be said that the first defendant, not knowing, yet ought to have known. Therefore I am here faced only with the question whether, although he did not know and could not have known of the condition in the will, he nevertheless can be said to have neglected to take and assume the name and arms.

The question is one which I do not find it possible to decide without reference to authority. If I had been free to follow my own inclination, I should have had no hesitation in saying that neglect, in its legal connotation, implies failure to perform a duty of which the person knows or ought to know. So in a document of this kind “ neglect ” imports failure to do something which the person knows or ought to know was a condition. Am I at liberty to adopt that view ? In *Re Quintin Dick* (1), ROMER, J., had to consider a name and arms clause and he reviewed the authorities. It was insisted on here that, in that case, ROMER, J., had to consider the words “ refuse or neglect ” and that the case is a binding decision only where “ refuse ” and “ neglect ” are in conjunction. However, I cannot ignore the justice of the words of ROMER, J., where, after referring to the decision of WARRINGTON, J., he says, at p. 1006 :

If the word “ neglect ” connotes the exercise of the will it cannot include a failure or omission which is due to ignorance of the provisions of the document, and which therefore does not result from any operation of the mind.

As I read that passage, ROMER, J., was not founding his interpretation of the word “ neglect ” solely upon its collocation with the word “ refuse.” I think he was considering what the word “ neglect ” would mean if it stood by itself. That view of the decision is, I think, correctly adopted in HALSBURY, LAWS OF ENGLAND, Hailsham Edn., Vol. 29, at p. 792, where it is said :

If a condition is expressed to take effect if the donee shall “ omit ” or “ fail ” to take the name and arms, this will cover every case of non-compliance. The word “ refuse,” however, implies a conscious act of volition, so that a person who was ignorant of the condition or was under disability cannot be said to have refused to comply with it ; but if a person knows of the existence of the condition, a refusal need not be express. “ Neglect,” when used alone, *prima facie* covers only omissions that are negligent, but when used in certain contexts it may mean no more than “ fail.” The expression “ neglect or refuse ” also implies a conscious act of volition.

The statement there, I think, is a correct one ; the relevant part is : “ neglect, when used alone, *prima facie* covers only omissions that are negligent.” There is nothing in the context here which, in my judgment, enlarges that *prima facie* meaning.

I must hold, consistently, as I think, with the judgment of ROMER, J., in *Re Quintin Dick* (1), that here “ neglect ” does not cover every case of failure but only that case where the person, acting consciously, omits to do that which he ought to do as a condition of receiving the testator’s bounty. Accordingly, I hold that the defendant Archibald George Hughes Black did not, within the meaning of the will, neglect to assume and take the name of Hughes and, therefore, was competent to execute the disentailing assurance which he did on

July 25, 1941, with the result that the plaintiff, who is the trustee for the purpose of the Settled Land Act of the settled premises, ought to execute in his favour the necessary assent.

Declaration accordingly. Costs of all parties as between solicitor and client to be to be paid out of the trust premises.

Solicitors: *Robinson & Bradley*, agents for *Charles Percy & Son*, Alnwick.

[Reported by HUBERT B. FIGG, ESQ., Barrister-at-Law.]

A

LEWIS v. MOGAN.

[KING'S BENCH DIVISION (Charles and Stable, J.J.). April 6, 1943.]

Shipping—Offences—Autrefois convict—Absentee punished by master by forfeiture of wages—Subsequent charge under Defence (General) Regulations—Merchant Shipping Act, 1894 (c. 60), ss. 159, 221—Merchant Shipping Act, 1906 (c. 48), s. 44 (5)—Defence (General) Regulations, reg. 47A.

B

The master of a ship investigated a complaint against one of his crew that he was absent without leave and ordered a forfeiture of wages. The seaman was later charged before a court of summary jurisdiction by the appellant acting on behalf of the Minister of War Transport with an offence under the Defence (General) Regulations, reg. 47A. The offence charged under the regulation was that, being lawfully engaged to serve on a requisitioned ship, he was absent without leave from his duty. The seaman pleaded *autrefois convict* :—

C

HELD : the seaman was not entitled to plead *autrefois convict* since the offence under the Defence (General) Regulations was a different offence from that under the Merchant Shipping Act, 1894. Further, proceedings in a domestic tribunal, such as the punishment, if any, inflicted by the captain of the ship under the Merchant Shipping Acts cannot be pleaded in bar of proceedings in a court of competent jurisdiction.

D

[EDITORIAL NOTE. This matter is a little complicated, though the decision is quite a clear one. In the first place the captain only deprived the seaman of his wages for the time he was absent without leave, which is hardly in the nature of punishment at all. The captain could have imposed a fine; and, whatever action he took, by the Merchant Shipping Act, 1906, s. 44 (5), no further proceedings could have been taken for any offence under the Merchant Shipping Acts. The offence here, however, was under the Defence (General) Regulations and, therefore, this statutory bar to further proceedings was inoperative. The common law right of a person not to be placed in jeopardy twice in respect of the same offence was not violated here because the first proceedings were before a purely domestic tribunal and under the terms of a domestic arrangement—namely, the man's service contract—and not before a court of competent jurisdiction.]

E

F

AS TO AUTREFOIS CONVICT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 152-154, para. 212; and FOR CASES, see DIGEST, Vol. 14, pp. 336-349, Nos. 3550-3653.]

CASE STATED by two justices in and for the city of Liverpool sitting as a court of summary jurisdiction. The facts fully appear from the judgment of CHARLES, J.

G

Arthian Davies for the appellant.

Astell Burt for the respondent.

Davies : By the entry in the log-book the master had merely recorded an intention to deprive the seaman of wages for the period during which he did not work, in accordance with the Merchant Shipping Act, 1894, s. 159, and in any event no punishment was thereby imposed by a court of law. Although it might have been possible for the master to impose a fine in accordance with the discipline regulations contained in the crew agreement, he did not do so. Even if he had so imposed a fine, it would only have been action taken under a domestic arrangement between the master and the seaman. Although by the Merchant Shipping Act, 1906, s. 44 (5) no proceedings for an offence under the Merchant Shipping Acts could have been instituted in respect of the same matter, this subsection had no application in the present case because the charge was not made under the Merchant Shipping Acts but for an offence under the Defence (General) Regulations.

H

Burt: The respondent was entitled to plead *autrefois convict* because the offence had been dealt with by a competent authority who had ordered the wages to be forfeited by way of punishment. The master had power under the Merchant Shipping Act, 1894, s. 221, to award the penalties there set out.

CHARLES, J.: The appellant, acting for and on behalf of and with the authority of the Minister of War Transport, laid an information against the respondent, a seaman, who was charged under the Defence (General) Regulations, reg. 47A, with :

... being a person lawfully engaged to serve on board the S.S. *Inventor* a ship requisitioned by and on behalf of His Majesty was on Oct. 1, 1942, at Southampton absent without leave from his duty.

The master of the ship had, before these proceedings were commenced, held an informal inquiry, which he was entitled to make, as to the conduct of this man, and he logged him "for neglecting his duties all day to forfeit a day's pay."

It is argued by the respondent that, inasmuch as he was in that way and for that offence dealt with by the master of the ship, this information was barred and the respondent was entitled to plead *autrefois convict*. In my view, that argument has no foundation when you come to examine the true circumstances of the case and the sections of the Merchant Shipping Act which are applicable. The master's authority, in my view, is obtained from the Merchant Shipping Act, 1894, s. 114, and that deals with agreements which have to be by statute entered into between the master and the seaman, and have to be in a form approved by the Board of Trade. In this case an agreement was produced and proved. It was in a form approved by the Board of Trade, and made between this master and this man. The Merchant Shipping Act, 1894, s. 114 (2) (g), provides that the agreement is to include :

... any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishment for misconduct which have been approved by the Board of Trade as regulations proper to be adopted, and which the parties agree to adopt.

It was under those regulations that the master, in order to deal with this man, caused him to forfeit a day's pay, because he neglected his duties all day. If one turns to sect. 159 of the same Act, one finds this :

A seaman or apprentice shall not be entitled to wages for any time during which he unlawfully refuses or neglects to work . . .

In this case the man did neglect to work, and, acting well within his authority, the master forfeited his pay. It is said that he cannot, therefore, be charged under the Defence (General) Regulations because he has already been convicted and, in effect, he was fined by forfeiture of a day's pay for the same offence. It is necessary not to lose sight of what the Emergency Powers (Defence) Act, 1939, was passed for. Sect. 1 (1) provides as follows :

... His Majesty may by Order in Council make such regulations . . . as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order . . .

It is not a question of domestic agreement between the seaman and the owners or the master ; it is directed to the defence of the realm and the public safety, and one is not astonished to find that there is a section dealing specifically with shipping matters. The Defence (General) Regulations, reg. 47A, provides :

No person lawfully engaged to serve on board any ship to which this regulation applies shall . . . (c) be absent without leave from his duty at any time . . .

Subject. (7) (a) provides :

The ships to which this regulation applies are (a) every ship belonging to His Majesty and every ship, whether British or foreign, chartered or requisitioned by or on behalf of His Majesty . . .

It is said that there is no finding in the case that this was a requisitioned ship. That is quite likely, because the plea of *autrefois convict* was put forward as a bar to the proceedings, but what we do see is that the information was laid by the appellant acting for and on behalf of and with the authority of the Ministry of War Transport. I think we are entitled to assume, although it is not specifically stated on the face of the case, that this was a ship requisitioned by His Majesty.

It is contended that you cannot convict this man under reg. 47A because he has been already convicted under the Merchant Shipping Act. As I have

indicated, I cannot accept that contention. The master was not in any way acting as a court of competent jurisdiction. He was acting in a domestic way under sect. 114 by virtue of the regulations which have been made and agreed to by both seaman and master or owner. He has never been tried for this offence of being absent without leave from his duty and I think the justices ought to have rejected the contention of *autrefois convict*. The matter must be sent back to them with a direction to hear and determine the case.

STABLE, J. : As this matter is going back to the justices, in order that there may be no possible misconception as to what was in the mind of each member of this court on this matter, I should like to add a few words to what has already fallen from my Lord, and to express my entire concurrence with what he has already said.

It was contended that these proceedings are barred by the Merchant Shipping Act, 1906, s. 44 (5), which is in these terms :

An act of misconduct for which any fine has been inflicted and paid by, or deducted from the wages of, the seaman, shall not be otherwise punished under the Merchant Shipping Acts.

In my judgment, the answer to that is that, even assuming for this purpose that the subject-matter of the entry in the log under date Oct. 3, 1942, was identical with the subject-matter of the present charge, this charge is not a charge under the Merchant Shipping Act at all, but is a charge under the Defence (General) Regulations, reg. 47A (1) (c). For that reason sect. 44 (5) has no application to the matter at all. Whether the point would be concluded in favour of the appellant in this court if the prosecution in fact was under the Merchant Shipping Act is a matter upon which I express no opinion. I venture to think that point would require much more careful investigation than it has been necessary for us to give it. It is unnecessary to pursue the matter further because, as I have already indicated, it is perfectly plain that the charge against this man is a charge under the Defence (General) Regulations, to which the Act of 1906 has no application whatever. The respondent was not entitled to plead *autrefois convict*, for the reason that this matter has never been dealt with by a court of competent jurisdiction at all.

For these reasons and the reasons already stated by my Lord, I agree that the case should go back to the justices.

Appeal dismissed with costs. Case remitted to the justices.

Solicitors: *Treasury Solicitor* (for the appellant); *J. H. Milner & Son*, agents for *Silverman & Livermore*, Liverpool (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Re LEVERHULME, COOPER v. LEVERHULME AND OTHERS (No. 2).

[CHANCERY DIVISION (Morton, J.), May 28, 1943.]

Perpetuities—Period allowed—Choice of lives in being—Descendants of Queen Victoria—Difficulty of ascertainment—Validity.

The testator, who died on May 7, 1925, by his will directed his trustees to set aside certain shares and hold them upon the trusts declared until the date of distribution which was defined as meaning the date of the expiration of the period of 21 years calculated from the death of the last survivor of certain persons, including the descendants of Her late Majesty Queen Victoria, living at the death of the testator. It was contended that it was impossible to ascertain with accuracy the descendants of Queen Victoria living on May 7, 1925, that the difficulty of proving the date of the death of each of such descendants would, in the circumstances at present prevailing in Europe, be even greater and that the trusts declared concerning these shares were, therefore, void for uncertainty :—

Held: the trusts which were valid at the date of the testator's death could not be rendered void by reason of subsequent events making proof of the necessary matters more difficult, and their validity was, therefore, unimpaired.

Re Villar (1) followed.

[EDITORIAL NOTE. The difficulties of ascertaining the descendants of the late Queen Victoria living at a certain date were considered by the Court of Appeal in *Re Villar* (1), and it was held that that difficulty did not make a clause of the type here considered invalid. Since the testator in the present case died before the date of that decision, it is clear that MORTON, J., was bound by the decision in that case and a reconsideration of the position in the light of the further difficulties which have arisen as a result of the present war was out of the question. The main source of the difficulty can be avoided by choosing a later monarch whose descendants will not be so numerous or so scattered and the probability is that the period will prove of equal length.

AS TO CHOICE OF PERIOD FOR PERPETUITY RULE, see HALSBURY, Halsham Edn., Vol. 25, pp. 95-96, para. 181; and FOR CASES, see DIGEST, Vol. 37, pp. 61-63, Nos. 53-66.]

Cases referred to:

* (1) *Re Villar, Public Trustee v. Villar*, [1929] 1-Ch. 243; Digest Supp.; 98 L.J.Ch. 223; 140 L.T. 90

(2) *Re Moore, Prior v. Moore*, [1901] 1 Ch. 936; 43 Digest 595, 438; 70 L.J.Ch. 358; 84 L.T. 501.

SUMMONS to determine whether certain trusts declared in the testator's will were void for uncertainty. The facts are fully set out in the judgment.

J. Neville Gray, K.C., and *L. M. Jopling* for the plaintiff.

R. F. Roxburgh, K.C., and *J. H. Stamp* for the present Lord Leverhulme.

J. Norman Daynes, K.C., and *R. R. Formoy* for Ernest Bisiker.

Hon. Charles Romer, K.C., and *Cecil W. Turner* for the companies.

H. O. Danckwerts for the Attorney-General.

C. E. Harman, K.C., and *A. P. Vanneck* for the remaining defendants.

MORTON, J.: The first question raised by this summons relates to a block of nearly 3,000,000 ordinary stock in Lever Bros. and Unilevers, Ltd., formerly Lever Bros., Ltd., that stock being settled by the will of the first Viscount Leverhulme. The question is whether or not (a) the trusts declared until the date of distribution (as defined in cl. 4 of the above-mentioned will of the testator) of the income of the shares, which in that clause were defined as "the shares comprised in this clause," and are hereinafter referred to as the ordinary shares, are void for uncertainty by reason of the impossibility of ascertaining the date of the death of the last survivor of the descendants of Her late Majesty Queen Victoria who were living on May 7, 1925 (being the date of the death of the testator) and (b) the trusts of the corpus of the ordinary shares thereby declared to take effect at the date of distribution (as so defined) are void for uncertainty for the like reason.

The testator made his will on Sept. 11, 1924, and died on May 7, 1925, and his will was proved on July 7, 1925. By cl. 1 of his will the testator appointed certain persons to be executors and trustees, and by cl. 2 he gave and devised to his son William Hulme Lever, who is the second Viscount Leverhulme, absolutely, all his property real and personal movable and immovable subject only to the disposition contained in his will regarding his ordinary shares in Lever Bros., Ltd., at the time of his death. I omit certain words referring to a company known as the Benevolent Company, because nothing turns on those words.

The testator continued:

I declare that I do not make provision by this my will for my relations and friends because I have already during my lifetime made provision in all cases in which I wish to do so.

Cl. 3, so far as material, is as follows:

I bequeath to my trustees all my fully paid ordinary shares in Lever Bros., Ltd., and all my shares at the time of my death in the Benevolent Companies And I direct my trustees by means of the said shares and in such manner as they shall in their absolute and uncontrolled discretion think fit and either by sales or exchanges of shares purchases of other shares or reconstruction or winding up of companies or otherwise to carry out the following objects as nearly as may be, namely first to set aside and appropriate or procure to be set aside and appropriated in the names or under the control of my trustees one half of the total number of the fully paid ordinary shares of Lever Bros., Ltd., issued at my death to be held by them upon the trusts hereinafter directed concerning the same and secondly to vest or procure to be vested in my said son William Hulme Lever for his own absolute benefit the residue which shall then remain after carrying out the operations aforesaid of all my said ordinary shares in Lever Bros., Ltd., and my said shares in the Benevolent Companies and any unapplied proceeds of sale of any of such shares.

By virtue of certain events to which I need not refer in detail, the shares in Lever Bros., Ltd., which are to be set aside and appropriated in the name and under the control of the trustees, are now represented by £2,991,350 ordinary stock in Lever Bros. and Unilevers, Ltd.

Cl. 4 is as follows :

I direct my trustees to stand possessed of the ordinary shares in Lever Bros., Ltd., which by the last preceding clause they are directed to set apart and appropriate or procure to be set apart and appropriated in their names or under their control (which shares are hereinafter referred to as the shares comprised in this clause) but subject to and charged with (in exoneration of the rest of my estate) such part of the estate duty payable on my death as my trustees may consider is payable in respect of the same shares or the property applied in the acquisition thereof upon the trusts hereinafter declared that is to say [the testator then defines certain expressions as follows]: "The date of distribution" shall mean the day on which shall expire the period of 21 years (less the last two days thereof) calculated from the death of the last survivor of the following persons that is to say (1) my executors and trustees hereinbefore named (2) my descendants living at my death and (3) the descendants living at my death of Her late Majesty Queen Victoria.

No difficulty arises as to the first and second of those two groups, but considerable difficulty has arisen as to the third group. Then follows the definition of the associated companies, which I do not think I need read. The clause continues :

(b) None of the said shares comprised in this clause shall be sold by my trustees ;
(c) Until the date of distribution the income of the said shares comprised in this clause shall (subject as aforesaid) be held on the trusts following that is to say . . .

Then follow under headings (1), (2) and (3) certain legacies and annuities to certain persons whom I need not particularise including persons on the testator's personal and domestic staff. Certain annuities amounting to £510 per year at the present day are still outstanding. Sub-cl. (4) says :

Subject as hereinbefore declared the income of the said shares comprised in this clause shall (subject as aforesaid) be divided into 100 equal parts and held as follows namely : (i) 10 of such parts shall be paid to the chairman for the time being of Lever Bros., Ltd., for his own benefit. (ii) 10 of such parts shall be paid to or held in trust for the person for the time being entitled to the Viscounty of Leverhulme now held by me . . . (iii) 20 of such parts shall be paid in equal shares to the persons (other than the chairman for the time being of Lever Bros., Ltd.), who shall for the time being constitute the committee known as the Special Committee of Lever Bros., Ltd. . . (iv) 20 of such parts shall be paid to the persons (other than the chairman for the time being of Lever Bros., Ltd., and other than the members for the time being of the Special Committee aforesaid) who shall for the time being be directors of Lever Bros., Ltd., or chairmen of any of the associated companies in the following proportions namely . . .

It is unnecessary for me to read the provisions as to the proportions.

I pause to say that, as regards the 50 parts the income whereof was payable to the various officials whom I have mentioned, omitting for the moment the 10 parts which are payable to the Viscount Leverhulme for the time being, the income of these 50 parts has all been assigned in a manner which I need not specify and that income is now applicable in the manner set out in an exhibit in this case F.D.C. (1) ; the precise manner in which that income is applicable is not material for the present purpose.

Sub-cl. (v) says :

20 of such parts shall be paid to the directors for the time being of a company about to be incorporated by me for the purpose of acquiring Grosvenor House to be applied by them for such purposes of artistic encouragement as the said directors may in their absolute discretion from time to time think fit.

Again I pause to say that it has been decided by MAUGHAM, J., as he then was, that this particular gift of income has failed for reasons which I shall mention hereafter. The clause continues as follows :

(vi) The remaining 20 of such parts shall be paid to or applied for such charities connected with commercial travellers or grocers or chemists their wives widows and children including in particular the London Commercial Travellers Benevolent Society and in such shares and proportions as my trustees in their discretion may either permanently or from time to time direct.

There follows a direction as to any surplus income of the 20 parts, which I need not read, and a provision as to estate duty which is immaterial for the present purpose. Sub-cl. (viii) is as follows :

On failure or determination for any reason of the trusts by any paragraph declared of any of such 100 parts whereof the trusts shall so fail or determine and all accretions thereto by virtue of this provision shall accrue to those of such 100 parts whose trusts shall for the time being be subsisting and as between themselves in proportion to the number of the last-mentioned parts and so that all accruing parts shall be held on the same trusts powers and provisions (including this provision for accruer) as the parts to which the same respectively accrue.

A As a result of the failure of the trust declared concerning the 20 parts the income whereof was to be applied for the purpose of artistic encouragement, the present position is that the income of $12\frac{1}{2}$ parts is now payable to Viscount Leverhulme; the income of $62\frac{1}{2}$ parts is applicable in the manner described in the exhibit F.D.C. (1) and the income of 25 parts is applicable for the charitable purposes described in sub-cl. (vi).

B There follow the trusts of capital to which I think I need only refer quite briefly :

On the date of distribution all the said shares comprised in this clause shall (subject as aforesaid) be held in trust as to ten per centum thereof for the person then holding the title of Viscount Leverhulme.

I do not think it is necessary for me to read at length the dispositions of the remaining 90 parts.

C It is manifest that, if the trusts in the will which I have just read are valid, the dead hand of the late Viscount Leverhulme will continue to govern the distribution of the income of this valuable stock and postpone the distribution of the capital for a period which may be as long as 100 years from the date of his death. It is, of course, conceivable that some descendant of Queen Victoria who was an infant at the time of the testator's death may live for, let us say, some 80 years, and then will begin the period of 21 years less two days.

D I must now refer to one or two passages in the affidavit of Mr. Francis D'Arcy Cooper. Para. 10 explains the facts upon which MAUGHAM, J., held that the trusts of income as regards 20 of the 100 parts have failed. I need not read it in detail, but it describes the formation of a company under the name of Grosvenor House, Ltd., and the winding up and dissolution of that company, so that the undertaking of the company came absolutely to an end, and it refers to the order of MAUGHAM, J., which, at a later stage, I must read in detail.

E Some very interesting evidence has been filed in this case as to the descendants of Queen Victoria. It appears that, on May 17, 1925, when Lord Leverhulme died, there were at least 134 of those descendants. The evidence filed on this summons shows that there are certain difficulties in ascertaining exactly how many of Queen Victoria's descendants were living on that date; and the evidence shows also that there will be very great difficulty, which may prove insuperable, in proving the fact of death and the date of the death of each of such descendants.

F I do not propose to read the whole of the evidence which has been filed, but I shall refer to certain paragraphs by way of example. In the first affidavit, sworn on Jan. 24, 1941, which was that of Mr. Alfred Trego Butler, who is Windsor Herald, a Fellow of the Society of Antiquaries of London and who, for some years edited BURKE'S PEERAGE. Mr. Butler says, in para. 6 :

G Persons who were lineal descendants of the late Queen Victoria were born or were known to have settled in all the following continental countries, viz.: Germany, Russia, Austria, Sweden, Denmark, Norway, Spain, Greece, Jugo-Slavia, and Rumania and many such persons have probably become scattered at the present day over the entire continent of Europe and may even have gone further afield.

He takes the family of the late Czar of Russia as one instance of the difficulty which may arise in ascertaining which of the descendants of Queen Victoria were alive in 1925.

H He says, in para. 8 :

Under the conditions at present prevailing in Germany and Central Europe persons even of the highest rank and standing disappear in mysterious circumstances their ultimate fate being unknown even to their closest friends and relatives and, in my opinion, it is quite probable that some of the continental descendants of Her late Majesty Queen Victoria who were living at the death of the testator may have fallen into penury and obscurity or otherwise disappeared from the public view rendering the ascertainment of their deaths or survival a matter of the greatest uncertainty. A further element of great uncertainty is caused by the probable destruction of records as a result of aerial bombardment and other war activities.

In the joint affidavit of Mr. Butler and Sir Stephen Gaselee, Librarian to and Keeper of the Papers of the Foreign Office, certain other grave difficulties are referred to. I shall only take one or two examples. In para. 5 they say :

In the Royal and Princely Houses on the continent of Europe there has been generally a family chancery in which records of births marriages and deaths in the family have been carefully kept but with important omissions, viz. : (a) while they record the marriages classed as morganatic, they ignore the issue of such marriage and (b) they wholly ignore marriages and the issue of marriages which have not been sanctioned by the head of the family. A morganatic marriage is a marriage sanctioned by the head of the family but with a person whose birth is not such as in the opinion of the head of the family to qualify issue of the marriage for admission to the dynasty. Our authority as regards the treatment of marriages of the second class is Mr. Owen Frederick Morshead, C.V.O., D.S.O., M.C., the Librarian of the Royal Library at Windsor and Deputy Keeper of the Royal Archives who has a special expert knowledge of such matters and who as we are informed will make an affidavit in these proceedings. Marriages of both kinds are, however, valid by the civil laws of all the countries concerned and the children of such marriages are legitimate by such laws.

That is a matter which, as it seems to me, might affect not only the difficulty of ascertaining when the last survivor of Queen Victoria's descendants died, but a difficulty in ascertaining precisely who were the descendants of Queen Victoria living on May 7, 1925 ; and I might multiply instances of the difficulties which arise.

On this evidence it is argued that the whole of the trusts declared by the testator's will concerning this ordinary stock are void for uncertainty. I should add that the present Lord Leverhulme, who would benefit if this argument succeeded, has expressly instructed his counsel not to argue that the trusts are void ; but counsel for the plaintiff has argued the question for the assistance of the court, and counsel appearing for Mr. Ernest Bisiker, representing the London Commercial Travellers' Benevolent Society, has put forward certain arguments, and Mr. Roxburgh, at my invitation, as *amicus curiae*, and Mr. Stamp have also assisted me with certain observations on the matter. I, therefore, feel that I have had this question sufficiently argued.

It is submitted by counsel for the plaintiff that the testator has chosen as his date of distribution, a date which cannot possibly be ascertained with accuracy. Impossibility, says counsel for the plaintiff, may arise from the number of persons selected as what I may call the commencing class, or it may arise from other circumstances. The evidence he submits shows that it is impossible to ascertain with accuracy the persons constituting the class of descendants of Queen Victoria living on May 7, 1925, and that the evidence shows still more clearly that it will be impossible to ascertain, with accuracy, the date on which the last survivor of these persons died. Any inquiry which the court might direct for the purpose of ascertaining these facts, says counsel for the plaintiff, would necessarily prove abortive. In these circumstances he submits there is such uncertainty as renders the whole of this trust void. I confess that I found his argument by no means unattractive, but there are certain decisions on the point to which I must shortly refer. Before doing so, I make these preliminary observations. First, I think it is plain that I must consider whether the trusts were valid when the instrument declaring them came into effect, that is, immediately after the death of Lord Leverhulme on May 7, 1925. Secondly, when one is considering a trust of this nature it is material to consider not only whether the testator has made his meaning clear, but whether the persons constituting the commencing class on May 7, 1925, can be ascertained. Thirdly, it may, I conceive, be necessary also to look forward as from May 7, 1925, and to consider whether the court is satisfied that it will be possible to ascertain when the last of these persons dies. Fourthly (and this, I think, is beyond all doubt) if the trusts were valid on May 7, 1925, they cannot be rendered invalid by reason of any subsequent events which make certain matters more difficult of proof. Lastly, it is clear that there are certain descendants of Queen Victoria who were living on May 7, 1925, and who are living today, including, happily, His Majesty the King. Thus, it is certain that the date of distribution cannot possibly yet have arrived whatever matters remain uncertain.

In these circumstances it would have been strange if the court had to say to the persons at present receiving the income : You have no right to this income and you never have had any right to it. That may be the result of the testator's

disposition, but it would be a strange result to follow. I should add in the present case there is no doubt the testator has made his meaning perfectly clear; he has defined the class with complete clarity; the only difficulty is in ascertaining certain facts with regard to the members of that class. I have to consider whether this difficulty is such as to render the trusts void.

I must consider that question in the light of certain recent authorities. I turn first to *Re Villar* (1). The headnote is as follows, and I think it is accurate:

- A By his will dated June 14, 1921, and confirmed by a codicil of Feb. 2, 1926, a testator who died on Sept. 6, 1926, gave his property to his trustees upon certain trusts as to income and capital for his participating issue as therein defined, using a well-known common form so as to tie it up in such a way that the capital was not to vest until the expiration of "the period ending at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of Her late Majesty Queen Victoria who shall be living at the time of my death." Held, that though the existing lives selected were very numerous and it might be extremely difficult and expensive
- B in the future to ascertain the date of the survivor's death, the trust did not offend against any rule of law and was therefore valid. It could not be said that it would be beyond the scope of ordinary legal testimony to ascertain the date of the survivor's death so as to avoid the trust, either for uncertainty or as infringing the rule against perpetuities.

- C In my view, there is no real distinction for the present purpose between the trusts which the Court of Appeal were considering in *Re Villar* (1) and the trusts which I have to consider. Moreover, it is to be observed that the date at which the class had to be ascertained and the validity of the trusts determined in *Re Villar* (1) was Sept. 9, 1926, which was over a year later than the relevant date in the present case. In the course of his judgment, LORD HANWORTH, M.R., said, at p. 249:

- D It is true that the number [of descendants] is considerable, amounting to 120 or 130, but they can be ascertained at the present time. It follows that the testator has selected a period of restriction during which division of the capital is postponed, which, inconvenient though it may be, offends against no canon of law at the present time.

- E But it is said that the courts ought to take into consideration the difficulty that will arise in the future when, it may be 100 years hence, their successors will be faced with the problem of finding out who is the last survivor of this body of 120 or 130 persons and when he died. That is a difficulty which may arise by reason of the vicissitudes of life, but it may not . . . The difficulties are not insurmountable, and they may in fact never arise.

At p. 251, LAWRENCE, L.J., said:

If it be impossible to ascertain the lives upon the death of the survivor of which the vesting of the capital is to take effect, such vesting is not in fact postponed beyond the permitted limit, but the gift is void for uncertainty. That this was the opinion of JOYCE, J., is shown by his judgment in *Re Moore* (2), with which I agree.

- F In the present case there is, in my opinion, no infringement of the rule against perpetuities. All that is said is that there will or may be great difficulty in ascertaining the lives upon the death of the survivor of which the ultimate vesting depends. If it could now be established definitely that it is impossible to ascertain who were the descendants of Queen Victoria living at the death of the testator, and that any inquiry for the ascertainment of such descendants which might be directed by the court would necessarily prove abortive, there would be solid ground for holding that the gift was void for uncertainty. That, however, cannot be said in this case.

- G He went on to develop that by referring to the evidence. RUSSELL, L.J., said, at p. 252:

I am of the same opinion. The property here is made to vest within legal limits; therefore, it is impossible to say that it creates or tends towards a perpetuity. Then it is said that the residuary gift is void for uncertainty. In my opinion, we are unable to say that. The persons to take under the gift are clearly defined, and the event on

- H which they are to take is equally clearly defined. All that can be said is that it may be and probably will be expensive and difficult to prove that the specified event has occurred.

Then he referred to the affidavit of Mr. Butler, who deposed in the present case, and also made an affidavit in *Re Villar* (1). He continued:

The case cannot therefore be put higher than that it may be difficult and expensive hereafter to prove who is the last survivor of the lineal descendants of Queen Victoria specified and when he or she died. In my opinion, this falls short of a ground for saying that the residuary gift is void for uncertainty.

If, then, I was to hold that similar trusts were invalid in the year 1925, my decision would be sharply in conflict with the decision of the Court of Appeal in *Re Villar* (1). If it was possible to ascertain the class as at Sept. 6, 1926, there is no logical reason why it should have been impossible on May 7, 1925. It is said, however, that I have much stronger evidence as to the impossibility of ascertaining the class than that which was before the Court of Appeal, and that, if the evidence now before me had been before the Court of Appeal, they would have arrived at a different conclusion. Reliance is placed, for instance, on the passage in the judgment of LAWRENCE, L.J., to which I have already referred. In view of this argument I have most carefully compared the affidavit sworn by Mr. Butler in *Re Villar* (1) with the evidence in the present case. As regards the ascertainment of the commencing class, I think it may fairly be said that I have some further evidence in regard to the difficulty of ascertaining the descendants of Queen Victoria living at the death of the testator. I do not propose to embark on a closer examination of the differences between the evidence in *Re Villar* (1) and the evidence before me, but I am not convinced that on this point the Court of Appeal would have arrived at any different conclusion if they had had this further evidence before them. The Court of Appeal having held that similar trusts were valid in 1926, I think it would be quite wrong for me to plunge matters into confusion by holding, even if I felt so inclined, that these trusts were invalid in 1925. I think this is a case in which one should apply the principle *stare decisis*, and it is of the utmost importance that the law should be certain.

As regards the further matter, whether it will be possible to ascertain when the last survivor of these persons dies, it may be true that, owing to unrest in Europe, culminating in the present war, it has become more difficult to ascertain whether some of these persons are alive or dead; but as I have already pointed out, the events of 1939 to 1943 cannot render void a trust which was validly created in 1925. The court will have to deal with these difficulties as and when they arise. On this point also, I think, one must consider the matter as from the standpoint of the date of the testator's death, and the Court of Appeal, looking forward as from that standpoint, were unable to say that it would be impossible to ascertain the date of the death of the last liver. Looking from the standpoint of May 7, 1925, I do not feel able, having regard to the view taken by the Court of Appeal, to arrive at the contrary conclusion.

There is one other decision to which I may refer, and that is the decision of MAUGHAM, J., in the matter of the trusts of the same will that I am considering. On May 10, 1929, MAUGHAM, J., declared as follows:

This court doth declare that the trust declared by such para. 4 (c) (4) (v) of the said will for the purposes of artistic encouragement has failed and that the 20 parts of the income therein referred do pass under the accruer clause contained in sub-para. 4 (c) (4) (viii).

If the trusts of income and capital declared in this will had been wholly void, for the reason urged before me, it would have been quite wrong for MAUGHAM, J., to have declared that the 20 parts of the income referred to in sub-para. 4 (c) (4) (v), passed under the accruer clause. It may be said that the attention of MAUGHAM, J., was not directed specifically to the point I am considering. On the other hand, the decision of MAUGHAM, J., was given a few months after the decision of the Court of Appeal in *Re Villar* (1), so I think it is, to put it no higher, extremely probable that MAUGHAM, J., had the point well in mind, and, if so, his order can only be explained on the footing that he took the view that the trusts declared by the will concerning these shares were not void for uncertainty.

For these reasons I have arrived at the conclusion that the trusts are not invalid, but I desire to add this warning. I hope that no draftsman will think that because of my decision he will necessarily be following a sound course if he adopts the well-known formula referring to the descendants living at the death of the testator of Her late Majesty Queen Victoria. When that formula was first adopted there was, no doubt, little difficulty in ascertaining who those persons were, and it was not, I think, apprehended that there would be any difficulty in ascertaining when the last of them died. As a result of my decision the clause in question can still be validly employed in the case of a

testator dying in 1925 ; but I do not at all encourage anyone to use the formula in the case of a testator who dies in the year 1943 or at any later date.

Declaration accordingly.

Solicitors : *Field, Roscoe & Co.* (for the plaintiff) ; *Simpson, North, Harley & Co.* (for the present Lord Leverhulme) ; *Denton, Hall & Burgin* (for Ernest Bisiker) ; *Treasury Solicitor* (for the Attorney-General).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

A

MULLET v. POWELL DUFFRYN ASSOCIATED COLLIERIES, LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.),

B **June 24, 25, 1943.]**

Workmen's Compensation—Review—Workman entitled to compensation under 1897 Act—Review on fluctuation in wage rates—Workmen's Compensation Act, 1925 (c. 84), ss. 11 (3), 50 (2).

C

The appellant workman sustained an accident in 1905 and was paid compensation under the Workmen's Compensation Act, 1897, until the year 1916, when he went back to light work. On Feb. 6, 1940, he became totally incapacitated. It was contended for the appellant that the 1897 Act, which governed his right to review, was repealed by the 1906 Act, which in its turn was repealed by the 1925 Act, and that he was, therefore, subject to proof of the appropriate facts, entitled to the benefits conferred by the Workmen's Compensation Act, 1925, s. 11 (3), because it is provided that review in sect. 11 (3) includes a review under the provision of any Act repealed by the Act corresponding to the section :—

D

HELD : the appellant's right to a review arose under the Workmen's Compensation Act, 1897, which was not repealed by the Act of 1906, where the accident happened before the commencement of that Act, except to the extent to which that Act would apply to such a case. It could not be said, therefore, that the Act of 1897 was repealed by the 1925 Act and the appellant was not entitled to a review.

E

[**EDITORIAL NOTE.** The provisions of the Workmen's Compensation Act, 1925, s. 11 (3), have been before the courts several times recently and it will be remembered that the section gives a right to review where there has been a fluctuation in the ruling wage rates in the workman's particular employment. This is a valuable right to the workman at the present time when the tendency is for wages to increase, and it is of importance to note that it has no application to the case of a man who became entitled to compensation under the 1897 Act. There cannot, however, be many such cases.

F

AS TO REVIEW ON FLUCTUATION OF WAGES, see HALSBURY, Hailsham Edn., Vol. 34, p. 955, para. 1306 ; and FOR CASES, see DIGEST, Vol. 34, pp. 452, 453, Nos. 3707-3720.]

Case referred to :

(1) *Potts v. Pope & Pearson, Ltd.*, [1940] 1 K.B. 868 ; [1940] 2 All E.R. 263 ; Digest Supp. ; 109 L.J.K.B. 449 ; 162 L.T. 290 ; 33 B.W.C.C. 83.

G

APPEAL by the applicant from an award of His Honour JUDGE WILLIAMS, given in the Aberdare and Mountain Ash County Court, dated Feb. 2, 1943. The facts are fully set out in the judgment of LORD GREENE, M.R.

The Workmen's Compensation Act, 1925, s. 11 (3), provides as follows :

H

Where the review takes place more than 6 months after the accident, and it is claimed and proved that, had the workman remained uninjured and continued in the same class of employment as that in which he was employed at the date of the accident, his average weekly earnings during the 12 months immediately preceding the review would, as a result of fluctuations in rates of remuneration, have been greater or less by more than 20 per cent. than his average weekly earnings during the 12 months previous to the accident (or if the weekly payment has been previously varied on a review during the 12 months previous to that review or the last of such reviews), the weekly payment shall be varied so as to make it such as it would have been if the rates of remuneration obtaining during the 12 months previous to the review had obtained during the 12 months previous to the accident. For the purposes of this subsection "review" includes a review under the provision of any Act repealed by this Act corresponding to this section.

S. R. Edgedale for the appellant.

F. W. Beney, K.C., for the respondent.

LORD GREENE, M.R. : The appellant workman in this case suffered an accident in the year 1905. He was entitled, therefore, to the rights conferred upon him by the Workmen's Compensation Act, 1897. It does not appear whether the compensation which he in fact received was given to him by virtue of an award or by virtue of an agreement, but for present purposes that is immaterial ; in fact, he received compensation at the appropriate rate down to 1916, when he went back to light work. His intervening history need not be mentioned, but on Feb. 6, 1940, he unfortunately became totally incapacitated. The application out of which this appeal arises was an application for a review for the purpose of securing to the workman the benefits conferred in appropriate cases by the Workmen's Compensation Act, 1925, s. 11 (3). That is a subsection which, in cases to which it applies, enables the weekly payments to be reviewed on a different basis of wages from that under which the original compensation came to be awarded, and it was directed to enabling an injured workman to have his compensation scaled up whenever the ruling wage rates in his particular employment had increased in the manner mentioned in the subsection. Conversely, the employer was entitled to apply for a review in a case where wage rates had fallen. Subsect. (3) is intended to reproduce and re-enact the section by which that special type of review was first introduced, that is sect. 15 of the Workmen's Compensation Act, 1923, which applied only to the case of accidents happening after the commencement of that Act. The Act of 1925 is a consolidating Act, and sect. 11 (3) of that Act which replaces sect. 15 of the 1923 Act, with some changes in language, does not refer to accidents happening before the commencement of the Act of 1925, or, indeed, to accidents happening before the Act of 1923 ; but if, on the true view of its construction, the 1925 Act has extended this particular benefit to workmen who suffered accidents before the Act of 1923 came into force, it would mean that this consolidating Act had altered the law by extending that particular benefit to workmen who previously would not have been entitled to it. Of course, if the language shows sufficiently that that was the intention, notwithstanding that the Act is described as a consolidating Act, effect would have to be given to it ; but the language must be approached with, at any rate, an inclination to find that the law has not been altered. The subsection follows on subsect. (1) and subsect. (2), which merely provide for reviews such as had been possible before the Act of 1923, and then in subsect. (3) this special type of review is dealt with. So that all the review provisions which had been scattered about the Acts before are brought together in three subsections of sect. 11. Subsect. (3) begins by saying, "Where the review takes place more than 6 months after the accident," and the relevant matters are proved which bear on the question of a change in wage rates, then the weekly payments are to be varied in the manner mentioned. On the face of it, that part of the subsection taken by itself would not appear to apply to any accident which had taken place before the Act of 1925 came into force. It concludes with the following words, which are not to be found in sect. 15 of the Act of 1923 :

For the purposes of this subsection "review" includes a review under the provision of any Act repealed by this Act corresponding to this section.

That is a very puzzling enactment because, among other things, this section contains not merely provisions for the original types of review, but also for this new type of review which had been introduced by the Act of 1923. Therefore, it is very difficult to find a provision of an Act which corresponds to the section. There are provisions of other Acts which correspond to parts of the section.

However that may be, the argument presented to us in the present case by counsel for the appellant is to this effect : When the subsection says, "Where the review takes place," that must be read as meaning, "Where a review takes place under the provisions of an Act repealed by this Act," and, accordingly, where under the provisions of an Act repealed by this Act a workman applies for a review, he is to be entitled on that review to obtain the relief provided for by subsect. (3). I do not pause to consider whether the reference to the review in that concluding paragraph really refers to the review on which the relief is asked, or whether it refers only to the review mentioned in a certain bracketed

passage in the subsection, which introduces a reference to a previous review for the purpose of calculating a certain period of 12 months, which is important for the purpose of determining whether a case has arisen for adjustment in accordance with fluctuations in wage rates. I will assume in favour of counsel for the appellant that his construction of the paragraph is right, but it is to be observed that that only helps him, and he admits, quite rightly, that it only helps him if he can show that his application for a review under which he is now asking for relief is one which he is making under the provisions of an Act repealed by the Act of 1925. The Act of 1925 does not repeal the Act of 1897. If, therefore, his rights arising out of his accident are rights which arose from the Act of 1897, this paragraph does not help him, because the Act of 1897 is not an Act repealed by the Act of 1925. He is, therefore, concerned to show that his right to apply for a review generally are not under the Act of 1897, but under some other Act, which can only be the Act of 1906.

It is accordingly necessary to see whether or not his general right to apply for a review is one to which he stands entitled under the Act of 1897, or whether it is a right which he at present enjoys under the Act of 1906. The Act of 1906 was repealed by the Act of 1925 and, therefore, if his right to a review comes under that Act, he has got over the first stage, at any rate, of his difficulties. In my opinion, his right to a review does not arise under the Act of 1906, but under the Act of 1897, which remains in force. The Act of 1906, which was a consolidating and amending Act, contained a repeal section, sect. 16. The first subsection of that section deals with the scope of the Act and says :

... but, except so far as it relates to references to medical referees, and proceedings consequential thereon, shall not apply in any case where the accident happened before the commencement of this Act.

Then in subsect. (2) it provides :

The Workmen's Compensation Acts, 1897 and 1900, are hereby repealed, but shall continue to apply to cases where the accident happened before the commencement of this Act, except to the extent to which this Act applies to those cases.

I thought at one stage in the argument that it was possible to construe that subsect. (2) as repealing the Act of 1897 *in toto* and re-enacting it to the extent there indicated. If that had been the case, there would have been ground, and substantial ground, for arguing that immediately after the Act of 1906 came into force the workman's right to a review depended not upon the original Act of 1897, but upon the provisions of that Act re-enacted by the Act of 1906, which repealed the Act of 1897. On consideration, however, I have come to the conclusion that that argument cannot be maintained and that, on its true construction, subsect. (2) repeals the Act of 1897 to a limited extent only ; in other words, that the repeal provision does not extend to any cases where the accident happened before the commencement of the Act of 1906 except to the extent to which the 1906 Act applied ; and the 1906 Act, in my opinion, on its true construction, did not apply to the case of the review.

The result, therefore, is that the Act of 1897 is not repealed by the Act of 1906 as regards a case where the accident happened before the commencement of that Act except, as I have said, to the extent to which that Act would apply to such a case, which is not the case here. That means that the Act of 1897, immediately before the Act of 1925 came into operation, was the Act which governed the workman's right to review, and it is incontestable that immediately before the passing of the Act of 1925 this workman could never have obtained the benefit of the special review based on a change in wage rates because that had been introduced, as I have said, only by the Act of 1923, and in terms only applied to accidents taking place after that Act came into force. That being the position immediately before the Act of 1925 came into force, it could only be altered, assuming in favour of counsel for the appellant the construction of the concluding paragraph of subsect. (2) which I have mentioned, if the Act of 1897 had been repealed by the Act of 1925. But it was not and, accordingly, counsel for the appellant cannot get over the first difficulty in his way.

Counsel for the appellant, however, had an alternative argument based on sect. 50, the repeal section of the 1925 Act. That section contained in subsect. 2 a repeal of the enactments mentioned in the Fourth Schedule, which included the Act of 1906 to the extent mentioned in that Schedule, but it provided that those

enactments were to continue to apply to cases where the accident happened before Jan. 1, 1924, and then it contained a proviso :

... that nothing in this repeal shall affect any scheme, order, rule, regulation, agreement or award, or other instrument certified, issued or made, or any other thing done under the enactments so repealed and in force at the commencement of this Act . . .

Counsel for the appellant wishes to read the word "and" there as "or" so that the proviso would read "any other thing done under the enactments so repealed or in force at the commencement of this Act." He said that, assuming that the Act of 1897 was in force at the commencement of this Act, that proviso applies. It is no disrespect to the very frank argument of counsel for the appellant to say that that construction is completely inadmissible. The court has no right to rewrite the section ; it must construe it as it stands, and quite clearly it is not susceptible of the meaning which counsel for the appellant attributes to it.

That is really sufficient to dispose of this appeal, because on the view that I take, even assuming what I have assumed in his favour, counsel for the appellant does not get over the first stile. Had he succeeded in doing so, there was another stile awaiting him in the form of the decision of this court in *Potts v. Pope & Pearson, Ltd.* (1). He would have had in some way to distinguish that case and its *ratio decidendi* from the present case, but, in view of that case, he would have had, to say the least of it, very great difficulty in asserting for himself a right to the benefit of the Workmen's Compensation Act, 1925, s. 11 (3) having regard to the fact that the accident did not take place after the coming into force of the Act of 1923 which first introduced this new type of review. However, it is not necessary to discuss that branch of the argument or to examine the reasoning of the decision in *Potts v. Pope & Pearson, Ltd.* (1), because counsel for the appellant never succeeded in getting his case to that point.

In my opinion, therefore, the appeal fails and must be dismissed with the usual consequences.

MACKINNON, L.J. : I agree.

DU PARCQ, L.J. : I also agree.

Appeal dismissed with costs.

Solicitors : *Lawson, Elliott & Lawson* (for the appellant) ; *William A. Crump & Son*, agents for *A. J. Prosser*, Cardiff (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

Re POTTER'S WILL TRUSTS. Re THOMSON'S SETTLEMENT TRUSTS. ECKFORD AND ANOTHER v. THOMSON.

[CHANCERY DIVISION (Bennett, J.), May 27, 1943.]

Wills—Construction—Direction for settlement on daughter's marriage—"For my said daughter's benefit and that of any children she may have"—Settlement including trust for children of first marriage—Children of second marriage excluded—Whether settlement in conformity with direction in will.

By his will the testator directed his trustees to divide the residue of his estate into 2 equal parts and to hold 1 part in trust for his infant daughter which, on her attaining the age of 25 years or on the day of her marriage with the consent of her guardians, whichever should occur first, was to be secured by settlement for the daughter's benefit and that of any children she might have. At the age of 16 the daughter married with the consent of her guardians and a settlement of the daughter's share was made whereby the income of the trust moneys was to be paid to the daughter during the joint lives of herself and her husband and after her death in trust for any of the children of the intended marriage. There were 3 children by that marriage and 2 by a second marriage. The property comprised in the settlement included property brought in by the husband. The plaintiffs, the issue of the second marriage, contended that the settlement was not in conformity with the direction in the testator's will which required that under any such settlement all the children of the daughter should benefit equally, and not only those of the first marriage, and that the settlement was inoperative :—

HELD : since the first husband brought some property into the settlement,

the guardians of the testator's daughter were, upon the true construction of the will, entitled if they considered it to be for the benefit of the daughter and some of her children, to make a settlement which excluded some of the daughter's children from benefit, and, therefore, the settlement, although it benefited only the children of the first marriage, was in accordance with the direction in the will.

[EDITORIAL NOTE.] The word "children" generally means the first generation of legitimate descendants by any marriage, but its meaning may be extended by the context or the circumstances of the case. Here the fact that the husband was bringing additional property into the settlement is held to justify the guardians in restricting the benefits under the settlement to children of the first marriage and excluding children of any later marriage.

AS TO MEANING OF "CHILDREN," see HALSBURY, Hailsham Edn., Vol. 34, pp. 303-305, paras. 553, 554; and FOR CASES, see DIGEST, Vol. 44, pp. 840-846, Nos. 6937-6994.]

B Case referred to:

- (1) *Nash v. Allen* (1889), 42 Ch.D. 54; 44 Digest 842, 6952; 61 L.T. 193; *sub nom. Re Nash, Nash v. Allen*, 58 L.J.Ch. 754.

ACTION claiming that a settlement was not in conformity with a direction contained in the will of the testator.

Harold Christie, K.C., and *Raymond W. Jennings* for the plaintiffs.

C *H. B. Vaisey, K.C.*, and *Wilfrid M. Hunt* for the defendants.

BENNETT, J.: This action raises a question of some interest on the will of a testator who died on June 21, 1854, his will having been made on June 12 of that year. The question is whether a settlement, made by the guardians of the testator's infant daughter upon the occasion of her marriage, of her share in the testator's estate is in conformity with a direction to make a settlement contained in the testator's will. The plaintiffs argue that the settlement in question did not conform to the directions.

D The will was made and was proved in Calcutta, the testator being a master mariner. After some provisions relating to his ship, he gave his residue to his wife Amelia Jane Potter and his friend James William Henry Ilbury upon the usual trusts for conversion and payment of his debts; and then he directed his trustees to divide the residue into 2 equal parts, 1 of which he gave to his wife absolutely.

E With regard to the other part, the terms of the will, so far as they are relevant, are as follows:

The said other half share I give and bequeath the same unto my said dear wife Amelia Anne Potter and to the said James William Henry Ilbury and the survivor of them and the heirs executors administrators and assigns of such survivor in trust for my infant daughter Florence Julia Alice Potter to be paid to her on her attaining the age of 25 years or day of marriage whichever may first happen such marriage to be with the consent of her guardian as hereinafter mentioned and in the meantime and till such payment for the trustees of this my will or any other trustees or trustee to be appointed as hereinafter mentioned to lay out and invest the share of the said Florence Julia Alice Potter in her name or in the names of the said Amelia Anne Potter and James William Henry Ilbury or of such other persons as shall happen to be the trustees for the time being of this my will in the purchase of a competent share of the public funds of India or England or on real estate whether freehold copyhold or leasehold but not in any hazardous or mercantile speculation and with full power to alter and vary at will the funds wherein such investment shall be made as aforesaid and to pay the dividends interest and annual produce thereof or permit and empower my said dear wife to receive the same and apply it for the support and maintenance of my daughter Florence Julia Alice Potter in such manner as she shall think proper and to pay over the said principal monies and all interest and dividends thereon unto my said daughter when she shall attain the age of 25 years or day of marriage whichever shall first happen provided such marriage is with the consent of the guardian or guardians for the time being of this my will who I direct shall cause such share to be properly secured by settlement for my said daughter's benefit and that of any children she may have.

H Then there follow provisions with regard to the marriage of the daughter under the age of 25 without the consent of the guardians, which I do not think are relevant, and provisions in the event of the daughter dying before she shall attain the age of 25 years or being married, which are also irrelevant; and then there follows this provision:

... in the event of my said daughter leaving any child children or issue of any child or children whether married with her guardians consent or otherwise then the said share to vest absolutely in such child children or issue in such manner as she my said daughter shall by will appoint or in default of appointment then to such child children or issue equally as *per stirpes* and not *per capita*.

The will appoints the testator's wife and Ilbury to be executors and joint guardians of his daughter.

The daughter, Florence Julia Alice Potter, at the age, I am told, of about 16, contracted a marriage with James Cameron Thomson, and upon the occasion of that marriage and immediately before it, namely, on Aug. 3, 1869, a settlement was made—a settlement which comprised the share of the testator's daughter in the testator's residuary estate and a policy of assurance which was to be effected by James Cameron Thomson. The parties to the settlement were the intending husband of the first part, the testator's daughter Florence Julia Alice Potter of the second part; the testator's wife had remarried in the name of Eagleshame and she and her husband and Ilbury were parties of the third part; and the said Eagleshame and Alexander Gentle were parties of the fourth part and were trustees of this marriage settlement. Ilbury had not proved the testator's will, but he had acted as a trustee of it apparently, and he, of course, was also, with the testator's widow, guardian of the testator's only daughter. The settlement recites the intended marriage and the will of the testator, including the executory direction or trust to make the settlement of the testator's daughter's share in her father's estate. Her share in her father's estate amounted to a sum of 49,200 rupees. It was invested in the 4 per cent. Loan of the Government of India. The witnessing part of the deed provided :

... that in consideration of the said intended marriage and in pursuance of the power in that behalf contained in the will hereinbefore recited the said Amelia Anne [that is the testator's wife] with the consent of her husband Andrew Eagleshame ... and James William Henry Ilbury do and each of them doth hereby assign unto the said Andrew Eagleshame and Alexander Gentle the aforesaid sum of 49,200 rupees and the funds or securities on which the same are now invested.

After the marriage the trusts were to pay the income of the trust moneys and securities during the joint lives of the husband and the wife to the wife for her separate use independently of the husband; and after the death of the wife the trusts were to hold the premises and the income thereof :

... in trust for the child or for all or any such one or more of the children of the said intended marriage in such manner and form in every respect as the said Florence Julia Alice Potter shall by deed or by will or codicil appoint and in default of any such appointment and so far as no such appointment shall extend in trust for all the children or any the child of the said intended marriage who being sons or a son shall attain the age of 21 years or being daughters or a daughter shall attain that age or marry and if more than 1 in equal shares.

There follows a hotchpot clause and after the hotchpot clause the settlement contains this provision :

... provided always that if the said Florence Julia Alice Potter shall survive the said James Cameron Thomson and whether she shall have children or a child or not it shall be lawful for the said trustees or trustee from time to time whenever the said Florence Julia Alice Potter shall so direct in writing to raise any portions of the said trust monies and securities not exceeding in the whole the sum of £1,000 sterling and pay the same to the said Florence Julia Alice Potter for her absolute use and benefit.

Then there follows a power for the wife to direct the trustees to raise out of the presumptive share of any child, and a trust in case there should be no children of the intended marriage. That trust is in these terms :

... and it is hereby declared that if there shall be no child of the said intended marriage, who being a son shall attain the age of 21 years or being a daughter shall attain that age or marry then (without prejudice to the trusts hereinbefore declared) the said trustees or trustee shall hold the said trust premises and the annual income thereof or so much thereof respectively as shall not have become vested or been applied under any trusts or powers herein contained upon the trusts following (that is to say) if the said Florence Julia Alice Potter shall survive the said James Cameron Thomson then after his death and such default or failure of children as aforesaid in trust for the said Florence Julia Alice Potter and her child or children by any future marriage the same to be resettled on such marriage on trusts similar to those herein contained.

The settlement also contained provisions relating to a policy of insurance for the sum of £2,000 which the husband was to take out, and the provision was that the sum of £2,000 to be assured by that policy and all other moneys if any

to become payable by virtue of that policy were to be held upon the trusts and with and subject to the powers, provisoes, agreements and declarations therein-before declared and contained concerning the thereinbefore mentioned sum of 49,200 rupees invested in the 4 per cent. Loan of the Government of India and in the funds or securities in or upon which the same may be invested. I think those are all the relevant provisions of the settlement.

A The action is proceeding on the footing that of that marriage there was issue 3 children. The statement of claim alleges that there was issue of it 2 only, but that seems to have been a mistake; there was a third child, not referred to in the statement of claim—the first child of the marriage who died in early infancy. The other children of the first marriage are the 2 defendants, the present trustees of the marriage settlement.

B The husband, Thomson, died on June 28, 1875. In 1884 the testator's daughter, then Mrs. Thomson, married a second time, a Mr. Bowman, and of that marriage there was issue 2 daughters, the plaintiffs; and on June 8, 1940, Mrs. Bowman died. After the death of her first husband (Thomson), and I think possibly in some way connected with her second marriage, the trustees of the settlement raised, in pursuance of the power in that behalf contained in the settlement, the sum of £1,000, and that sum was paid to Mrs. Thomson.

C The plaintiffs in this action claim that the settlement which was made upon the occasion of the marriage of the testator's daughter to Thomson was not in conformity with the direction contained in the will, because it did not provide that the share which was settled was divisible amongst all the children of the testator's daughter. They complain that it is in a form which, in the events which happened, gives the whole of the daughter's interest in her father's estate to the children of the first marriage, to their exclusion, they being the children of the second marriage. The contention advanced in para. 8 of the statement of claim is this. It is alleged that on the true construction of the will of the testator his will required that, under any settlement made pursuant thereto on the marriage of the daughter under the age of 25 years, all children of the daughter should be treated on an equal footing, and the plaintiffs will submit that the said settlement of Aug. 3, 1869, by excluding (in the events which have happened) the children of the second marriage from all interest in the daughter's share of the residuary estate, was inoperative to bind the capital of the said share and that the same is now held upon trust for the plaintiffs and the defendants in equal shares.

E It is only right to say that when the pleader framed that paragraph he was not aware of the fact that there had been issue of the first marriage 3 children, one of whom had died in early infancy. It was framed upon the view, alleged in para. 5 of the statement of claim, that there was issue 2 children of that marriage and no more, namely, the defendants.

F The argument of counsel on behalf of the plaintiffs is that, upon its true construction the executory trust contained in the testator's will for the settlement of his daughter's share requires, so far as the capital is concerned, the trust to be one which includes as beneficiaries all the daughter's children, and that there would be disconformity between a settlement which did not so provide and the executory trust contained in the testator's will. The question is whether that view is the right one.

G Mr. Vaisey, on behalf of the defendants, advances this proposition: that the settlement, which must be made in execution of the trust, may contain any provision of any kind which the guardians of the testator's daughter reasonably believe to be provisions or trusts for the daughter's benefit and of some one or more of her children, regard being had to the fact that the settlement is being made upon the occasion of the daughter's marriage to a particular person.

H Mr. Hunt, also on behalf of the defendants, advances an argument based upon a narrower ground. He says that, upon the true construction of the testator's will, the settlement to be made is one upon the marriage of the testator's daughter to a particular person, and upon the true construction of the executory trust the children to be benefited are the children of that particular marriage, they being the children within the marriage consideration.

I am not without guidance upon the way to deal with an executory trust of the kind which is embodied in this testator's will; but, of course, the first thing to do is to have regard to the language of the trust, and it is to be observed

and kept in mind that the trust is not "to cause the share to be properly secured by a settlement for my daughter and her children," but "for my daughter's benefit and that of any children she may have." I think there is a real distinction between those two forms of words. Under the first form it may well be that it would not be possible to include, as one of the objects of the trust to be embodied in the settlement, the daughter's husband; but, under the form of words which this testator has used, I think it may well be held that it would be for the daughter's benefit to insert into a settlement made upon the occasion of her marriage some beneficial provision for the benefit of her husband. It seems to me a reasonable view to hold, although it is not necessary in this case to decide it, that a wife might be quieted in her mind and thus be benefited by the thought that, when she died, if her husband survived her, he should enjoy during his life the income of the property which she had brought into the settlement; and so, for my part, I attach importance to the particular language which one finds in this will—the direction that the settlement is to be one not for the daughter and her children, but "for my said daughter's benefit and that of any children she may have."

The next question is whether these provisions compel those who are making the settlement to include as beneficiaries all the children of the daughter, at any age or by any marriage. Would a settlement, for example, not conform to the executory direction if it limited the children to those who attained 21? Would the settlement not conform to the direction, for example, if it gave to the wife a power of appointment amongst the children of the marriage? With those questions in mind, I propose to read the opening passage from the judgment of KAY, J., in *Nash v. Allen* (1), at p. 59. He was dealing with an executory trust the terms of which are not identical with the terms of the executory trust in this testator's will; but it is a principle, I think, that one is looking for, and I think one finds one in this case:

... in the first place I observe that this is an executory trust—a trust to be carried out by the making of a settlement, for which there is, of course, only a general direction; and in framing such a settlement the court always exercises, if the settlement has to be made under the direction of the court, and any conveyancer to whom the preparation of the settlement was submitted according to the will would in like manner exercise a certain discretion in modifying the trusts.

That I understand to be in framing the trusts. With that passage in mind and with the language of the testator's will in mind, in my judgment, having regard to the fact that when the settlement in question was made the intended husband was bringing into the settlement some property, the guardians of the testator's daughter in executing the direction contained in the testator's will were not exceeding their authority. I think, upon the true construction of the will, they had a discretion which enabled them to select from amongst all the daughter's children some of them who were to be beneficiaries under the settlement; they were entitled to make a settlement which excluded children of the daughter who died under the age of 21; they were entitled to make a settlement, in my judgment, which enabled the daughter herself, in the exercise of a power of appointment, to give the settled property exclusively to some of her children or one of her children; and they were entitled, under the power, in my judgment, to make a settlement in the form of this one, which excluded the children of a second marriage, in whole or in part, if in all the circumstances as adjudged by them at the time they came to the conclusion that a settlement in that form was for the benefit of the daughter and for some of her children. On that broad ground, in my judgment, this action fails. I also think that, as a matter of construction, what the testator had in his mind when he framed the executory trust in his will was a particular marriage, and provision being made for that particular marriage, and in such a case it certainly is not usual to include not only the children of that particular marriage but also the children of a future marriage along with the children of the particular marriage.

For these reasons, in my judgment, the action fails and the plaintiffs are not entitled to the declaration for which they ask.

Action dismissed with costs.

Solicitors: *Burton, Yeates & Hart*, agents for *Nye & Donne*, Brighton (for the plaintiffs); *Arthur Pyke & Co.* (for the defendants).

[Reported by HUBERT B. FRIGG, Esq., Barrister-at-Law.]

GRAY v. FIDLER.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.),
June 30, July 1, 26, 1943.]

Landlord and Tenant—Rent restriction—Furnished letting—Articles usually furniture supplied by landlord and attached to freehold—“Furniture”—Whether substantial part of rent for use of furniture—Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (2) (b), Sched. I.

A The appellant was the tenant of a flat let at a rent of £78 per annum which included the use of fitted wardrobes, bed cupboards and beds, a fitted cupboard in the kitchen, other fitted cupboards in other rooms and a fitted dressing-table in the bedroom. These articles were fixed to the walls with screws and could be removed without destroying the nature of the article or fitment. It was contended that this was not a furnished letting within the Rent Restrictions Acts because these articles were fixtures which had been affixed to the realty :—

B **HELD** [LORD GREENE, M.R., dissenting]: in considering whether a letting is a furnished letting within the meaning of the Rent Restrictions Acts, the word furniture must be taken in its popular meaning and, in that meaning, the articles in question were furniture and the letting was, therefore, a furnished one.

C [EDITORIAL NOTE. With the passing of time, many articles which were once separate and movable articles have become fixed things supplied with the building. In the case of the flat here considered, that process had been carried out to such an extent that the tenant would only require to bring in his own tables and chairs, linen and crockery and cooking utensils. The wardrobes and beds were supplied and were fixed to the walls with screws. The main contention here is whether these were still furniture or had become fixtures in the sense that they were part of the property demised. Upon this there is a difference of opinion, LORD GREENE, M.R., thinking that they were part of the thing demised, the other members of the court thinking that, when the Act is said not to apply where the rent paid includes a substantial sum paid in respect of the use of furniture, the word “furniture” is used in the ordinary and popular meaning of the word and includes wardrobes and beds “fitted” to the rooms, although they are screwed to the wall.

D **AS TO FURNISHED LETTINGS**, see HALSBURY, Hailsham Edn., Vol. 20, p. 314, para. 370; and **FOR CASES**, see DIGEST, Vol. 31, pp. 560, 561, Nos. 7078-7084.]

E Cases referred to :

- (1) *Burns Wallace v. Hardingham* unreported.
- * (2) *Wilkes v. Goodwin*, [1923] 2 K.B. 86; 31 Digest 560, 7080; 92 L.J.K.B. 580; 129 L.T. 44.
- (3) *Leigh v. Taylor*, [1902] A.C. 157; 31 Digest 197, 3343; 71 L.J.Ch. 272; 86 L.T. 239; *affg. sub nom. Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523.
- F** (4) *Necchi v. Cranchi* (1921), 37 T.L.R. 934; 31 Digest 556, 7031.
- * (5) *Crane v. Cox* (1923), 92 L.J.K.B. 544; 31 Digest 561, 7082; 128 L.T. 831.
- (6) *Ex parte Quincey* (1750), 1 Atk. 477; 31 Digest 197, 3346.
- (7) *Boswell v. Crucible Steel Co.*, [1925] 1 K.B. 119; 31 Digest 192, 3275; 94 L.J.K.B. 383; 132 L.T. 274.
- (8) *Birch v. Dawson* (1834), 2 Ad. & El. 37; 44 Digest 714, 5615; 4 L.J.K.B. 49.
- (9) *Brown v. Robins*, [1943] 1 All E.R. 548; Digest Supp.
- (10) *Finney v. Grice* (1878), 10 Ch.D. 13; 44 Digest 712, 5571; 48 L.J.Ch. 247.
- G** (11) *Re Seton-Smith, Burnand v. Waite*, [1902] 1 Ch. 717; 44 Digest 714, 5622; 71 L.J.Ch. 386; 86 L.T. 322.
- (12) *Crossley Bros., Ltd. v. Lee*, [1908] 1 K.B. 86; 31 Digest 193, 3286; 77 L.J.K.B. 199; 97 L.T. 850.
- (13) *Rimmer v. Carson* (1923), 39 T.L.R. 349; 31 Digest 561, 7081.
- (14) *Nadler v. Wilson* (1924), 40 T.L.R. 639; 31 Digest 560, 7071.
- (15) *Bailey (Stoke-on-Trent Revenue Officer) v. Potteries Electric Traction Co., Ltd.*, [1931] 1 K.B. 385; Digest Supp.; 100 L.J.K.B. 1; 143 L.T. 650.
- H** (16) *Lyon & Co. v. London City & Midland Bank*, [1903] 2 K.B. 135; 31 Digest 188, 3233; 72 L.J.K.B. 465; 88 L.T. 392.
- (17) *Reynolds v. Ashby & Son*, [1904] A.C. 466; 37 Digest 170, 127; 73 L.J.K.B. 946; 91 L.T. 607.

APPEAL by the defendant from an order of His Honour JUDGE EARENGAY made at the Clerkenwell County Court, and dated Dec. 18, 1942. The facts are fully set out in the judgment of LORD GREENE, M.R.

Gilbert Beyfus, K.C. and *C. T. Salkeld-Green* for the appellant.

A. S. Comyns Carr, K.C. and *S. P. J. Merlin* for the respondent.

Beyfus, K.C. : The fact that a fixed article, if it belonged to the tenant, could be removed by the tenant at the end of the tenancy, does not make it cease to be furniture and become a fixture. The intention of the landlord as to whether or not certain articles fixed in a certain way are fixtures is irrelevant. If an article be a fixture, it is not a piece of furniture either in the popular sense, or in the dictionary meaning of the word, or in the meaning of decided cases relating to wills or within the meaning of decisions based on the Rent Restrictions Acts. That furniture excludes fixtures, at any rate in a legacy, is laid down by JESSEL, M.R., in *Finney v. Grice* (10). *Re Seton-Smith, Burnand v. Waite* (11) shows that in a bequest of furniture in a hotel the trade and tenant's fixtures are not included. That which is a fixture in the eyes of the law cannot be furniture for the purposes of the Rent Restrictions Acts. There should be a definite line of principle. If an article is a movable, it is a piece of furniture. If it is annexed to the freehold, it is a fixture. Furniture cannot include fixtures. [Counsel referred to *Crane v. Cox* (5), *Wilkes v. Goodwin* (2), *Brown v. Robins* (9), *Crossley Bros., Ltd. v. Lee* (12), and *Rimmer v. Carson* (13).] A B

Comyns Carr, K.C. : In *Nadler v. Wilson* (14) there was a separate payment for attendance and the court held that the payment for attendance could be taken into consideration as well as what may be described as the rent proper. Therefore, in the present case, the judge was entitled to take into account the matters covered by the £6 per annum as well as the matters covered by the £78 per annum. In the present case, we are not concerned with what happens under a will nor are we concerned with what constitutes or does not constitute attachment to the freehold. We are, however, concerned with the section of an Act which deals with the letting of furnished or partly furnished houses as distinguished from unfurnished. The test is as to whether or not the landlord has supplied something in the nature of furniture which one would not expect to find in an ordinary unfurnished flat. If a thing is of the nature of furniture, it does not matter, for the purposes of the Rent Restrictions Acts, whether it is attached or is not attached. What the Act contemplates is the services provided by the landlord over and above the letting of the mere building. It is a question as to whether or not the articles serve the purposes of what is ordinarily called furniture and not as to whether or not they are attached. If the question is considered to be one of degree, *Bailey v. Potteries Electric Traction Co., Ltd.* (15) would apply to any appeal from the county court where the question of degree of annexation was involved. The point really is as to whether or not a thing would cease to be furniture if it were attached. The term fixtures as distinct from furniture does not depend upon annexation. In *Lyon & Co. v. London City & Midland Bank* (16) it was held that the screwing of chairs to the floor of a building did not cause them to become part of the freehold. [Counsel referred to *Reynolds v. Ashby & Son* (17).] C D E

Beyfus, K.C., in reply. F

LORD GREENE, M.R. : If MACKINNON and DU PARCQ, L.JJ., had not taken a view different from my own, I should have thought that this was a reasonably clear case.

Under the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (2) (b), the Rent Restrictions Acts (as they may conveniently be called) do not apply "to any dwelling house *bona fide* let at a rent which includes payments in respect of board, attendance or use of furniture." By sect. 10 of the 1923 Act, as amended by the first schedule to the Act of 1939, the flat here in question is not to be : G

... deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent. H

The complaint made by the tenant, the appellant before us, is (i) that the county court judge has treated as "furniture" certain fittings or fixtures which are not furniture; and (ii) that, in determining whether the amount of rent which he decided to be fairly attributable to the use of furniture formed a substantial part of the whole rent, he had no regard to its value to the tenant.

The first of these questions raises a question of law of some general importance; and, apart from the special language of the tenancy agreement, the answer to it depends in the first place upon the true interpretation of the word "furniture"

in sect. 3 (2) (b) of the 1939 Act. Counsel for the respondent argued that no question of interpretation arises. I say no more than that I disagree with him.

I will refer later in more detail to the various things which the county court judge held to be "furniture." At the moment it is sufficient to say that they fall into two classes, (i) loose articles which are admittedly "furniture" and do not pass under a demise of the flat; (ii) what in building and architectural circles are usually called "fitments," that is to say, conveniences in the shape of fittings fixed to the structure of the flat which perform functions similar to those of loose articles of furniture, but quite clearly do pass under a demise of the flat. They are in fact "fixtures" within the true meaning of that word, since they are affixed to and form part of the inheritance, although, if the lessor here is, as she probably is, herself a leaseholder, she is entitled to remove them as against her lessor. The county court judge appears to have thought that as (a) the various things in this class fulfil the same functions as corresponding articles of loose furniture and, (b) a tenant, if he had himself affixed them, could have removed them at any time during the tenancy, they are therefore "furniture" for the purpose of sect. 3 (2) (b) of the 1939 Act. With regard to (a) above, the fact stated is undoubtedly correct. It is in respect of (b) that the county court judge, in my opinion, fell into an error since, for reasons which will appear, the fact that a tenant, if he had himself affixed these things, could have removed them is, as it seems to me, an entirely irrelevant consideration.

In my opinion, apart from the special language of the tenancy agreement itself, the answer to this question is to be found in the language of sect. 3 (2) (b) of the 1939 Act. That paragraph assumes the existence of two distinct kinds of subject-matter, namely (1) a dwellinghouse, (2) matters distinct from the dwellinghouse, namely, board, attendance and the use of the furniture. It also treats an inclusive rent as severable into two elements, one of which is to be referred to the dwellinghouse, and the other of which is to be referred to the matter or matters distinct from the dwellinghouse. In the case of furniture the latter element is referable to the "use" of the furniture. If, as in the present case, the "use" of the things in question is something which the tenant enjoys *ipso facto* under the demise of the dwellinghouse, that "use" is included in that element in the rent which is referable to the dwellinghouse.

The matter may be put in another way. "Board" and "attendance" are matters which are provided for the tenant by virtue of a contract distinct from the demise of the dwellinghouse. The collocation of the words "use of furniture" with "board" and "attendance," is a clear indication that in the case of furniture also the use of it is something which the tenant enjoys under a contract distinct from the demise of the dwellinghouse. *Noscitur a sociis*. The section is, therefore, contemplating the case where there is (i) a demise of a dwellinghouse, (ii) a contract distinct from the demise under which the tenant enjoys the benefits of a contract for the supply of goods, a contract for services, or a contract of hiring furniture, as the case may be.

Two questions, therefore, may arise in any given case. First, are the things in controversy things of which the tenant enjoys the use otherwise than by virtue of the demise itself? Secondly, if so, are those things "furniture"? In the present case the things of which the tenant enjoys the use otherwise than by virtue of the demise are admittedly "furniture." No question, therefore, arises with regard to them. The controversy relates to the things which, as I have already said, the tenant clearly enjoys by virtue of the demise itself and therefore are, in my opinion, not "furniture" within the meaning of the paragraph.

The tenancy agreement is dated Oct. 8, 1940; and by it the landlord lets to the tenant:

All that flat on the fourth floor of and being No. 50 in the messuage or block of flats known as Trinity Court, Gray's Inn Road, London, W.C.1. together with the right to use the lifts, entrance hall, staircases and landings in the building for three months, and thereafter from month to month, paying therefor during the said term the yearly rent of £78 by equal monthly payments in advance . . . and also paying by the like monthly payments the sum of £6 per annum for the hire and maintenance of the electric hotwater heater, cooker, two heating stoves, meter rent and the fixed charge for obtaining a flat rate for the whole of the electric supply.

By cl. 2 (3) the tenant agrees to keep in repair:

. . . the interior of the said flat and all the furniture fittings and fixtures therein

(a list of which is set out in the second schedule hereto).

By cl. 2 (4) to keep all windows, cisterns and furniture of the said flat properly cleansed. By cl. 2 (6) not without the written consent of the landlord to make any alteration in the said flat or remove any partitions, doors, or cupboards or other fixtures therein. Clause 2 (9) is in these terms :

To permit the landlord . . . to view the state and condition of the said flat and to take inventories of the fixtures therein.

By cl. 2 (13) the tenant agrees at the end of the tenancy to deliver up possession of the flat "together with all fixtures fixed or belonging to the flat." Clause 3 (2) contains an agreement for quiet enjoyment of "the said flat hereby demised." The second schedule is headed "Landlord's Fixtures and Fittings"; but its contents (in accordance with what is said in cl. 2 (3)) contains particulars not only of "fixtures and fittings," but also of loose articles which are admittedly "furniture."

The language of this document deserves more attention than it received during the course of the argument. In cl. 2 (3) a clear distinction is drawn between "furniture" and "fittings and fixtures." In sub-cl. (6) "cupboards" are referred to as "fixtures." Sub-cl. (13) refers to "fixtures fixed or belonging to the flat." The second schedule contains descriptions which I will number for convenience of reference, namely :

(1) Two fitted wardrobes with mirrors; (2) two fitted bed cupboards and beds; (3) three-light electric fitting with lamps and shades in the bed-sitting room; (4) electric centre fitting with shade and lamp; (5) fitted cupboard with drawers in the kitchen; (6) fitted dressing-table with three mirrors; (7) two electric light fittings with shades and lamps; (8) fitted cupboard and drawers in the bathroom; (9) two fitted cupboards with drawers; (10) electric light fitting with lamp and shade in the hall.

As a mere matter of construction of the document, it seems to me clear that, as between the parties, all these things are to be regarded not as "furniture," but as fittings, since they are so described. Moreover, Nos. (2), (5), (8) and (9) are "cupboards," and cl. 2 (6) of the agreement refers to cupboards as "fixtures."

The importance of this aspect of the matter lies in the fact that there is nothing to prevent a landlord and a tenant agreeing that for the purposes of the lease a loose article which would normally fall under the word "furniture" shall be regarded as a "fixture." In the unreported case of *Burns Wallace v. Hardingham* (1), a house was let with "Fixtures as in schedule," and the schedule mentioned (*inter alia*) linoleum. LORD STERNDALE, M.R., and ATKIN, L.J., sitting as a Divisional Court, held that it was not furniture, the reason being (as was pointed out by SCRUTTON, L.J., in *Wilkes v. Goodwin* (2) at p. 101) that the parties themselves did not treat the linoleum as furniture (which normally it would have been) but as a fixture.

Of the articles which I have numbered, the following were held by the county court judge to be "furniture" within the meaning of sect. 3 (2) (b) of the 1939 Act, namely, Nos. (1) (fitted wardrobes) and (2) (fitted bed cupboards), which he said "really form one composite piece of furniture"; Nos. (3), (4), (7) and (10) (electric light fittings).

I will develop later my view, already expressed, that quite apart from the express language of the tenancy agreement itself, all these articles are fixtures the use of which the tenant has by virtue of the demise itself and not by a contract of hiring distinct from the demise; but in any event the parties have in terms agreed to treat them as "fittings" and not as "furniture," and for this reason alone the decision with regard to them ought not to stand.

Having regard to the conclusions which he reached on the question of value, the county court judge expressed no opinion on Nos. (5) (fitted cupboards in kitchen); (6) and (8) (fitted dressing-table and fitted cupboard in bathroom); or (9) (two fitted cupboards in hall). It may be that No. (5) is what he refers to as a "dresser," in which case he seems to have held that it was not furniture. Subject to this item, had he found it necessary to deal with these articles he would, apparently, on the principle which he adopted, have held them to be furniture; and counsel for the respondent argued that they ought to be so treated. Both on the language of the tenancy agreement and on the more general principle as to fixtures, with which I will deal later, I am of opinion that these things are not "furniture."

The second schedule contains descriptions of a number of articles which are clearly or admittedly furniture and not fixtures or fittings. These are "loose sideboard" (on which a special point arises) and "standard lamp" in the bed-sitting room; "electric refrigerator" and "linoleum" in the kitchen, "linoleum" "rubber curtains to shower-bath" in the bathroom; and linoleum in the hall. The county court judge rightly held that all of these were "furniture." The linoleum was not fastened down. There were also two electric stoves and an electric table cooker which were included in the £6 payable under the agreement. The judge was not satisfied that these were "furniture."

There remain two other items which the judge held to be furniture, namely, a mirror and shelf over basin in the bathroom, and what he calls a "hot water roller in bathroom," obviously the same as what is described in the second schedule as "chromium plated hotwater towel rail." The mirror and shelf are to be seen in the reflection of the bathroom dressing-table mirror in one of the photographs. They are of a well-known type and are obviously fixtures. The towelrail is also obviously a fixture. These items are not described in the second schedule as being fittings, and the position with regard to them must be ascertained independently of the language of the agreement.

As I have said, the judge dealt with the question without regard to the language of the agreement; and it now becomes necessary to examine the position on that basis. The judge in holding the various fixtures which I have described to be furniture, based his decision on the general ground that, if they had been affixed to the premises by the tenant, he could have removed them, and that they would, therefore, remain furniture; and he added "would they be any the less furniture if they belonged to the landlord?" He alluded to the fact that some of these things had been made by furnituremakers. He dealt at greatest length with the wardrobes and bed cupboards in the bedroom which are affixed to the wall by screws, the wardrobes (but not the bed cupboards) having wooden backs. When the bedcupboards are opened the beds (which when not in use stand upright against the wall with their legs folded) descend on hinges screwed on wood screwed into the floor. The object of screwing the fitment to the wall he found to be to prevent it from moving or falling forward when the beds are moved up or down.

This method of fixing he held negatived any intention on the part of the landlord:

... to affix the article so as to make it a fixture forming part of the realty and so brings the article within the second principle in *Leigh v. Taylor* (3) at p. 158.

The electric light fittings with their shades and bulbs he held not to be fixtures at all. He said that the practice was universal for the tenant (if he supplied them) to remove them at the end of his tenancy. He gave his reasons for holding that the mirror and shelf and the towelrail were furniture.

In my opinion, the judge approached the question before him from quite a wrong point of view. The question is not what would have been the proper description and status of these articles if they had been affixed by the tenant. Nor is it relevant to consider what the position would have been if the landlord had disconnected them before the tenancy agreement was made. Nor is it relevant to consider what would be the position as between the landlord and a superior lessor. The question, in my opinion, is, did they pass by the demise itself, or are they articles the use whereof is enjoyed by the tenant under a distinct contract of hiring? There can only be one answer to this question.

The test which I consider to be the right one, namely, did the use of the articles come to the tenant by virtue of the demise, follows, in my opinion, from the clear language of the statute. It has the merit of easy and universal application. If it is not the right test, very few modern flats will fall within the Acts, since space-saving fitments such as fitted wardrobes, cupboards, etc., are the rule, not the exception. It covers the common case of the kitchen dresser screwed to the wall; I can see no ground for holding that such a dresser is not furniture, if the test adopted by the judge is the right one, since, if a tenant affixes such a dresser, he can remove it. It is worthy of remark that, in no case has it ever been suggested that fitted wooden cupboards (which have been common for years) or dressers are furniture, a fact all the more remarkable when it is remembered that before the 1923 Act, the inclusion of any article of furniture was sufficient to take the case out of the Acts (*Wilkes v. Goodwin* (2)).

There is another point worth noting. Under the 1920 Act business premises were for a time within the Acts. If let together with the use of furniture, they were outside the section (*Necchi v. Cranchi* (4)) and the principle just cited from *Wilkes v. Goodwin* (2) would have applied. Fitted cupboards and other fittings of the same kind are to be found in most shops and many other business premises, and it would, accordingly, have been the exception for such premises to fall within the Acts.

The test which I favour can be examined from other points of view. A contract to sell these flats would have covered all these articles. The vendor could not have removed them after the signing of the contract. If the flats had been devised by will to one person and the furniture bequeathed to another, these articles would have gone to the devisee. These two tests are taken as the right ones by SCRUTTON, L.J., in *Wilkes v. Goodwin* (2), at p. 97, where he says:

Would the article or articles in question pass under a contract to buy the "furniture" in the house, or a will bequeathing the "furniture" in a house?

There is authority on the question. In *Crane v. Cox* (5), it was held that fixtures and fittings were not furniture and articles held to be fixtures or fittings were a gas-cooker, blinds, a gas-fire, cornice poles and gas brackets, all of which, according to the reasoning of the judge in this case would be furniture. This decision has stood in the books uncriticised on this point—the comments on it in *Wilkes v. Goodwin* (2) were directed to a different matter. Since the decision in *Crane v. Cox* (5) the Acts have been amended time and again. Sect. 10 of the 1923 Act dealing with furniture was no doubt passed to remedy the defects disclosed in *Wilkes v. Goodwin* (2). Sect. 3 (2) (b) of the 1939 Act corresponds to the like provision in the 1920 Act (sect. 12 (2) (i)); and sects. 9 and 10 of the 1920 Act which limit the charges to be made in cases where rent includes "payment in respect of the use of furniture" were applied to houses under the 1939 Act by the First Schedule to that Act. It is impossible to suppose that, if the legislature had desired to alter the meaning of the word "furniture" as interpreted in *Crane v. Cox* (5), it would not have done so, particularly when it is remembered that sect. 10 of the 1920 Act and its application by the 1939 Act create a criminal offence.

I have already referred to certain observations of SCRUTTON, L.J., in *Wilkes v. Goodwin* (2). The article in question in that case was linoleum; and one argument was that it was not "furniture." It was held by this court that it was "furniture." BANKES, L.J., referred to that word as a "common and well-understood word" (at p. 93); and at p. 95 he said:

... the only safe guide to what constitutes "furniture" within the meaning of the Act is to consider first whether the article or articles in question come within the popular meaning of the word . . .

Similarly, SCRUTTON, L.J., at p. 97, said:

The first question will be answered by taking the ordinary use of "furniture" . . . The court was dealing with a loose article and not with fixtures or fittings; but the test is applicable in the case of fixtures or fittings, too, since the ordinary popular meaning of the word "furniture" is confined to movable articles, as appears from the definition in the NEW OXFORD ENGLISH DICTIONARY.

The county court judge referred to *Leigh v. Taylor* (3); but that case was not concerned with what passes under a demise. It dealt solely with the question as to whether, as between the executor of a limited owner and the remainderman, the former had the right to remove the ornamental tapestry. It was held, to use the words of LORD HALSBURY, at p. 160, that there was nothing which pointed to any intention to dedicate these tapestries to the house. Here the question, in my opinion, is an entirely different one and is, what as between landlord and tenant, passed by the demise.

It was argued that, if an article which serves the same purpose as a corresponding piece of loose furniture ceases to be furniture if it is so fixed as to pass by virtue of the demise, such an article as a table or a settee, if screwed to the floor at the date of the demise, would not be furniture for the purposes of the statutes. This argument leaves me unperturbed. It is for the lessor to show that the dwellinghouse is excluded from the Act by reason of the inclusion of furniture. If he chooses so to equip the dwellinghouse that articles which he might have let to the tenant as movable articles under a contract of hire, had

he so chosen, pass instead under the demise itself, he can scarcely complain. He cannot be heard to say to the tenant: "True it is that I let these articles to you as part of the dwellinghouse, nevertheless, now that there is a question of the Rent Restrictions Acts, I claim to have them treated as furniture the use of which is enjoyed by you under a contract distinct from the demise."

A The fact that part of the most important of the fitments consists of bed cupboards with bedsteads lends a certain speciousness to the argument for the respondent. Who would dream of saying that a bedstead is not "furniture"? it is asked. My answer to this question is that we are dealing not with the meaning of the word "furniture" in general, but with its meaning in a particular context; and that there is no more reason why a bedstead rising and falling on hinges fixed to the structure of the flat should not be a fixture than, for example, a hinged flap table fixed to the wall (a very common kind of fixture which no one, I imagine, would dream of calling "furniture" for the purpose of the B Acts), the hinged lid of a lavatory, a tip-up wash-basin, or any similar hinged device. If the landlord chooses to install hinged fixtures in his premises in this way, the fact that their functions might have been performed by loose articles is, in my opinion, nothing to the point. Indeed, the argument with regard to the bed cupboards when analysed comes to nothing more than saying that, as bedsteads are normally loose articles and, therefore, "furniture," it follows that they remain furniture even when they are fitted as part of a fixture. C But this argument does not, in my opinion, bear examination. There is scarcely a fixture whose functions could not be performed by a loose article. A cupboard, a fixed wardrobe, a lavatory basin, a bath, a table, bookshelves—all can be either fixtures or movable furniture. In the development of constructional technique many articles which formerly used to be provided as furniture by a tenant have become part of the fixed equipment provided by the landlord. D In a modern hotel such a thing as a movable wardrobe is seldom seen—its place is taken by a "fitment." Such a fitment is made of wood, as are those in the present case. If it was made of breeze blocks bonded into the wall, no one would call it "furniture." But, according to the argument, if it is made of wood and fixed to the wall in the only effective way in which wood can be fixed, namely, by screws, it is, apparently, "furniture." Why this discrimination against a fixture made of wood should be made I fail to see. Indeed, this E argument appears to me to be incapable of leading to any consistent result. It does not cover such a case as that of the kitchen dresser, which no one suggests is "furniture." It assumes that the list of fixtures or fittings as distinguished from furniture has in some way become closed; that only those things which our fathers were accustomed to expect in the houses which they took are to be regarded as fixtures or fittings; and that modern types of fixtures or fittings must be regarded as "furniture." Any such idea appears to me to be calculated F to leave outside the Act many modern dwellings which ought to fall within it. Two minor points remain to be mentioned. The "loose sideboard" was never in fact delivered and it was argued that the tenant never had the use of it. The judge rightly rejected this argument. The rent clearly included a payment in respect of its use; and the tenant could have obtained it if he had pressed for it.

G The other point is that secondly mentioned at the beginning of this judgment, namely, that the judge did not have regard to the value to the tenant of what he held to be furniture. In particular, it was said that the tenant did not need the bedsteads as he brought bedsteads of his own and, accordingly, that the bedsteads provided were of no value to him. The section does not direct the court to give effect to any consideration of this kind—the most that it must do is to have regard to the value to the tenant. I cannot assume that the H judge omitted to do this: he was entitled to come to the conclusion on the facts that this particular element in his calculations was one which did not justify him in reducing the amount of rent which he held to be attributable to the use of the furniture. The mere fact that the tenant did not need to use the bedsteads does not mean that they were of no value to him. They formed part of the conveniences of the flat and were available for his use.

I would allow the appeal and send the case back to the county court judge with a direction to ascertain whether the amount of rent which is fairly attributable to what I hold to be furniture forms a substantial portion of the whole rent;

but as **MACKINNON** and **DU PARCQ, L.JJ.**, take a different view, the appeal will be dismissed with costs.

MACKINNON, L.J. [read by **DU PARCQ, L.J.**]: The only reason why I have any doubt about this case is because I find that **LORD GREENE, M.R.**, has come to a conclusion other than that which commends itself to me.

This is an appeal from the judgment of the judge of the Clerkenwell County Court. The plaintiff was the owner of a block of flats in the Gray's Inn Road called Trinity Court. By an agreement dated Oct. 8, 1940, the plaintiff let to the defendant one of those flats, being No. 50. It apparently contained four rooms, an entrance hall, a bed-sitting room as its largest unit, a kitchen and a bathroom. The term was for three months and thereafter from month to month until the tenancy should be terminated by one month's notice on either side. The yearly rent was £78 payable by monthly instalments, and a further £6 per year by like instalments in respect of certain electric apparatus and supply of electricity. The agreement is not in terms expressed to be a letting of furnished premises, but among the tenant's covenants is one by which he is:

... to keep the interior of the flat and all the furniture fittings and fixtures therein (a list of which is set out in the 2nd Schedule) ... in good and tenantable repair. The second schedule specifies a number of articles under the heading "Landlord's Fixtures and Fittings."

On June 11, 1942, the plaintiff gave the defendant a month's notice to quit. *Prima facie* she was entitled to do so under the terms of the agreement. The defendant, not having complied with this notice, the plaintiff, on Aug. 13, 1942, issued a writ in the High Court claiming possession. This action was remitted to the Clerkenwell County Court. The defence of Oct. 27, 1942, pleaded as follows:

The defendant will rely on the Rent Restrictions Acts, 1920-1939. ... In particular the defendant will contend that the said premises were not and are not a furnished dwellinghouse within the meaning of the Rent Restrictions Acts.

This particular contention was in anticipation of the certainty that the plaintiff would by way of reply rely upon sect. 3 (2) (b) of the 1939 Act, which provides:

The principal Acts shall not ... apply ... to any dwellinghouse *bona fide* let at a rent which includes payments in respect of ... use of furniture.

The issue thus raised was the only one for determination by the judge and upon it he heard evidence.

It was manifest from that evidence that, if, when he took this flat, the defendant was a newly married man setting up house, he would be spared a great many of the expenses of one in that position who takes an unfurnished dwelling. There was no need to provide beds for the couple; they were provided by the landlord and specified in the schedule. There was no need to provide a wardrobe for his clothes, or one for those of his wife, a wardrobe for each was so provided and specified. There was no need to provide a dressing-table or mirrors; there was a dressing-table with mirrors in the bathroom, and there were other mirrors on the doors of the wardrobes. There was no need for a sideboard in the bed-sitting room; there was one in the schedule to the use of which he was entitled. Unless they had a fancy for extra rugs or carpets, there was no need to buy floor coverings; for linoleum was fitted and laid throughout the premises. In short, if I may use my own knowledge of the sort of equipment necessary for people starting residence in such a little flat, the only things that it would be essential to purchase by way of furniture would be a table, two chairs, household linen and blankets, cooking utensils, knives and plate and crockery.

There was evidence, which the judge appears to have accepted, that all the flats in the building were similar, and similarly equipped, to this one: and that the cost of the actual building was some £12,600, and of the "landlord's fixtures and fittings" as expressed in the second schedule was for all the flats some £11,000.

Upon this evidence it would seem that the judge had ample material upon which he could find, as he did find, that this was "a dwellinghouse *bona fide* let at a rent which includes payments in respects of use of furniture." From that finding the defendant can only appeal if he can establish that the judge was wrong in law. He seeks to do so upon a contention that the judge has put a wrong construction upon the word "furniture" in the section. It is not

denied, of course, that beds and wardrobes are pieces of "furniture"; but it is said that in order to be "furniture" within the section, a bed or a wardrobe must be a movable article, whereas these beds and wardrobes, and most of the articles specified in the second schedule, are affixed by screws or other connections to the walls or floors of the building. And being so fixed, and not movable in their normal user, they cannot be "furniture" within the section.

A It was first said that "furniture" must be "movable," and the definition of the NEW OXFORD ENGLISH DICTIONARY was invoked. That is as follows:

Movable articles in a dwellinghouse, place of business, or a public building (now the prevailing sense) dating from 1573.

I cannot agree that to constitute furniture the articles notoriously within that description must be movable. It seems to me that it would be absurd to say that members of the Bar have the use of no furniture in this court, and that my brethren and I have the use of no furniture except the chairs on which we are now sitting. Of course, articles of furniture are usually movable, and the definition of the NEW OXFORD ENGLISH DICTIONARY is amply justified; but if a pedant had said to the late Dr. Murray: "Barristers in the law courts sit on very uncomfortable wooden seats with very inconvenient desks in front of them. Those seats and desks are fixed to the floor. Do you say those seats and desks are not furniture?" I feel sure he would have replied that he did not.

C I, personally, have no doubt that it is no part of the proper definition of "furniture," in its ordinary meaning, that it must consist of movable articles. The briefest mental survey of my own house recalls many things that are fixed to the wall—mirrors, a bracket-clock, corner cupboards, many book-shelves, a medicine cupboard—which everyone would describe as articles of furniture. In houses I knew in my earlier days there were many articles of Victorian mahogany which were certainly not movable (except by a powerful crane), and to screw them to floor or wall was a superfluity. But they were certainly D "furniture" though not movable by unaided human effort. A billiard table is only movable after it has been taken to pieces.

Then it was said that, if the present respondent made a will by which she bequeathed the building of this block of flats to A, and the furniture in them to B, the latter would only get the sideboards and standard lamps, but A would get all the beds, wardrobes, etc., on the doctrine of their being affixed to the freehold. E If the respondent did make such a will she might, of course, suffer the fate that has befallen so many testators—that of having their manifest intentions defeated. That it would be her manifest intention, as a user of ordinary English, that B should have these beds and wardrobes, I should have no doubt. But I protest against the suggestion that, in order to construe a simple English word in an Act of Parliament, one should have recourse to its use in a hypothetical will of which another part, in the light of a highly technical rule of real property, F throws doubt on the meaning of that simple English word.

Then it was said that the structures I have spoken of as wardrobes—they are described in the second schedule as "fitted wardrobes"—were really only "cupboards," and cupboards are not furniture. "Cupboard" is a word of several meanings. No doubt the common cupboard under the stairs is not a piece of furniture, nor the cupboard which was once more commonly called a closet. But a cupboard fitted up for clothes may just as well be called a wardrobe and is certainly a piece of furniture. G

Then it was said that, because these articles are fixed to the walls or floor they pass to the tenant under the demise of the flat, and the tenant does not enjoy their use under a contract for the use of chattels. Most of us have had experience of taking furnished houses for a term. But I have never known such an agreement to specify separately payment for the demised house, and payment H for the use of the furniture. Indeed, the section now under consideration obviously contemplates a single amount payable to the landlord, and the judge has to inquire how much, if any, of that single payment by way of "rent" is "for the use of furniture."

I think the word "furniture" in this section is to be construed as a common English word, or, as BANKES, L.J., said in *Wilkes v. Goodwin* (2), "the popular meaning of the word." For articles to be "furniture" within that meaning I do not think it is essential that they shall be movable, and though, of course, articles of furniture are commonly movable, I do not think they pass out of the

popular meaning of furniture because they are fixed by a nail or a screw to wall or floor. Further, I think that the judge was right in treating these beds and wardrobes as articles which come within the ordinary and popular meaning of furniture.

In strictness, perhaps, one should add "the ordinary or popular meaning of furniture at the present day." For no doubt the ambit of the word has changed. The close-stool of our ancestors is as obsolete as the triclinium; the round bath and its accompanying can of my undergraduate days is gone. No one would speak of their substitutes, the apparatus of the water closet or the bath in the bathroom as furniture. But that would not be because they are fixed to floor or wall, but merely because they are not within the common or popular meaning of the word. A contrasted change may be that, whereas no one would include a fireplace within furniture, the electric fire which can stand anywhere, with a wire to a wall plug, probably would be called a piece of furniture. But there again that is not because it is movable, but because it is within the common or popular meaning.

In my view, therefore, the judge was right in the matter of construction. If so, there can be no question that there was ample material on which he could find that the amount of rent fairly attributable to the use of these articles of furniture formed a substantial proportion of the whole rent within sect. 3 (2) (b) of the 1939 Act.

In the result I think this appeal fails and should be dismissed.

DU PARCQ, L.J. : I have had an opportunity of considering the judgments of LORD GREENE, M.R., and MACKINNON, L.J., and must now state my reasons for agreeing with the view taken by MACKINNON, L.J. The principal question at issue is whether, for the purposes of the relevant sections, the word "furniture" must be read as necessarily excluding all fixtures, that ambiguous word being here used in the sense of "things affixed to the freehold." If it were to be so construed, the concluding words of the first proviso to sect. 12 (1) of the principal Act might be paraphrased as follows : "A rent which includes payments in respect of . . . use of furniture consisting of chattels not annexed to the realty." If Parliament had enacted the proviso in those terms, it would, I think, have been a matter for some surprise. The question whether chattels have been annexed to the realty is indeed often of great importance. As between heir and executor, life tenant and remainderman, or landlord and tenant, it may be a matter of moment, decisive of the rights of rival claimants to the possession and ownership of property. It is apparent, however, that the subject-matter of the section which we are considering has nothing to do with any such rights. The hereditament which the landlord lets and all the objects (to use a neutral word) with which it is equipped for the use or delectation of the tenant are indisputably the property of the landlord, and the tenant is at no time entitled to remove them from the demised premises. Indisputably, also, the tenant has the right, during the term, to possess, and to enjoy the use of, all those objects, whether they are annexed to the realty or not, and it matters nothing to him whether or not they have lost their character of chattels provided that he can conveniently use them. Apart from authority, therefore, it would seem to me to be plain that the question whether the articles which the county court judge held to be furniture were, or were not, fixtures, was irrelevant. MACKINNON, L.J., has mentioned various fixtures which are commonly called furniture. I agree with him in thinking that they are properly so called.

It was said that there is authority for the proposition that fixtures cannot be furniture. If that proposition had been authoritatively laid down, I should, of course, accept it, though I confess that I should do so with reluctance, because it would be contrary both to my own understanding of the English language and to what I believe to be the manifest intention of the legislature. I am satisfied, however, that such authority as is binding upon us lays down no such proposition, but is rather to the contrary effect. It is true that in *Crane v. Cox* (5) words were used by two judges in the Divisional Court which seem to support it. That decision does not bind us, though I appreciate the force of the observation made by LORD GREENE, M.R., that Parliament must be supposed to have known of the interpretation placed upon its language by the Divisional Court and, with that knowledge, to have left the proviso unamended so far as this particular point is concerned. It must also be assumed, however, that

Parliament did not fail to observe what was decided by this court, one month after the decision in *Crane v. Cox* (5), in *Wilkes v. Goodwin* (2). There the question was whether linoleum covering the floors of the rooms came within the description of "furniture." In the course of the arguments it was submitted, on the one hand, that linoleum, being fitted to the floors, was not furniture, but "more like a fixture, such as parquet," and, on the other hand, that, even if it was temporarily fixed to the floor by nails that did not take it out of the category of movables, "for it would be removable as between the landlord and tenant, just as much as a carpet." The court sent the case back to the county court in order that the judge might find certain facts. One of the questions of fact which he was asked to answer was "Whether the 63 square yards of linoleum in four rooms is 'furniture'?" (*per SCRUTTON, L.J.*, at p. 99). The court gave the judge some guidance, but said nothing to suggest that he ought to ascertain or consider whether or not the linoleum was annexed to the realty, and does not seem to have thought that point of any materiality. The arguments of counsel, to which I have just referred, lead me to think that the linoleum may well have been a fixture. The real importance of *Wilkes v. Goodwin* (2) is that it lays down the one test which a county court judge ought to apply. He is to consider whether the article in question comes within the popular meaning of the word "furniture." This, said *BANKES, L.J.*, at p. 95 is "the only safe guide to what constitutes 'furniture' within the meaning of the Act." I respectfully agree, and I would add that the test so laid down in *Wilkes v. Goodwin* (2) does not demand, and indeed precludes, an inquiry whether or not the articles in question have become and must remain part of the realty. *SCRUTTON, L.J.*, said of *Crane v. Cox* (5) that he did not agree with the reasons for the decision which had been given by the court. He mentioned some of the reasons with which he disagreed. A further unsatisfactory reason which *SCRUTTON, L.J.*, did not mention was that given by *BAILLACHE, J.*, for holding (rightly, as I think) that linoleum might be said to be furniture, namely, that "it was put over the floor instead of a carpet." We are all agreed, I think, and it seems to me to be plain, that it is not right to call an article a piece of furniture merely because it replaces, or is a substitute for, something which is furniture. As *MACKINNON, L.J.*, has said, we do not call the bath in a bathroom a piece of furniture although it replaces something, once in more common use, which might aptly have been so described. It is unnecessary to comment further on *Crane v. Cox* (5). If it is to be treated as deciding that what is properly called a fixture cannot also properly be called furniture, I regard it as inconsistent with the general principle laid down in *Wilkes v. Goodwin* (2) and as impliedly overruled by that decision. For myself, I hope that county court judges, in cases of this kind, will never again think it their duty to decide as to each article whether it is a "fixture" or might, if it belonged to a tenant, be said to be removable as a "tenant's fixture." The word "fixture" is often loosely used, and not always with the same meaning. Its introduction into cases of this class serves only to confuse what should be a comparatively simple investigation. The question to be decided is not one of law. The word "furniture" has no esoteric significance. Expert evidence is not necessary to enlighten the judge as to its meaning, nor ought he to be influenced by what other judges have decided about other articles. Decisions on questions of fact do not bind other tribunals, and, if anyone chooses to report them, their citation ought not to be encouraged. The judge is, of course, entitled to consult a dictionary if he thinks it helpful to do so, but in the end he must answer, as a juryman would, the question: Which of these articles ought to be described, in a popular sense, as furniture? If he applies his mind to that question, his decision can be assailed in this court only on the ground that it involves a finding to which, on the evidence, no reasonable man could come.

In the present case the judge did address his mind to this question of fact, and, although he was induced to pay undue attention to the different question whether, if the articles had been annexed to the realty, not by the lessor but by a tenant, they would have been "tenant's fixtures," I am satisfied that (save possibly as to one article to which I shall refer later) the appellant's case was not thereby prejudiced. A definition from the *NEW OXFORD ENGLISH DICTIONARY* was cited before the judge, and stress was laid, as it was at the Bar in this court, on the word "movable" which that definition contains. It

was suggested that what was fixed could not be movable, so that, applying the test of popular meaning, the conclusion that fixtures could not be furniture was reached by another path. I would observe, however, that movable only means "capable of being moved." An apple growing in an orchard is movable. The proposition that no article which is fixed or annexed to the structure of a building is capable of being moved is not one to which any jurymen would be likely to assent except under duress. In 1750 LORD HARDWICKE said of beds that they were sometimes "fastened to the ceiling with ropes, nay, frequently nailed, and yet no doubt but that they may be removed": see *Ex p. Quincey* (6), at p. 478. LORD HARDWICKE was speaking, of course, of the right of the tenant, but it is manifestly true as a physical fact that many things which the ordinary man calls furniture are fixed to a structure but are still capable of being moved. If in 1750 an enterprising thief had been able to unfasten and to carry away the bed of a householder, he might well have taken the point, if he had been accused of stealing it, that his act was no felony, because the asportation had immediately followed on the severance, so that the bed still savoured of the realty and could not be the subject of larceny. That would have been a good plea and might have saved him from hanging. If, however, it had been necessary for him to convince a jury that the bed which he was carrying away was not furniture "in a popular sense" because it was not movable, he would, I think, have had short shrift. The conclusive answer would have been that he himself had proved in the most practical manner that it was movable, since he had moved it. If a thing which would ordinarily be regarded as an article of furniture has been attached to a structure, and can be detached and moved and still be recognisable as the same article of furniture, then, in my opinion, furniture it is. The word "movable" is necessary to the definition only because the ordinary man does not describe as furniture things which are, in fact, part of the structure of the house (e.g., most, if not all, mantelpieces). His reason is not that they are "fixtures," but that they really are part of the building. The distinction between fixtures and parts of the structure is usefully drawn in *Boswell v. Crucible Steel Co.* (7). When SCRUTTON, L.J., referred to questions of fact which may arise under wills, he may have had in mind the decision of the Court of King's Bench in *Birch v. Dawson* (8). There the question was whether a looking-glass nailed to a chimney piece, and a bookcase screwed to the wall, passed under a bequest of "fixed furniture." The court was unanimously of opinion that they did. TAUNTON, J., put the point concisely in an interrogative form. He asked, at p. 40:

Are not looking-glasses furniture? and are not these looking-glasses fixed? If so, are they not fixed furniture?

It does not seem to have occurred to any of the judges that the expression "fixed furniture" was, as the appellant's argument would suggest, a contradiction in terms. The Court of King's Bench appears to have thought, as I humbly think, that the testator had used good and plain English.

If the judge's decision can be supported as a justifiable finding of facts, without error in law, then it seems to me that the question which finally falls to be decided can be simply answered. That question is: Did the rent which the defendant agreed to pay include payments in respect of the use of furniture? The agreement certainly gave him the right to enjoy the use of the articles enumerated by the judge. Nobody doubts that he was paying for the use of them. The payment that he made for them must necessarily have been included in the rent, because (apart from the sum of £6 paid for a separate consideration) he paid nothing to the landlord except a "yearly rent of £78."

The appellant further relied on an argument founded on the unreported case of *Burns Wallace v. Hardingham* (1), to which SCRUTTON, L.J., referred in his judgment in *Wilkes v. Goodwin* (2). In that case what was let was, as the lease itself expressly stated, an unfurnished house, and it was, therefore, impossible for the landlord to say that the tenant was paying for the use of furniture, even though he had left in the house some articles which might have been so described. In the present case furniture is expressly mentioned in the tenancy agreement. A list of the "furniture fittings and fixtures" (see cl. 2 (3) of the agreement) is set out in the second schedule, and this list contains at least two articles which, according to the appellant's own admission, are furniture. In my opinion, the appellant is not assisted either by the unreported decision or the observations

made upon it by SCRUTTON, L.J. With respect, I do not think that the law permits a landlord and tenant to alter their statutory rights and liabilities by agreeing between themselves either that what is not, in fact, furniture shall be deemed to be furniture for the purposes of the Act, or that what is furniture shall be deemed not to be furniture for the purposes of the Act.

A If the judge's findings of fact are considered in the light of what I understand to be the true rule of construction, I am of opinion that, with one possible exception, they are reasonable and justifiable. The exception is the hot water roller, or rail, in the bathroom. I doubt if the judge would have called this furniture if he had not regarded it as a "tenant's fixture" which the hypothetical tenant who had notionally fixed it to the hereditament would have been permitted to remove. If I am right, this is an illustration of the trouble which may be caused by unnecessarily importing a fiction into a case in which the court is only concerned with facts. It is hardly necessary to add that many "tenant's fixtures" (for instance, wainscoting) are not furniture. This doubt cannot, however, affect my decision. The rail or roller is of very small value, and the judge tells us that he would regard the annual value of the furniture as still substantial even if his list were very considerably reduced. On the main point, therefore, the appellant, in my judgment, fails.

C With regard to the subsidiary points on which LORD GREENE, M.R., takes a view adverse to the appellant, I am happy to find myself in complete agreement with him. As the appellant relied on a passage in my judgment in *Brown v. Robins* (9), I will add a few words to what LORD GREENE, M.R., has said with reference to the sideboard. I do not wish to retract, or to modify, anything which I said in that case. There the tenancy agreement provided that the tenant might call for certain furniture to be delivered to him if he chose to do so. He had not in fact done so, and that furniture had never been delivered. In those circumstances the tenant could not be said to have paid for the use of it. D In the present case, it seems manifest that the rent paid by the tenant included a payment for the use of the sideboard. He had a right, without demand, to the immediate possession of the sideboard from the beginning of the tenancy. It was only through inadvertence that it was not placed in the flat. In my opinion, nothing that is being decided in this case conflicts with what was laid down in *Brown v. Robins* (9).

E For these reasons I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: W. G. Street & Co. (for the appellant); Lea & Lea (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

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LAWRENCE v. JOHNSON.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du ParcQ, L.J.J.), July 2, 5, 1943.]

Emergency Legislation—Landlord and tenant—Restriction on remedies—Action to recover possession and arrears of rent—Conditions of application of the Courts (Emergency Powers) Acts—Liabilities (War-Time Adjustment) Act, 1941 (c. 24), s. 26.

H

The appellant was the landlord of a house of which the respondent was tenant. The rent originally fixed by a tenancy agreement of June 23, 1941, was £65 per annum. The appellant gave the respondent notice to quit because he wanted the house for his own occupation. On Mar. 13, 1942, the respondent was called upon to report for military service. On Mar. 18, the appellant's solicitors wrote to the respondent stating that the house was no longer required for the personal occupation of the appellant but, if the respondent remained, he must pay the standard rent of £110. On

Mar. 23, 1942, he elected to remain but refused to pay the standard rent. Thereupon the appellant took proceedings and obtained judgment for the arrears payable by instalments and the standard rent was fixed at £110. The respondent still refused to pay the standard rent but continued to pay £65 per annum rent and also the instalments of arrears. The appellant then took proceedings to recover possession and arrears of rent amounting to £36 16s. 8d. The county court judge held that the matter came within the Liabilities (War-Time Adjustment) Act, 1941, s. 26, and made an order for possession in 28 days to be suspended on payment of £6 5s. 10d. per month rent, the first payment to be made on Feb. 23, 1943. The appellant also obtained judgment for £36 16s. 8d. arrears of rent but was not given leave to proceed. The appellant contended that the case was not one which could be dealt with under the Liabilities (War-Time Adjustment) Act, 1941, s. 26:—

HELD: the respondent, when he elected to remain on Mar. 23, 1942, entered into a new tenancy and the question whether the powers of the court under the Liabilities (War-Time Adjustment) Act, 1941, s. 26, should be exercised must be determined on the facts as they existed at that date. Since the respondent had then been called up and would know his financial position with some certainty, he was not entitled to any relief under that section, because no circumstances had arisen after the contract was entered into to which the inability to pay was attributable.

[EDITORIAL NOTE.] This case turns upon the point that when a tenant holds over upon fresh terms—in this case an increase in the rent—there is a new tenancy and he will in future be paying rent under a contract entered into on the date of the holding over. This is, perhaps, elementary, but it has an important bearing upon the tenant's position under the Courts (Emergency Powers) Acts, since he can then rely only upon events which have happened after the holding over.

FOR THE LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1941, s. 26, see HALSBURY'S COMPLETE STATUTES OF ENGL'ND, Vol. 34 p. 49 and BUTTERWORTH'S EMERGENCY LEGISLATION, Statutes, Supp 9, p. 61.]

APPEAL by the plaintiff from an order of His Honour JUDGE DRUCQUER, Brentford County Court, dated Feb. 22, 1943. The facts are fully set out in the judgment of LORD GREENE, M.R.

B. Mark Goodman for the appellant.

The respondent did not appear and was not represented.

LORD GREENE, M.R.: The appellant is the landlord of a certain house of which the respondent is the tenant. The respondent, although duly served with notice of appeal, has not appeared before us. This is the second piece of litigation between the parties with regard to this house, but I need not go into the details of the first action. It is sufficient to say that the rent originally fixed by the tenancy agreement of June 23, 1941, was £65 per annum. That rent was in fact less than the standard rent which, it was found, was £110. Before the earlier proceedings took place the appellant gave the respondent 2 months' notice to quit, because he desired at that time to occupy the house himself. The respondent claimed the benefit of the Rent Restrictions Acts, and on Mar. 13 the respondent was called upon to report for military service. On Mar. 18 the appellant's solicitors wrote to the respondent's solicitors, saying that the house was not now required for the personal occupation of the appellant but, if the respondent remained, he must pay the standard rent of £110. He elected to remain, but refused to pay the standard rent and, accordingly, the appellant instituted the first action. In that action the judgment was for arrears payable by certain instalments and the standard rent was ascertained at £110. Notwithstanding that judgment, the respondent still refused to pay the £110 and continued to pay rent at £65, which was the original rent, and to pay the instalments of the arrears. The result of that was that arrears under the new rent of £110 were piling up; and on Nov. 24, 1942, the present action for possession and arrears of rent amounting to £36 16s. 8d. was begun.

The county court judge dealt with the matter on the footing that it was a case which fell within the provisions of the Liabilities (War-Time Adjustment) Act, 1941, s. 26, which was the section which extended the Courts (Emergency Powers) Acts to contracts made after the commencement of the war. He did not treat the case, nor, according to his judgment, was he asked to treat the case, as one in which he was to exercise his powers in relation to suspension of orders

for possession under the Rent Restrictions Acts. The only point taken was that section of the Liabilities (War-Time Adjustment) Act, 1941. The judge held that, under that section, he was entitled to make the order that he did, and the order that he made was an order for possession in 28 days, suspended on payment of £6 5s. 10d. per month rent, the first payment to be made on Feb. 23, 1943. That £6 5s. 10d. is, of course, rather more than the £65, the original rent, but substantially less than the standard rent of £110. He made no order with regard to the payment of £32 16s. 8d., for which the appellant got judgment, but did not obtain leave to proceed.

A In my opinion, the county court judge had no evidence before him to justify him in treating the case as one falling within that extension of the Courts (Emergency Powers) Acts. The original tenancy agreement was, as I have said, dated June 23, 1941, that is to say, it was dated after the Courts (Emergency Powers) Act, 1939, but the actual tenancy at the relevant date was a new tenancy entered into on Mar. 23, 1942, on which day the respondent, having been given the option of continuing in possession on payment of the increased rent of £110, which was in fact the standard rent, accepted that offer and decided to stay on. Accordingly, it must be shown by the respondent, in order to bring the section into operation, not only that he was unable immediately to satisfy a judgment or to pay the rent by reason of circumstances directly or indirectly attributable to the war, but those circumstances must be shown to be circumstances which arose after the tenancy was made or entered into. The tenancy here was made or entered into 10 days after the respondent was called up and was, therefore, made with full knowledge of what his circumstances were and what they were likely to be in the near future. It, therefore, appears that, deliberately and with his eyes open and knowing all the relevant facts, he entered into a tenancy agreement for a house the rent of which was one which he was quite unable to pay, and he claimed to keep that house and pay less than the rent which he had agreed to pay. In my opinion, there was not a particle of evidence before the county court judge to show that the circumstances which made him unable to pay the rent or to satisfy the judgment for arrears were circumstances which arose after the tenancy. They existed at the date of the tenancy. He knew perfectly well what the circumstances were; and there is no evidence of any change of circumstances since.

E It is right to observe that both these parties are small people. The appellant has got this little house. He is a civilian pay clerk in the Royal Air Force, being, as we are told, too old for active service, and the respondent is a bank clerk who is now in the Forces. The facts before the county court judge made it quite obvious that to the appellant this was a matter of very great hardship. His interest in the house was mortgaged and the instalments under the mortgage which he had to pay were substantially greater than the sum which the county court judge thought was the highest sum that the respondent ought to be called upon to pay. No circumstances having arisen after the tenancy was entered into, in my opinion, the whole basis of the judgment of the county court judge is cut away and there is no jurisdiction under that section either to refuse leave to proceed on the judgment or to suspend the order for possession in the way he did, giving the respondent the right to remain indefinitely at a reduced rent. This is a case where the only jurisdiction that he would have had appears to me with regard to possession to depend on the Rent Restrictions Acts, and with regard to the arrears on the general powers under the County Courts Act, 1934, s. 96. Under the Rent Restrictions Acts, what used to be sect. 5 (2) of the Act of 1920, but is now embodied in the Act of 1923, s. 4, the court has jurisdiction in the case of a controlled house, to suspend the operation of a judgment for recovery of possession or postpone the date of possession:

H . . . for such period or periods as it thinks fit, and subject to such conditions (if any) in regard to payment by the tenant of arrears of rent, rent, or mesne profits and otherwise as the court thinks fit . . .

In the present case, I cannot see any ground upon which that discretionary power could properly be exercised having regard to the relative circumstances of these 2 parties, and, in particular, to the fact that the respondent does not appear to me to merit sympathetic treatment, in that, as I have said, with his eyes open and knowing all the facts, he took a house which was far above his means and which he never ought to have taken at all. He ought to have gone

out and contented himself with a smaller house, the present house having much more accommodation than is required for his invalid mother. I cannot see, therefore, why, in the circumstances of this case and the facts as they stood when the matter came before the county court judge, he would have been justified in doing more than suspend the order for possession so long as the current rent from time to time at the proper rate of £110 was paid. That was the order, and, in my opinion, the only order, which ought to have been made in this case on the facts as they then stood. The remedy, if the respondent is in fact not able—and I am not even satisfied as to that on the facts—to pay that rent, is to take a house the rent of which is less than the substantial sum, for a person in his circumstances, of £110 per annum.

Under the Acts there is another power now contained in Sched. I of the Act of 1933, in which the court, for the purpose of sect. 3 of that Act, has power :

... to make ... an order ... for ... possession ... without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if (a) any rent lawfully due from the tenant has not been paid ...

That, of course, is the present case and, in my opinion, the case is one where the court should consider it reasonable, and I do consider it reasonable, to make an order for recovery of possession, but, using the discretionary power given by the other subsection to which I have referred, to suspend the order for possession so long as the current rent is paid.

The only matter that remains is the question of the judgment for arrears. With regard to that, this court is put in difficulty. The jurisdiction to decide the terms upon which a money judgment of this kind should be satisfied is one essentially for the county court judge. That does not mean that this court could not exercise that jurisdiction if it had sufficient material before it. The difficulty here is that the position is now substantially changed so far as the respondent is concerned by reason of the order that we propose to make as to the terms on which the order for possession is to be suspended. We think that, in the circumstances, the matter should go back to the county court judge with regard, and with regard only, to the judgment for the arrears and the instalments by which they should be paid. The matter will go back to him on that question with, of course, the direction that the section amending the Courts (Emergency Powers) Act, 1939, with which I dealt earlier in this judgment, which is now embodied in the consolidation Act, the Courts (Emergency Powers) Act, 1943 does not apply to the present case, because there are no facts which bring that section into operation.

The result, therefore, will be that the appeal will be allowed, the order for possession will be suspended so long as the current rent from time to time falling due is paid at the rate of £110 per annum, and the matter of the arrears will go back to the county court judge to determine by what instalments those arrears should be paid.

MACKINNON, L.J. : I do not think it necessary to add anything. I agree.

DU PARCQ, L.J. : I also have nothing to add and agree.

Appeal allowed with costs. Order for recovery of possession subject to suspension whilst the current rent is paid. Case remitted to trial judge on question of arrears.

Solicitors : Zeffertt, Heard & Morley Lawson (for the appellant).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

Re HODGE, deceased, MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LTD., v. MORRISON.

[CHANCERY DIVISION (Simonds, J.), July 2, 1943.]

Wills—Acceleration—Annuities subject to life interest—Disclaimer of life interest—Whether annuities accelerated.

The testatrix by her will, dated Dec. 17, 1935, provided that after the death of her sister and subject to the life interests given to her brother certain annuities should be provided, the first payments of which were

to be made 3 months after the death of the brother. The testatrix died on July 9, 1942, having been predeceased by her sister and thereupon the life interest of the brother took effect in possession. On Mar. 12, 1943, the brother disclaimed his life interest, and the question arose whether the annuities were accelerated to take effect as from the death of the testatrix or whether they were payable only as from the death of the brother :—

HELD : the annuities were accelerated to take effect as from the death of the testatrix and the first payment became due 3 months after her death.

[EDITORIAL NOTE. Where a gift is postponed for the purpose of letting in a prior interest, the general rule is that on the disclaimer or failure of the prior interest, the gift takes effect immediately. In the present case there was a direction to pay the first instalments of the annuities 3 months after the death of the donee of the prior life interest. This is held to be merely an administrative provision and not a direction that in any event the annuities are not to be paid until that date. Thus the annuities would commence from the death of the testatrix.

AS TO ACCELERATION OF SUBSEQUENT INTERESTS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 132, 133, para. 171 ; and FOR CASES, see DIGEST, Vol. 44, pp. 428-432, Nos. 2575-2596.]

SUMMONS by the executors of the testatrix to determine whether certain annuities provided for under the will of the deceased were accelerated.

G. D. Johnston for the executors.

A. J. Belsham, V. P. Stranders, J.A. Reid and H. A. Rose for the parties interested.

SIMONDS, J. : The testatrix, Emily Madge Hodge, made her will on Dec. 17, 1935, and thereby, after making certain specific bequests, directed that, after the death of her sister, certain legacies should go to a Mrs. Morrison and a Mrs. Jervis ; and then, by cl. 6, provided that, after the death of her sister and subject to the life interests given to Sir Rowland Hodge, Bart., as thereafter mentioned, certain annuities should be provided, namely, to Mrs. Morrison an annuity of £50 during her life to be paid to her free of all deductions but not of income tax by equal quarterly payments, the first whereof was to be made 3 months after the death of the said Sir Rowland Hodge ; and a similar annuity to Dora Jervis. There was the usual direction to appropriate a sum to provide the annuities and then, in the ordinary form, a devise and bequest of the residuary real and personal estate upon trust for sale. The residuary trust fund arising from such sale was to be held upon the following trusts, namely, upon trust to pay the income to the sister of the testatrix, Dora Blanche Hodge, during her life and after her death upon trust to pay the income to the brother of the testatrix, Sir Rowland Hodge, for his life and after his death upon trust to provide for the legacies and annuities thereinbefore bequeathed and subject thereto upon certain trusts which were varied by a codicil made on Mar. 29, 1938.

The testatrix died on July 9, 1942, having been predeceased by her sister. Thereupon the life interest of Sir Rowland took effect in possession. He disclaimed his life interest on Mar. 12, 1943. The question which I have to determine is whether the interests in reversion, the annuities and the residuary interests, were thereby accelerated so as to take effect as from the death of the testatrix. As to the residuary interests, it is conceded by counsel who are interested to argue the contrary that those interests were accelerated ; and the only question which has been argued is whether the annuities also were accelerated or whether they are payable only as from the death of Sir Rowland Hodge.

The principle of acceleration was first established in regard to remainders in real estate, and probably the origin is to be found in the technicalities of real property law. However that may be, the principle became extended to interests in personalty, and, although counsel have not been called upon to find any case where acceleration has been applied except in the case of what may be called a residuary interest, I see no reason why, once it has been extended from real to personal estate, it should not be applied in the case of any interest whether a partial interest such as an annuity or a residuary interest. The principle is exactly the same. You find that the postponement of a particular interest is merely in order that a prior interest may be enjoyed. If that prior interest is determined, whether by the death of a prior beneficiary or for any other reason, the reason for postponement goes and there is no reason, therefore, why there should not be acceleration.

Accordingly, when I find here that the annuity is expressed to be subject to the life interest of Sir Rowland and Sir Rowland disclaims his life interest, I come to the conclusion that the annuity is to be accelerated, for it is just as if it were said "subject to the interests of Sir Rowland which may be determined either by his death or for some other reason." The difficulty arises in this case from the further words which are found in the will, namely, the direction that the first payment of the annuity is to be made 3 months after the death of Sir Rowland. That is really an administrative provision which follows upon the gift of the annuity expressed to be subject to the life interest of Sir Rowland. I must, I think, interpret that as meaning no more than "3 months after the death of Sir Rowland or other determination of his interest"; and if, in fact, he disclaims that is equivalent, for this purpose, to the determination of his interest. A

Accordingly, I am of opinion that the annuities will be accelerated, will run from the death of the testatrix and that the first payment became due 3 months after the death of the testatrix. B

Declaration accordingly.

Solicitors: *Alfred Neale & Co.* (for the executors); *Wrinch & Fisher*, agents for *Murton, Clarke & Murton-Neale*, Cranbrook, and *Stoneham & Sons* (for the parties interested).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.] C

WALDER v. MONO CONCRETE CO., LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.),
June 25, 29, July 16, 1943.]

Workmen's Compensation—Industrial disease—Disablement—Recovery not complete—Return to former work—Second certificate of disablement but no date of commencement stated—Whether date of second certificate conclusive evidence as to the commencement of the second disablement—Workmen's Compensation Act, 1925 (c. 84), s. 43. D

The appellant workman, who was employed by the respondents as a concrete caster, contracted dermatitis in 1936 as a result of his employment. A certifying surgeon certified that the workman was thereby disabled from earning full wages. Towards the end of Jan., 1937, the workman resumed work as a concrete caster with the respondents. On Oct. 25, 1940, another certifying surgeon certified that the workman was suffering from dermatitis and was thereby disabled from earning full wages at the work on which he had been employed, but the surgeon was unable to state the date on which the disablement commenced. The workman was paid compensation by the respondents from Oct. 25, 1940, until Nov. 2, 1942, on the basis of total incapacity. On Dec. 1, 1942, he obtained work in a different occupation at a reduced wage and on Dec. 24, 1942, he requested an arbitration. The workman claimed compensation in respect of 2 distinct accidents, the certified disablements of 1936 and 1940; alternatively, if he was compelled to rely on one of the two notional accidents, that he could elect. It was contended for the workman that the certificate of 1940 was, by reason of the Workmen's Compensation Act, 1925, s. 43 (2), conclusive evidence of the onset of a disablement commencing at the date of the certificate and that the arbitrator was precluded from finding that there was merely one disablement commencing in 1936 from which the workman had not fully recovered:— E F G

HELD: where a certificate of disability given under sect. 43 (2) does not state a date on which the disability occurred, it proves no more than that the workman was disabled, and, in the case of a dispute, it is for the arbitrator to decide when the disease which caused the disability began. H

[EDITORIAL NOTE.] If the certifying surgeon is unable to certify the date on which the disablement due to an industrial disease commences, then the Act states that the date on which he gives his certificate is to be the date of disablement. From this wording it might be thought that, where the certificate does not state the date of the disablement, that date must necessarily be the date of the certificate; but it is here held that the arbitrator is not bound to find that the disablement commenced

on that date. He may consider all the relevant facts and upon them come to a decision as to the date on which, in his view, disablement commenced, and that date may, of course, be either the date of the certificate or some other date according to the view which the arbitrator takes upon all the facts proved.

AS TO CERTIFICATE OF DISABLEMENT, see HALSBURY, Hailsham Edn., Vol. 34, pp. 975-979, paras. 1333, 1334; and FOR CASES, see DIGEST, Vol. 34, pp. 469-471⁴ Nos. 3838-3846.]

Cases referred to:

- A * (1) *Richards v. Goskar*, [1937] A.C. 304; [1936] 3 All E.R. 839; Digest Supp.; 106 L.J.K.B. 85; 156 L.T. 52; 29 B.W.C.C. 357.
 * (2) *M'Dougall v. Summerlee Iron Co.* (1927), 20 B.W.C.C. 419; Digest Supp.
 * (3) *Wilsons & Clyde Coal Co., Ltd. v. Flynn*, [1930] A.C. 516; Digest Supp.; 99 L.J.P.C. 139; 143 L.T. 362; 23 B.W.C.C. 159.
 * (4) *Eaton v. Wimpey (George) & Co., Ltd.*, [1938] 1 K.B. 353; [1937] 4 All E.R. 583; Digest Supp.; 107 L.J.K.B. 259; 158 L.T. 6; 30 B.W.C.C. 408.
 B (5) *Macnamara v. India Tyre & Rubber Co., Ltd.* (1937), 30 B.W.C.C. Supp. 47; Digest Supp. [1937] S.C. 186.

APPEAL by the applicant from an award of His Honour JUDGE TUDOR REES, Uxbridge County Court, dated Mar. 23, 1943. The facts are fully set out in the judgment.

During the hearing of this appeal it was stated by LORD GREENE, M.R., that it was essential in workmen's compensation appeals that original documents such as certificates of certifying surgeons should be in court.

F. W. Beney, K.C., and Gilbert C. Dare for the appellant.
 J. Alun Pugh for the respondents.

DU PARCQ, L.J. [delivering the judgment of the court]: The appellant is a workman. In June, 1926, he entered the employment of the respondents. From 1933-1936 he worked for them as a concrete caster. In 1936 he contracted the disease of dermatitis. The disease was due to the nature of his employment, and the certifying surgeon certified that he was thereby disabled from earning full wages. In fact, he was totally incapacitated until the end of 1936, when he worked for about a month for other employers. Towards the end of Jan., 1937, he went back to work as a concrete caster for the respondents. He continued to do that work for them till October, 1940. On Oct. 25, 1940, another certifying surgeon certified that he was suffering from dermatitis and was thereby disabled from earning full wages at the work at which he had been employed. The certifying surgeon on this occasion used a printed form issued from the Stationery Office. The form contains the words:

... and I certify that the disablement commenced on the — day of — [The following note for the guidance of the surgeon is prefixed] Note.—If the surgeon is unable to certify a date on which the disablement commenced, he should strike out the following words. In that case the disablement will be deemed to have commenced on the date on which this certificate is given. See sect. 43 (2) of the Act.

The reference is, of course, to the Workmen's Compensation Act, 1925. The certifying surgeon, in fact, struck out the words referred to in the note, and it must, therefore, be assumed that he was unable to certify the date on which the disablement commenced.

The appellant, to whom it will be convenient to refer hereafter as "the workman," was paid compensation by the respondents, whom we shall call "the employers," from Oct. 25, 1940, to Nov. 2, 1942, on the basis of total incapacity. On Dec. 1, 1942, he obtained work in a different occupation at a reduced wage. On Dec. 24, 1942, the workman requested an arbitration. His claim and the contentions by which it was supported may be summarised as follows. First, it was said that the certified disablement of 1936 and the certified disablement of 1940, must, by reason of sect. 43 (1) (a) be regarded as indicating the occurrence of 2 distinct accidents. By reason of sect. 43 (2) the date of the latter accident must be taken to be Oct. 25, 1940. Each accident had resulted in disablement. For each accident, therefore, the workman was entitled to compensation. It was true that, for the period between Oct. 25, 1940, and Nov. 2, 1942, the workman had already received compensation on the footing of total incapacity, but that merely compensated him for the second notional accident, and he was entitled (so it was contended) to a further sum by way of full compensation for total incapacity attributable to the first certified disablement, otherwise referred to as the first notional accident, and to the same

measure of compensation in respect of each disablement from Nov. 2, 1942 to Dec. 1, 1942. To the objection that, if this claim were allowed, the workman would be receiving compensation twice over in respect of the same incapacity, the answer was made that this result necessarily followed from the provisions of the Act, as these have been interpreted in the courts. From Dec. 1, 1942, he claimed on the same principles to be entitled to "the proper compensation for partial disablement in respect of each certified disablement." In the alternative, however, it was submitted that the workman, if he was compelled to rely on only one of the two notional accidents, was free to choose between them as he might elect. In the present case it was to his advantage to select the second disablement, since his pre-accident wages would then be greater in amount than if the former disablement were treated as the cause of the incapacity.

The arbitrator rejected both these contentions. He found as facts, and it is not disputed that there was evidence to support the findings, that, to use his own words:

... the workman never fully recovered from the disease which originally incapacitated him ... there was not a second injury or notional accident, nor was there a "recurrence."

The disease had never completely abated, so that, in the view of the arbitrator, it was wrong to speak of it as having recurred. The arbitrator expressed the view that:

... the second certificate, in the circumstances of this case, should be regarded not as indicating a fresh "accident" or period of disablement, but as evidence—taken with the other facts—of the continuance of the original outbreak of the disabling disease.

In the result, the workman was awarded compensation on the basis of his average weekly earnings during the 12 months previous to the first certificate. The amount payable on this basis is 4s. 7d. per week, whereas, if the workman's alternative contention prevailed, he would be entitled to 17s. 1d. per week.

If there was in truth no new outbreak of disease in 1940, and if what the certifying surgeon then found was merely one of a long series of manifestations of a disease from which the workman had suffered ever since 1936, it seems plain, at first sight at any rate, that the workman should not be compensated as if he had been attacked by the disease in 1940. Under sect. 43 (1) the workman is to be compensated:

... as if the disease ... were a personal injury by accident arising out of and in the course of that employment ...

If the arbitrator's findings are to be accepted, the notional accident which caused all the personal injuries from which he has suffered occurred in 1936, and he has suffered no disablement from any other. It was contended, however, that the arbitrator had found facts which the provisions of sect. 43 precluded him from finding, and that they were based upon evidence which he ought not to have admitted. This contention was supported by reference to sect. 43 (1) (a), which provides that:

... the disablement ... shall be treated as the happening of the accident ... and sect. 43 (2), which says:

For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given ...

As has been said, the certifying surgeon who gave the 1940 certificate was unable to certify the date on which the disablement commenced. The date of the certificate was Oct. 25, 1940. That, it was submitted, was conclusive evidence that the disablement began on Oct. 25, 1940, and since the disablement is to be treated as the happening of the accident it was argued that the certificate conclusively established that the workman had been the victim of a notional accident on Oct. 25, 1940, and that this notional accident resulted in his disablement. This is the basis of the contention that the arbitrator had no right to hear evidence, or to find facts, which contradicted the surgeon's certificate. Admittedly, neither the certifying surgeon nor anyone else had any reason to think that the disablement, in fact, commenced on Oct. 25, 1940. It was clear also that, whether or not the arbitrator ought to have investigated the facts, he had satisfied himself by investigating them that the disease and the disablement which it produced commenced in 1936 and had continued to the

present time, although there were periods during which the disease was temporarily quiescent, so that, for the time being, the workman was capable of work. Nevertheless, we were told that the words of the section and the decided cases compelled us to hold that the arbitrator should have decided this case not according to the facts, but according to what may be called a statutory fiction.

It is unnecessary to pass in review all the authorities which were cited to us. The most convenient starting-point for a consideration of these authorities is the latest of the relevant decisions of the House of Lords in *Richards v. Goskar* (1), in which earlier authorities were reviewed by LORD ATKIN. The short speeches of the other Lords show that LORD ATKIN's opinion may be taken as expressing the considered view of the House of Lords. Undoubtedly it clarified the law. It had previously been supposed that the decision of the House of Lords in *M'Dougall v. Summerlee Iron Co.* (2) had dealt with a question of law, namely, the construction of sect. 8 of the Act of 1906, the section which is reproduced in sect. 43 of the present Act. There was certainly some justification for this view since LORD DUNEDIN, in his speech in *M'Dougall's* case (2), had made it clear that, in his opinion, it was a question of law and not of fact which was being decided. Scottish as well as English courts had acted upon what is now shown to have been an erroneous view of the scope of the decision, and *M'Dougall's* case (2) is said by LORD MACKAY to have been the foundation of at least 10 judgments in the two countries since 1927. In *Richards v. Goskar* (1), however, an elaborate analysis of the decision revealed that it had, after all, turned on a question of fact. What it decided was that an inference of fact which had been drawn by the arbitrator could not be supported. The decision in *M'Dougall's* case (2) can, therefore, throw no light on the present problem. The workman's case can derive no support from it, and it need not be further considered.

Another decision of the House of Lords which must now be read in the light of *Richards v. Goskar* (1) is *Wilsons & Clyde Coal Co. v. Flynn* (3). It is unnecessary to set out the facts of that case. It was relied upon by counsel for the workman as establishing the proposition that it is not competent for an arbitrator to find, or to hear evidence tending to prove, that the date of disablement is other than that which, by sect. 43 (2), is deemed to be the date of disablement when the certifying surgeon is unable to certify such a date. This argument derived strong support from the following passage in the speech of VISCOUNT HAILSHAM, at p. 522 :

... the fact that the subsection provides that if the certifying surgeon is unable to certify the date on which disablement commenced then that date shall be the date on which the certificate is given, seems to me wholly inconsistent with the view that it shall be a date to be ascertained by the arbitrator upon evidence adduced before him.

In the case then before the House, however, the certifying surgeon had been able to certify the date on which the disablement had commenced ; and had in fact certified a date. LORD ATKIN, in *Richards v. Goskar* (1), speaking, as we have said, with the assent of the other Lords who were present, said that he did not regard *Wilsons'* case (3) as deciding anything but the finality of the certificate "when the certifying surgeon has fixed the date of disablement."

It would seem, therefore, that the observations of VISCOUNT HAILSHAM which we have quoted must be regarded as *dicta*, not necessary to the decision, and of no binding force. The decision in *Wilsons'* case (3) was followed in this court in *Eaton v. Geo. Wimpey & Co., Ltd.* (4). There also the certifying surgeon had been able to certify the date when the disablement commenced. The present case is, therefore, distinguishable from *Wilsons'* case (3) and from *Eaton v. Geo. Wimpey & Co., Ltd.* (4). The distinction is quite clearly indicated in the passage in LORD ATKIN's speech which we have quoted, and is certainly not without a basis of fact and reason. When the date of the disablement is unknown to, and undiscoverable by, the certifying surgeon, it must often happen that all that can be said with certainty is that, whatever the true date may be, it is not the date on which the certificate was given. It is satisfactory to find, therefore, that we are not bound by authority to hold that the arbitrator was precluded from ascertaining the true facts in such a case.

It is not necessary or desirable to add to what was said in *Richards v. Goskar* (1) any lengthy exposition of the principles to be applied in construing sect. 43, but it may be well to state very shortly what we understand those principles

to be. The clue to the correct interpretation of the section is to be found in the words :

... as if the disease ... were a personal injury by accident arising out of and in the course of that employment.

When the language appropriate to disease is translated into the language appropriate to injury by accident, it is the disease and not the disability which is made equivalent to the accident and the injury resulting from it. The disablement follows the accident, it is not itself the accident. A certificate of disability given under sect. 43 in which no date is certified proves no more than that the workman was disabled. In case of dispute, it is for the arbitrator to decide when the disease which caused the disability began, just as in cases of injury by accident he has to decide when the accident which caused the injury occurred. The object of sect. 43 (1) (a) is to provide a means of fixing the stage at which the progressive disease can reasonably be treated as an injury by accident (see *per* LORD ATKIN in *Richards v. Goskar* (1), at p. 312; [1936] 3 All E.R. at p. 842). The effect of sect. 43 (2) is to fix the time of the happening of the accident :

... for the purpose of notice and for some purposes of calculating wages ...

Unless the certifying surgeon certifies a date, his certificate does not conclusively fix the date of the notional accident or preclude the arbitrator from forming his own judgment, upon all the evidence available, as to the true date of the onset of that disease which caused the disablement.

It is right to add that, since the decision in *Richards v. Goskar* (1), it has been held by the Court of Session that, even where the certifying surgeon had certified a date, the arbitrator was entitled to find that the workman was, in fact, suffering from the effects, not of a notional accident deemed to have occurred on that date, but of an earlier disablement. (*Macnamara v. India Tyre & Rubber Co., Ltd.* (5)). As LORD MACKAY pointed out in his dissenting judgment (at p. 65), it seems impossible to reconcile this decision with *Wilsons'* case (3), which remains a binding authority for the limited proposition stated by LORD ATKIN, and as such was followed by this court in *Eaton v. Geo. Wimpey & Co., Ltd.* (4). Save for the distinction to which we have alluded, the facts in the case before the Court of Session resembled in all material respects those in the present case, and it was held, applying the principles laid down in *Richards v. Goskar* (1), that the arbitrator was entitled to make his award on the footing that the earlier disablement was the only "injury by accident" in respect of which the workman ought to be compensated. We have derived great assistance from this Scottish authority, and, with the one exception to which we have referred, we find ourselves in full accord with the views expressed by the majority of the Court of Session. It may be hoped that the House of Lords will before long have an opportunity of deciding whether, on the one hand, LORD MACKAY's dissent was justified and the decision of this court in *Eaton v. Geo. Wimpey & Co., Ltd.* (4) was correct, or, on the other hand, this court has wrongly held itself bound by the decision in *Wilsons'* case (3). Meanwhile, there is an unfortunate divergence between the views of the two countries as to the true interpretation of sect. 43 (2). It may, perhaps, be said that the Court of Session has logic on its side, while this court may humbly lay claim to a more scrupulous regard for authoritative precedent. It is some satisfaction to know that our decision in this case will be in accordance with the view of the Court of Session.

In our opinion, the arbitrator has correctly interpreted the section. He has found the facts which it was his duty to find, and on those findings has come to the only possible conclusion as to the workman's rights. As there was only one "notional accident" which resulted in disablement, the question whether the workman could have recovered compensation twice over if there had been two notional accidents does not arise.

The appeal must be dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors : Barlow, Lyde & Gilbert (for the appellant); Hair & Co. (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

ABITIBI POWER AND PAPER CO., LTD. v. MONTREAL TRUST CO. AND OTHERS, ATTORNEY-GENERAL FOR ONTARIO (INTERVENER).

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright), **July 8, 1943.**]

- A *Privy Council—Canada—Federal and provincial relations—Bankruptcy and insolvency—Winding up—Leave to proceed with debenture holders' action—Action stayed by provincial Act—British North America Act, 1867 (c. 3), ss. 91 (21), 92 (13)—Abitibi Power & Paper Co., Ltd., Moratorium Act (Ontario), 1941 (c. 1).*

The appellant company was incorporated by letters patent of the Dominion of Canada and an important part of its property consisted of leases, licences, agreements, water power rights, privileges, franchises and concessions granted by the Province of Ontario. The company issued debentures secured by a trust deed which mortgaged the above property together with other property as security for the payment of sums due under the debentures. The company having encountered difficulties a debenture holders' action was commenced in 1932, in which an order was ultimately made for the sale of the mortgaged property. In the meantime a declaration had been obtained that the company was an incorporated company within the Dominion Winding Up Act, was insolvent and liable to be wound up under the provisions of the Act, but an order was made in the winding up allowing the action to proceed. Having regard to the important public interests involved and the difficulty of selling the property the Province of Ontario passed legislation staying the debenture holders action in order that the parties might consider a plan drawn up by a Royal Commission to meet the difficulties which had arisen. It was contended that this Act of the Province of Ontario was an encroachment on the Dominion powers to legislate on the subjects of bankruptcy and insolvency:—

HELD: (i) the action, though continued by the leave of the winding-up court, never became a proceeding in the winding up and the interference with it by the provincial legislature was not an intrusion into the field of bankruptcy and insolvency legislation. The pith and substance of the Act was to regulate property and civil rights within the province and it was *intra vires* the provincial legislature.

(ii) the provincial legislature has power to stay an individual action and such legislation need not be general in character.

[**EDITORIAL NOTE.** There are many matters in winding up and bankruptcy that can only be done with leave of the court charged with the winding up of the company. These matters are not matters in the winding up but are separate and independent proceedings even after the court has given leave for them to proceed. The importance of the point here turns on the fact that winding up is purely a matter for the Dominion and it was, therefore, suggested that the staying of the action by an Act of the provincial legislature was an intrusion into the exclusive domain of the Dominion. There was also a suggestion that provincial legislation must not be aimed at a particular firm or corporation but must be general in character, but this proposition has been denied by the Privy Council.

AS TO EXCLUSIVE RIGHT OF DOMINION IN BANKRUPTCY AND INSOLVENCY, see HALSBURY, Halsam Edn., Vol. 11, pp. 98, 99, paras 169, 170; and FOR CASES, see DIGEST, Vol. 17, pp. 429-445, Nos. 99-180.]

APPEAL from the Court of Appeal for Ontario which by a majority dismissed the appeal of the appellant company. The facts are fully set out in the judgment of the Board delivered by LORD ATKIN:

H *Sir Walter T. Monckton, K.C., and Frank Gahan* for the appellant company. *D. N. Pritt, K.C., and Patrick Devlin* for the respondents, the Montreal Trust Company.

Hon. Charles R. R. Romer, K.C., and G. H. Crispin for the respondents, the bondholders' committee.

Wilfred A. Barton, K.C., and Frank Gahan for the Attorney-General for Ontario.

LORD ATKIN: This is an appeal from the Court of Appeal for Ontario who by a majority (GILLANDERS, J., dissenting) dismissed the appeal of the defendant company from an order of MIDDLETON, J.A., which ordered that all

the property of the company should be sold by public auction. The question in the case is the validity of Acts of the Ontario Legislature, the Abitibi Power and Paper Co., Ltd., Moratorium Act, 1941, and a further Act, the Abitibi Power and Paper Co., Ltd., Moratorium Act, 1942. The Acts were passed in the following circumstances.

The defendant company was incorporated in 1914 by letters patent of the Dominion of Canada to acquire the undertaking of the existing company, Abitibi Pulp and Paper Co. In 1928 it made an issue of first mortgage gold bonds due 1953, of which in the year 1932 \$48,267,000 with interest at 5 per cent. were outstanding. The bonds were charged on the whole property and undertaking of the company. There were also issued: \$1,000,000 in 10,000 shares of 7 per cent. cumulative preferred stock; \$34,818,000 in 341,818 shares of 6 per cent. cumulative preferred stock; *1,088,117 common shares no par value upon which the book value placed was \$18,964,933.

As may be seen from the capital structure the company was a vast undertaking, dependent for its supply of pulp wood upon the Crown lands of the Province of Ontario, which it obtained under agreements for 21 years, and dependent for its water power on leases and licences from the Crown. A convenient summary of the position is given by ROBERTSON, C.J., in his judgment giving leave to appeal in the present case.

An essential part of the property covered by the mortgage consists of leases, licences, agreements, water power rights, privileges, franchises and concessions granted by the Province of Ontario. As is stated in the report of a Royal Commission that inquired into the affairs of the defendant company, whose report is before us and was referred to in argument, "Abitibi is dependent for its supply of pulp wood upon the Crown lands of the Province of Ontario. It also requires large quantities of power, in respect of which it is dependant upon leases from the Province." These licences, leases and other rights are granted in most, if not in all cases for fixed terms of years, and some of these have expired or are about to expire. As to some others the company is in default either in payment or in the performance of its covenants. If the Province of Ontario should exercise its rights strictly, the mortgaged premises would hardly be saleable at any price. Mills in which large sums of money are invested would be worthless without power to run them or pulp wood to supply them. In the report of the Royal Commission to which I have referred there is set forth on pages 10 and 11 a long list of the defendant company's further requirements from the Province, as given by the receiver. No doubt the Province is in the habit of co-operating fairly with persons who invest their money in establishing and developing industries on the lands of the Crown and in opening them up to settlement, and improving them, but when, as here, there may be danger that many persons who have invested largely will lose their investment, the Government of the Province may have some concern. It may well be that on a sale for cash none but bondholders who can turn in their bonds in payment, will be in a position to buy, especially in view of the difficulty of raising large amounts of capital for such investment in war-time. To avoid a result that may wipe out the investment of a great many people and that in such an event may cause some embarrassment to the Government in dealing with the property rights and interests of the Province, it is, to say the least, understandable that the proposed sale for cash should be the subject of some concern to the Legislature, whatever opinion one may have as to the power of the Legislature to enact the statute in question.

Subsidiary companies in which the company owned the majority of shares also carried on similar businesses in Manitoba and Quebec.

The gold bonds were secured by a trust deed in ordinary form dated June 1, 1928, made between the company and the present respondents, the Montreal Trust Co., whereby the company mortgaged and charged the whole of their property and undertaking to the trust company in trust for the holders of the first mortgage gold bonds. There was another party to the deed, the National City Bank of New York, as "authenticating trustee." They were not parties to the action and no further reference need be made to them.

In 1932 the company made default in payment of the half-yearly instalment of interest due on June 1, and thereupon in pursuance of a power in the trust deed the Montreal Trust Co., by writ issued on Sept. 8, 1932, commenced the ordinary debenture holders' action claiming administration of the trusts of the debenture trust deed, a declaration that the indenture and mortgage were a first charge on the undertaking of the company, to have an account of what was due on the mortgage, to have the undertaking property and assets of the company sold under the direction of the court, and for the appointment of a

receiver and manager. On Sept. 10, 1932, RIDDELL, J.A., appointed G. T. Clarkson receiver and manager of the undertaking and gave leave to named members of a bondholders' committee to attend the proceedings. Subsequently these gentlemen or some of them were by order of MIDDLETON, J.A., dated Sept. 13, 1935, added as defendants in the action, and are, in addition to the plaintiffs, respondents to the present appeal.

A So far the action was plainly a mortgagees' action brought in the courts of Ontario affecting property in Ontario and the civil rights of the mortgagees and subject to the exclusive authority of the provincial courts and the provincial legislature. It has to be determined how far, if at all, this position was altered by subsequent proceedings. On Sept. 15, 1932, an unsecured creditor, Canada Packers, Ltd., filed a petition in bankruptcy against the company in breach of a provision of the order appointing a receiver that no proceeding should be taken against the company without leave of the court. Their Lordships do not
B stay to examine the validity of this provision, for on Sept. 26, on the application of the same creditor, SEDGWICK, J., made four consecutive orders:—

(i) Granting leave to the creditor to proceed against the company under the provisions of the Bankruptcy Act and/or the Winding Up Act and confirming the petition dated Sept. 15.

(ii) On the creditor's petition adjudicating the company bankrupt, making a receiving order against it, and appointing a custodian of the estate.

C (iii) Granting leave to the creditor to apply for a winding-up order against the company.

(iv) On the petition of the creditor declaring that the company was insolvent, and ordering it to be wound up.

D On Nov. 25, 1932, F. C. Clarkson was appointed liquidator of the company, and so acted until Dec. 20, 1935, when he resigned, R. S. McPherson being appointed in his place. The Winding Up Act (a Dominion Act—R.S.C., 1927, c. 213), s. 21 provides:

After the winding-up order is made no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

E The court referred to is the appropriate Provincial Court acting in this capacity as a Dominion Court with Dominion jurisdiction. On Dec. 7, 1932, the following order was made by GARROW, J., and, as controversy arises as to its effect, it will be as well to set it out.

IN THE MATTER OF THE WINDING UP ACT, being c. 213 of the Revised Statutes of Canada, 1927, and Amending Acts, and IN THE MATTER OF ABITIBI POWER & PAPER COMPANY LIMITED.

F 1. Upon the application of counsel for Montreal Trust Co., the plaintiff in an action commenced in this court on Sept. 8, 1932, against the above-named Abitibi Power & Paper Co., Ltd., for the enforcement of the trusts and security of a certain deed of trust and mortgage dated as of June 1, 1928, made by the said Abitibi Power & Paper Co., Ltd., in favour of the said Montreal Trust Co., and the National City Bank of New York as trustees, in the presence of counsel for F. C. Clarkson, Esq., the liquidator appointed herein, upon reading the writ of summons in the said action and upon hearing what was alleged by counsel aforesaid.

G 2. IT IS ORDERED that the said Montreal Trust Co. shall be at liberty to proceed with the said action against the said Abitibi Power & Paper Co., Ltd., notwithstanding the winding-up order made herein Sept. 26, 1932.

D'ARCY HINDS,
Registrar, S.C.O.

H Thereupon the action proceeded leisurely as negotiations from time to time took place for a reconstruction and it was not till Feb. 15, 1937, that the statement of claim was delivered claiming the relief mentioned in the writ. On Sept. 16, 1937, the company delivered its defence, alleging on various grounds that the charge was not valid, and disputing the jurisdiction of the provincial court save for the purpose of determining the validity of the charge. On Nov. 3 KINGSTONE, J., on the trial of the suit declared the charge valid and gave liberty to apply as to any further directions. On June 10, 1940, MIDDLETON, J.A., on motion of the plaintiffs ordered a sale of the company's undertaking under the direction of the master and gave leave to any bondholder to bid. In October the master reported that he had received two bids of \$30,000,000 and \$40,000,000. The latter he rejected as not complying with the conditions

of sale: but reported that neither bid was equal to the reserve which he had fixed. The sale, therefore, proved abortive.

On Nov. 1, 1940, a Royal Commission was appointed by Order in Council in Ontario, consisting of three commissioners:

... to inquire into the affairs and financial structure of the company with a view to recommending an equitable plan for solving the financial difficulties of the company so that the company may be in a position to meet conditions, regulations and restrictions which the Lieutenant-Governor-in-Council may consider necessary upon the grant or renewal of the hereinbefore recited leases, licenses, water power rights, flooding rights, licenses of occupation and other rights, powers or privileges, and generally to make such recommendations in the premises as appear to be in the best interests of all parties concerned, including the Province of Ontario.

On Mar. 17, 1941, the commission reported. It is unnecessary to discuss their findings and recommendations in detail. They criticised the present Dominion legislation in so far as it dealt with schemes of reconstruction of such large concerns as the present: they stated that the Government and the public had a huge stake in the pulp and paper industry, and that no price could be obtained for the undertaking and assets under present conditions which would begin to approach the amount of the outstanding bonds with interest thereon, and they outlined a plan whereby the maturity of the bonds was extended for 25 years with provisions for maintaining the rights of the bondholders, and, in the absence of default, for payment by instalments of some portion of the ordinary creditors' claims. They recognised that to secure this object recourse would have to be had to Dominion legislation.

Meantime on Nov. 25, 1940, the plaintiff had given a further notice of motion for sale which was ordered to stand over pending the report of the Royal Commission. After the report of the Royal Commission the legislature, on Apr. 9, 1941, passed the Moratorium Act, of which the validity is questioned in these proceedings. It recited the various motions for sale, and a summary of the report of the Royal Commission and finally that it was deemed desirable to stay any action then pending or that might thereafter be taken under the provisions of the above-mentioned bond-mortgage for the sale of all the property and assets of the said company situate in Ontario in order that an opportunity might be given to all parties concerned to consider the plan submitted in the report of the said Royal Commission, and then proceeded to enact (sect. 1) that, as far as any property in Ontario was concerned no further proceedings should be taken or continued under the order of MIDDLETON, J.A., of June 10, 1940. This, in fact, was already exhausted. Sect. 2 enacted that without the consent of the Attorney-General no new action should be brought for the purpose of realising the mortgage, and no further step should be taken in the action then pending. The Act was to come into force on a day to be named by the Lieutenant-Governor, and by Order in Council its operation might be determined at any time, but otherwise it was to remain in force until Dec. 31, 1942.

On Oct. 9, 1941, the notice of motion for sale which was then standing over was renewed; and on the same day the Lieutenant-Governor made a proclamation bringing into force the Moratorium Act. On Oct. 17 the plaintiff gave notice that at the hearing of the motion for sale the validity of the Moratorium Act would be disputed on the ground that it dealt with matters that fall under the head "Bankruptcy and Insolvency" in the British North America Act, s. 91. The motion was heard on Nov. 27, 1941, by MIDDLETON, J.A., when counsel for all parties interested and the Attorney-General for Ontario were heard. In his considered judgment, given on Dec. 4, 1941, MIDDLETON, J.A., held the Act to be *ultra vires* and ordered the sale of the property and assets of the company to take place under the direction of the master and subject to a reserve bid, with liberty to the bondholders to bid. On appeal this order was affirmed by the Court of Appeal on Mar. 21, 1942, GILLANDERS, J.A., dissenting.

The objection to the Act that was expressed by MIDDLETON, J.A., and by the members of the Court of Appeal may be summarised by saying that leave to continue the action had been given under the powers of the Dominion Act (Winding Up Act), s. 21, and that the legislature could not thereafter interfere with the proceedings in the action without encroaching upon the exclusive Dominion powers to legislate on the class of subjects "Bankruptcy and Insolvency."

The right to take away the cause of action, said FISHER, J.A., is vested in the Dominion unless the Dominion has not seen fit to deal with it: and sect. 21 of the Winding Up Act does deal with it. HENDERSON, J.A., went further and was of opinion that legislation in the Province passed in respect to property and civil rights in the Province must not be legislation aimed at a particular firm or corporation but must be general in character.

The legislature is not competent to deny access to His Majesty's courts in an individual case.

- A Their Lordships are unable to agree with this decision in the Ontario courts. It has to be remembered that this action when commenced was subject solely to the laws of the Province, which at any time, in pursuance of the sovereign power entrusted to the legislature in this respect, might be altered as the legislature thought fit. When the company was ordered to be wound up, the bondholders might in pursuance of sects. 78 to 84 claim in the winding up as secured creditors. They would in that case have had to put a specified value on the security; and the liquidator could have consented to the retention by the creditors of their security or could have required the transfer to him at the specified value to be paid out of the estate when he had realised the security. The bondholders in this case made no claim at all in the winding up. Their security was known to be insufficient to meet the mortgage debt, and they deliberately remained outside; and proceeded to continue to exercise what
- C may be called their provincial rights against the provincial property. They were required by sect. 21 of the Winding Up Act to get leave to continue their action, a provision which is not directed to secured creditors alone but is applicable to all claims against the company whether in contract or tort or otherwise. In view of the circumstances the leave to proceed was *ex debito justitiæ*. The court could not rightly have refused it. Once granted the action proceeded
- D as a provincial action subject to the provincial law regulating the rights in such an action, and subject to the sovereign power of the legislature to alter those rights in respect of property within the Province. It could not be denied that the action proceeded subject to the possibility of being stayed under the ordinary rules of procedure as, for instance, for security for costs, default in pleading or discovery or any special circumstances which the court might think demanded a stay. MIDDLETON, J.A., appreciated this position; but expressed the opinion that the action would proceed in accordance with the orders and rules of practice that were in existence at the date of the application. The limitation to existing rules is significant; their Lordships can see no ground for such a restriction. If the rules of procedure were subsequently altered before the action came to an end it must proceed thereafter subject to the rules as amended. The Province, therefore, could enact rules in the course of the
- F action imposing a further ground of stay; and, if it can thus impose what may be a general moratorium, there is no reason why its sovereign power should be so limited as not to enable it to impose, if it so desired, a moratorium limited to a special class of action or suitor or to one particular action or suitor. There appears to be no authority and no reason for the opinion that legislation in respect of property and civil rights must be general in character and not aimed at a particular right. Such a restriction would appear to eliminate the possibility
- G of special legislation aimed at transferring a particular right or property from private hands to a public authority for public purposes. The legislature is supreme in these matters, and its actions must be assumed to be taken with due regard for justice and good conscience. They are not in any case subject to control by the courts. The short answer, therefore, to the contentions of the plaintiff is that the action though continued by leave of the winding-up court never became a proceeding in the winding up, and that the temporary
- H interference with it by the legislature to which it was subject was not an intrusion into the field of bankruptcy and insolvency. It was pressed upon their Lordships that the real substance of the legislation was an attempt to coerce the bondholders into accepting a plan of reconstruction and that arrangements such as were contemplated by the report of the Royal Commission were within the exclusive field of Dominion legislation. So they are, but this Board must have cogent grounds before it arising from the nature of the impugned legislation before it can impute to a provincial legislation some object other than what is to be seen on the face of the enactment itself. In the present case their

Lordships see no reason to reject the statement of the Ontario legislature contained in the preamble to the Act that the power to stay the action is given in order that an opportunity may be given to all the parties concerned to consider the plan submitted in the report of the Royal Commission. That the Act was renewed in Mar., 1942, by another temporary Act expiring in June, 1943, affords no reason for modifying this view: nor does the fact that the plan suggested by the Royal Commission involves recourse to Dominion legislation. The pith and substance of this Act is to regulate property and civil rights within the Province. It was contended that the Act was passed in relation to the management and sale of the public lands belonging to the Province and of the timber and wood thereon; but in view of what has been said on the topic of property and civil rights in the Province, it is unnecessary to discuss this further ground for supporting the validity of the Act. A preliminary objection was taken to the regularity of the order of the Court of Appeal on the ground that the case did not fall within the Privy Council Appeals Act, (R.S.O., 1937, c. 98), s. 1, giving an appeal where the matter in controversy in any case exceeds the sum or value of \$4,000. It was said that the order under appeal was an interlocutory order, and the appeal was granted because there were exceptional circumstances by reason of the importance of the constitutional question. Their Lordships intimated at once that, if necessary in view of the constitutional question, they would give leave to file a petition for special leave in favour of which they would report, and counsel for the respondents very reasonably did not further press the objection. Their Lordships are, however, satisfied that the order in question which forms one of the final orders asked for in the statement of claim, whether it were interlocutory or not, relates to a matter in controversy which exceeds the sum in value of \$4,000. If a litigant is to be deprived by order of the court of any rights over a property worth \$30,000,000, as he is by an order of sale to which he objects, it would appear reasonable to hold that there is a matter in controversy raised by the appeal exceeding the sum of \$4,000. On this ground the preliminary objection fails. For these reasons the appeal should be allowed and the orders of MIDDLETON, J.A., and the Court of Appeal be set aside and the motion for sale should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The respondent company must pay the costs of the appellant company in the Ontario courts and on this appeal.

Appeal allowed with costs.

Solicitors: *Blake & Redden* (for the appellant company); *Lawrence Jones & Co.* (for the Montreal Trust Co.); *Linklaters & Paines* (for the bondholders' committee).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

LYON AND LYON v. DAILY TELEGRAPH, LTD.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.JJ.), July 21, 29, 1943.]

Libel—Fair comment—Honest expression of opinion—Letter to newspaper—False name and address.

The plaintiffs, who were the principal artistes in a radio entertainment, claimed damages for libel in respect of a letter, purporting to be written from a vicarage by a person named A. Winslow, which was published in the correspondence columns of the defendants' newspaper. It was admitted that the address on the letter was non-existent and that there was no clergyman named A. Winslow. The letter described the entertainment as a costly broadcast and complained that it was a vulgar and unworthy performance. There was no evidence as to the cost of the production and the defendants pleaded fair comment:—

HELD: (i) whilst it was true that the letter did refer to a costly entertainment, the criticism was not based on the cost, but on the nature of the entertainment. It could not be said on this ground that the defence of fair comment was defeated by a misstatement of fact.

(ii) although the address was fictitious and assuming that there was no

person of the name of A. Winslow, that was no evidence of malice and, since the letter itself did not exceed the limits of fair comment on a matter of public interest, that defence was open to the defendant newspaper proprietors.

Decision of HILBERY, J., ([1943] 1 All E.R. 586) reversed.

[EDITORIAL NOTE.] This is a decision of great importance to newspapers. It was sought to be said that there was an obligation on the newspaper proprietors to satisfy themselves as to the *bona fides* of their correspondents. The correspondence column has become an important feature of the press and is constantly used as a vehicle for criticism. It would be very difficult for the newspaper proprietors to ascertain in every case that the writer of the letter published has not given a false address or signed it in a false name. Indeed, in many cases the writers make use of a *nom de plume*. The Court of Appeal is clear that, provided the letter itself does not go beyond the bounds of fair comment on a matter of public interest, the fact that the address is false and there is shown to be no one of the name with which the letter is signed does not defeat a defence of fair comment on the part of the newspaper.

AS TO FAIR COMMENT ON A MATTER OF PUBLIC INTEREST, see HALSBURY, Halsham Edn., Vol. 20, pp. 488-496, paras. 596-606; and FOR CASES, see DIGEST, Vol. 32, pp. 141-151, Nos. 1730-1824.]

Cases referred to:

- (1) *McQuire v. Western Morning News Co.*, [1903] 2 K.B. 100; 32 Digest 151, 1826; 72 L.J.K.B. 612; 88 L.T. 757.
- (2) *Thomas v. Bradbury Agnew & Co., Ltd.*, [1906] 2 K.B. 627; 32 Digest 162, 1955; 75 L.J.K.B. 726; 95 L.T. 23.
- (3) *Hennessy v. Wright* (No. 2) (1888) 24 Q.B.D. 445n.; 32 Digest 149, 1804.
- (4) *Hunt v. Star Newspaper Co., Ltd.*, [1908] 2 K.B. 309; 32 Digest 139, 1702; 77 L.J.K.B. 732; 98 L.T. 629.
- (5) *Lyle-Samuel v. Odhams*, [1920] 1 K.B. 135; 18 Digest 206, 1534; 88 L.J.K.B. 1161; 122 L.T. 57.
- (6) *Crozier v. Wishart Books, Ltd.*, [1936] 1 K.B. 471; [1936] 1 All E.R. 1; Digest Supp. 105 L.J.K.B. 257; 154 L.T. 363.
- (7) *South Suburban Co-operative Society, Ltd. v. Orum*, [1937] 2 K.B. 690; [1937] 3 All E.R. 133; Digest Supp.; 106 L.J.K.B. 555; 157 L.T. 93.

APPEAL by the defendants from a judgment of HILBERY, J., reported [1943] 1 All E.R. 586. The facts are fully set out in the judgment of SCOTT, L.J.

Serjeant A. M. Sullivan, K.C., and Valentine Holmes for the appellants.

G. O. Slade, K.C., and Colin P. Duncan for the respondents.

Serjeant Sullivan, K.C., was stopped by the court after reading the pleadings and judgment below.

Slade, K.C.: The plea of fair comment might have been good had the alleged writer of the letter been sued. The newspaper was the only possible defendant because there was no such person as A. Winslow. This goes to the root of fair comment. If the alleged signature is not true, there cannot be fair comment. The point of the defence is: Is the statement the honest opinion of the writer? In a defence of fair comment all the facts on which a defendant relies must be true and the onus is on him to prove the facts. [Counsel referred to *Thomas v. Bradbury Agnew* (2), *Hennessy v. Wright* (No. 2) (3), *Hunt v. Star Newspaper Co.* (4), *Lyle-Samuel v. Odhams, Ltd.* (5), *Crozier v. Wishart & Co.* (6), and *South Suburban Co-operative Society, Ltd. v. Orum* (7).]

SCOTT, L.J.: The two plaintiffs were performing artistes employed by the B.B.C. to broadcast a radio entertainment called "Hi Gang!". It was broadcast every Sunday evening at 6.30 p.m. for several succeeding weeks, the plaintiffs being the two principal artistes. The defendants on Mar. 5, 1942, published in the "Daily Telegraph" a letter in the following terms:

Flabby Amusement.

To the Editor of the Daily Telegraph.

Sir,—Every Sunday evening at church time there is put on the air a costly broadcast which is an insult to British intelligence. The type of humour consists of a vulgar exchange of abuse. One comedian alludes to the other as "a louse" and his chief humorous contribution is to say at intervals, "I'm laughing me blooming 'ead off." The woman artist has a fair voice and sometimes sings a good song, but for the most part she indulges in vulgar wisecracks. We must be a nation of lunatics to permit such a waste of money for such a very sordid show. Yours sincerely, A. Winslow.

The Vicarage, Wallington Road, Winchester.

The defendants pleaded fair comment. HILBERY, J., came to the conclusion

on the whole, "not without considerable doubt," that the publication was defamatory of the plaintiffs as artistes, that is to say, not of them as man and woman in their private lives, but as "Ben Lyon" and "Bebe Daniels" in the "Hi Gang!" entertainment. He was further of opinion that the opinions expressed in the letter were such as an honest person might hold, and that, so far as the criticism itself was concerned, it was fair comment on a matter of public interest. On the other hand, there was one statement of fact in the letter, the phrase "costly broadcast," which he thought was inaccurate and gave "a barb" to the criticism that followed; and I gather he was of opinion that that inaccuracy of statement by itself put an end to the plea of fair comment. I do not agree with him on that point; for there is nothing defamatory of the plaintiff in saying the broadcast was costly, nor was there any evidence about cost: but there is another fact in the case which requires careful consideration, and, indeed, raises a new point in the law about fair comment. It appears that there was no person of the name of the signatory who could be traced, and there was no vicarage at the address on the letter. In other words, the letter was in fact not a signed letter, and not merely anonymous; for the writer had concealed his identity by putting in a false address, even if the writer was really "A. Winslow." Of these last two points the newspaper proprietors were ignorant. Upon these facts HILBERY, J., expressed the view that, in an action of libel against a newspaper in respect of the contents of a letter from a correspondent the onus on the issue of fair comment lies upon the defendant newspaper to prove affirmatively that the writer of the letter was merely expressing fair comment; and on this he found for the plaintiffs, holding, naturally enough, that there was no positive evidence in the case before him about the motive of the person who actually wrote the letter.

Before considering this conclusion, a little further explanation of the facts, which led the judge to it, is necessary. It was admitted or proved below that the letter came to the office of the "Daily Telegraph" bearing the address on the notepaper which was printed in the newspaper, and also the name of the signatory as so printed; and the good faith of the editorial staff in printing it was not impugned. They had assumed the genuineness of both, though apparently they had not made inquiries themselves to verify either signature or address. In these circumstances the judge held that the defendants had failed to discharge the onus of proving that the writer of the letter (whoever he was) honestly held the views expressed in the letter. He further inferred that "the motive" of the anonymous writer "was not wholly prompted by conscience," and for that reason also held that the plea of fair comment "broke down completely" and made it "an undefended action." He gave very small damages, because the plaintiffs themselves had said that they did not bring the action for the sake of damages.

The judge had thus two separate reasons for holding that the defendants' plea of fair comment failed. On the issue of cost I have already said that, in my opinion, the judge took an erroneous view. I think he was wrong both in fact and law. The entertainment, as is evident from the transcripts of the programmes, was obviously one which involved an outlay, considerable in itself, and perhaps more so relatively to the public interest in the matter broadcast; and anyhow, the comment that the entertainment was costly could not be regarded as defamatory of the actors in it. Even if it could, the criticism of the relative value of the broadcast in comparison with its cost to the nation was obviously mere comment on a matter of public interest, and *prima facie* as comment quite fair.

The other ground on which the judge relied is the only one which caused us to reserve judgment, as it raises a matter of general importance. There is no question but that the comment contained in the letter represented the honest opinion of the "Daily Telegraph"; and at the trial no doubt was cast upon the complete belief of the newspaper that they were publishing a letter in which the writer was making a fair comment on a matter of public interest. I cannot accept the submission implied in the argument of counsel for the respondents before us, that there is a general rule of law making it the duty of every newspaper to verify the signature and address of the writer before publishing it; although it may be desirable on public grounds that, so far as is practicable, the newspaper should take such steps. In most cases, writers unknown to the newspaper

establish their identity by enclosing a visiting card or a private note to the editor ; but to hold as a matter of law, where that has not been done, that the absence of such verification of itself destroys the newspaper's plea of fair comment, would be to put upon newspapers a heavy burden—a burden so deterrent in practice as very much to reduce the valuable contribution to public discussion which results from a free publication of correspondence in the press. If the comment is in itself fair within the meaning of the law, and if the newspaper publishes it solely as matter of public interest, I cannot see that any hardship is caused to the persons criticised, if the newspaper is able to succeed on its plea of fair comment ; whereas, if the rule laid down by the judge were made general, a very heavy burden of contingent liability would be put upon the press—a burden which on balance does seem to me undesirable from the public point of view, and contrary to the principle of the existing law about fair comment. The reason why, once a plea of fair comment is established, there is no libel, is that it is in the public interest to have free discussion of matters of public interest. In the case of criticism in matters of art, whether music, painting, literature, or drama, where the private character of a person criticised is not involved, the freer criticism is, the better it will be for the aesthetic welfare of the public.

There is no decided case which covers the precise point. It is unnecessary to consider how far the rule, that the fairness of comment may be destroyed by any oblique motive, extends, where it is the defendant's own motives which are concerned ; but, assuming that comment inspired by indirect, improper or private motives *ipso facto* ceases to be fair, and that the writer of such a letter to a newspaper will, when sued for libel, have put himself outside the pale of the defence of fair comment, it does not necessarily follow, as contended by counsel for the respondents, that, if he is made co-defendant with the newspaper, the newspaper also will lose its defence of fair comment. Counsel argues that they are just two joint tortfeasors and they must stand or fall together. But, even if he be right on that contention, it does not necessarily follow that the newspaper will lose its own defence, if the writer is not made defendant. In the present case the writer of the letter was never discovered and, therefore, was not sued. It seems to me contrary to common sense to say that the anonymous writer (who may have been absolutely single-minded in his comment) must in law be regarded for the purpose of that contention as if he had been co-defendant and his oblique motive had been exposed in the trial, with the consequence that the newspaper must lose the protection of the defence.

Although there is no direct authority, I think that the question of law is really implicit in the well-established rule that the publishers of a newspaper, when defendants in an action for libel, cannot, on the issue of fair comment, be required to disclose the source of their information. If the innocent state of mind of the writer of a letter published in the newspaper was a relevant fact, which had to be proved by him before his plea of fair comment could be established, it would go far towards justifying counsel's argument ; but the very existence of the exceptional rule about interrogatories and discovery in the case of newspaper defendants seems to me to presuppose a rule of law that, at least in the absence of special circumstances (on the possibility of which I express no opinion), there is no such presumption or onus, and that fairness of the comment contained in the newspaper's correspondence columns must be judged by its tenor, subject only to the proviso that the statements of fact upon which the comment is based are not untrue.

Counsel for the respondents put forward an alternative contention, viz., that, even if the defendant newspaper's right to rely on its plea of fair comment is not taken from it by the failure of the anonymous writer to come forward and plead his *bona fides*, yet the newspaper has lost its own right to that defence because it was guilty of negligence or carelessness in publishing the letter without inquiring into the identity of the writer. The answer to this is that fairness and carefulness are different moral and legal qualities ; and that, whilst malice or indirect motive may destroy the fairness of an apparently fair comment, negligence does not. I hold, accordingly, that the letter itself in no way exceeded the bounds of fair comment on a matter which was obviously one of public interest, and that, on the facts in evidence, there was nothing to destroy the defendant newspaper's plea of fair comment.

Before parting with the case I wish to make one observation. The meaning of the plea of fair comment is well-known to lawyers, and to most newspaper and other publishers; but some people misunderstand the right of "fair comment." It is one of the fundamental rights of free speech and writing, which are so dear to the British nation, and it is of vital importance to the rule of law upon which we depend for our personal freedom, that the courts should preserve the right of "fair comment" undiminished and unimpaired. Some people evidently think that in a case of libel or slander a judicial pronouncement that what the defendant wrote or said was within his right of fair comment, means that the court accepts and indorses his opinions. That impression is, of course, wrong. The court may, as private individuals, agree or disagree with the opinions expressed: indeed, it may disagree very much, and yet hold that there is nothing in the language used which exceeds the limits of public criticism so as to become mere personal defamation.

The appeal is allowed, the judgment below set aside and judgment entered for the defendants with costs here and below.

MACKINNON, L.J.: I agree that this appeal should succeed and judgment be entered for the defendants with costs here and below. A clearer case of fair comment there can never have been, and I think the point made as to the non-existence of the supposed writer, or the genuineness of his address, was quite irrelevant. The action was against the defendant company, alleging that they had published a libel on the plaintiffs; and the defendants are entitled to say that what they published was not libellous since it was fair comment on a matter of public interest.

Having been supplied with a copy of the script of the plaintiffs' performance which was subjected to the defendants' criticism, I am apprehensive that my own comment on it might exceed the bounds of judicial decorum. I, therefore, content myself by repeating the words with which SIR RICHARD HENN COLLINS, M.R., concluded his judgment in *McQuire v. Western Morning News, Ltd.* (1) at p. 113:

We have had excerpts from the play . . . read to us; and I think it right to say that, in my opinion, it would be matter of regret for all well-wishers of the stage if an honest critic were debarred from commenting in the sense of this criticism upon such a production.

GODDARD, L.J.: The words complained of in this case are contained in a letter addressed to and published by the defendants in their newspaper, and were a comment on a stage production of the plaintiffs. It is not contended that the comment in its terms exceeds the limits of fair and honest criticism. It is, however, submitted, and the judge has held, that, as the writer of the letter gave a false name and address, the defendants are deprived of the defence of fair comment. The address given is undoubtedly fictitious; as to whether the name given by the writer is that by which he or she is commonly known there is no evidence at all. The plaintiffs seem to assume that, because the address given in a letter was "The Vicarage," the writer must be the vicar of the parish; but the letter might equally be that of the vicar's wife, daughter, son or servant or visitor. Let it, however, be assumed that "A. Winslow" is not the writer's proper name; in my opinion, that fact is quite immaterial. Anonymity is no evidence of malice; dramatic and musical criticism in newspapers is usually contained in an unsigned article. Many people whose letters are published in the press use some form of *nom de plume*, and had the letter been signed "Disgusted" or "Mother of Six," or with some equally foolish expression, counsel for the respondents agrees that that would be no evidence of malice. Evidence may no doubt be given to show that a critic was actuated by malice, and then the court or a jury may find that his unfavourable criticism was inspired, not by an honest belief, but by a desire to gratify his malice, but they are not bound so to find. Here there was no evidence of malice and the criticism itself contains none, and so it is unnecessary to consider whether the newspaper would have been able to rely on the defence of fair comment if it had been found that the writer of the letter which they published was not honest but was inspired by malice in writing what he did.

As to the finding that there was a misstatement of fact, I cannot follow the judge's view. The letter did refer to a costly entertainment; that is a matter of opinion and is not defamatory, and the criticism is not based on the cost but

on the nature of the entertainment. To say that the chief humorous contribution was so and so and that part of one of the plaintiffs' lines consisted of vulgar wisecracks is obvious comment.

I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Alfred Cox & Son* (for the appellants); *Harold Kenwright & Cox* (for the respondents).

Ed. HARRIS v. ROWLEY. [1949] [Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.] E.R. 524.

T. R. PICKFORD & SON v. MACE.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.J.J.),
July 13, 14, 1943.]

Landlord and Tenant—Rent restriction—Restriction on right to possession—Agricultural holding—House required for employee—Employee neither named nor described in certificate of agricultural committee—Sufficiency of certificate—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3, Sched. I, para. (g).

The appellants, who were the landlords of a farmhouse occupied by the respondent, admittedly a statutory tenant, made an application to recover possession of the premises under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. I, para. (g), in order to install therein a foreman for the proper working of their agricultural holding, and, in accordance with the requirements of the Act, tendered in evidence a certificate, confirming their requirements, issued by the war agricultural committee. The respondent contended that the certificate was bad on the face of it because it did not indicate, either by name or by some means of identification, an actual person in contemplation as an employee of the appellants:—

HELD: it is not necessary to state in the certificate a person by name or in such a manner that he can be identified, but the committee must be satisfied that a worker of a particular class is necessary for the proper working of the holding. In this case, the committee had these requirements in mind, and the appeal must be allowed.

[EDITORIAL NOTE] The landlord of an agricultural holding may obtain possession of premises for use as the residence of some person engaged in his whole-time employment or with whom, conditional on housing accommodation being provided, a contract for such employment has been entered into. For this purpose there has to be a certificate by the agricultural committee that the person is to be employed on work essential to the proper working of the holding. It will at once occur that it may be said that there must be some definite employee in mind when such certificate is asked for and obtained. However, if it was required that the certificate should name a particular individual, it would, as explained in the judgments herein, give rise to great practical difficulties, since the named employee might not be available when possession of the premises was obtained. The Court of Appeal have, however, held that, upon the true construction of the paragraph in the Schedule, it is not necessary to name any particular individual in the certificate, but it is necessary that they should have in mind at the time of the application that a person is, or is going to be, employed on work necessary for the proper working of the holding.

FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS (AMENDMENT) ACT, 1933, SCHED. I, PARA. (g), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 26, p. 280.]

Case referred to:

(1) *Knight v. Winter* (1942), unreported.

APPEAL by the plaintiff from an order of His Honour JUDGE HURST, Witney County Court, dated May 26, 1943. The facts are fully set out in the judgment of LORD GREENE, M.R.

A. T. Denning, K.C., and *A. Safford* for the appellants.

Ronald Hopkins for the respondent.

LORD GREENE, M.R.: This appeal raises a question of considerable practical importance in relation to the working of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

Under Sched. I to that Act a number of circumstances are set out in which, if the court considers it reasonable so to do, it has power to make an order for

recovery of possession without proof of alternative accommodation. The particular paragraph with which we are concerned is para. (g). The circumstances there stated are these:

... if the dwellinghouse is reasonably required by the landlord for occupation as a residence for some person engaged in his whole-time employment ... or with whom, conditional on housing accommodation being provided, a contract for such employment has been entered into, and either ... (ii) the court is satisfied by a certificate of the county agricultural committee [which is now the war agricultural executive committee] ... that the person for whose occupation the dwellinghouse is required by the landlord is, or is to be, employed on work necessary for the proper working of an agricultural holding ...

The appellants sought to recover possession of a farmhouse known as Malt-house Farmhouse. They are farming a substantial holding of over 500 acres. That really comprises what were originally 2 farms, Yew Tree Farm and Malt-house Farm. Malthouse Farmhouse is in the occupation of the respondent, a lady, who lives there with a brother and a lodger, and is at present, admittedly, a statutory tenant. The appellants require possession of this farmhouse in order to install therein an agricultural foreman whom they have engaged in the expectation that they would obtain possession of this house. The foreman, possession having been refused, is at present living in a boarding-house and cannot have his family to live with him. That is the position which, unless something else can be done, will continue if the order appealed against stands.

When the matter came before the county court judge the appellants produced a certificate which I will read in a moment. That certificate did not mention any farm worker by name. The appellants led evidence to the effect that, before the certificate was granted, they had in fact made a provisional contract of employment, conditional on accommodation being obtained, with a man named Perrett, whom they wished to engage as agricultural foreman. That evidence the county court judge did not accept. He held that no contract had been made, conditional or otherwise, with Perrett at that time. Accordingly, when the matter came before the agricultural committee the position was that there was nobody actually bound to enter into this employment.

The case that was made by the respondent in the county court was to this effect: the certificate is bad on its face because it does not specify the person for whose occupation the dwellinghouse is required.

The actual language of the certificate is as follows. After a reference to certain regulations, the

... committee hereby certifies that the agricultural worker for whose occupation the cottage or dwellinghouse now occupied by Miss Florence Mace and known as Malthouse Farmhouse is required by T. R. Pickford & Son, the landlords, is to be employed on work necessary for the proper working of the agricultural holding known as Yew Tree and Malthouse Farm, Standlake, Oxfordshire.

It is signed by McFee, executive officer. At the foot there is this note:

This certificate is granted on the understanding that the Court of Appeal in *Knight v. Winter* (1), Apr. 24, 1942, ruled that it was not necessary for the name of the person for whose occupation the cottage is required to be inserted in the certificate.

The county court judge took the view, as he had, apparently with reluctance, found himself compelled to take in other cases, that the person referred to in the certificate must be identified or identifiable as being the actual person in respect of whom the application is made. I do not think he intended to hold, nor has it been argued, that it is necessary that, at the date of the application for the certificate, the worker in question should actually have been engaged absolutely or conditionally. What he meant, I think, was this, that the certificate must have in mind a particular person. I do not think he thought that it was necessary that that person should be mentioned by name provided he could be identified. Indeed, counsel for the respondent before us did not argue that the certificate would be bad merely because the name of the worker was not specified in it, he conceded that the worker could be identified by evidence, but he maintained that this certificate was what he called a blank cheque in that the certifying committee had not got in mind any particular worker because no particular worker was mentioned to them nor had they in mind any particular class of work which he was to do.

The question raises a difficult matter of construction as to the meaning of

para. (g) which I have just read, and particularly subpara. (ii) of that paragraph. It seems to me that there are two possible constructions. The first is that the certificate in order to be valid must refer to a person identified to the mind of the committee at the time when the certificate is given, and that it must identify the work, which is the same thing as saying that it must identify the class of workman whom the committee is considering. That would not mean that the workman should be mentioned by name. It is said that the committee cannot comply with the requirements of this subparagraph unless it directs its certificate to an individual who is either identified on the face of the certificate or is capable of identification by parol evidence, and further, that the work which that individual has to do must again be specified or at least capable of identification. There are two separate points there. I will deal with them separately when I come to consider that construction.

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The other possible construction seems to me to be that the only matter in respect of which the certificate is made the statutory and only admissible evidence of certain facts relates to the work which has to be done and its necessity for the proper working of the holding. Speaking quite generally with regard to these two alternative constructions, it is perhaps worth pointing out that the former construction would lead to great practical difficulties and inconvenience. Agricultural workers are not standing in queues ready to be employed. It may be quite impossible for a farmer when he comes before the agricultural committee to say that he has a definite person in contemplation, and, even supposing that he has, between the time when he obtains his certificate and when he goes to the county court judge that person may have gone off and engaged himself to somebody else. He would then have to go back to the committee and get another certificate and very likely the same thing might happen again. The consequence would be that these matters which are matters of urgency, and very often matters of seasonal urgency having regard to the seasonal requirements of labour on a farm, would be dealt with in a most unsatisfactory manner.

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With regard to the other construction, speaking again quite generally, it seems to me that it would be not only very much more convenient, but also would have the effect of confining the task of the committee to the particular matter of which it has expert knowledge. The crucial matter which a committee of this kind has to consider is the nature of the work in connection with which the man is going to be employed. Is it necessary for the proper working of the holding? That is a matter which these committees are pre-eminently qualified to answer and it is to them that the legislature under this paragraph has given the exclusive right of specifying on that particular matter.

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Bearing those considerations in mind—which are, of course, by no means conclusive—as one is entitled to do, when one comes to look at the language used, it appears to me that the second construction is really preferable. Para. (g) begins with matters which are to be established to the satisfaction of the court, established not by a certificate but by evidence in the ordinary way. One point is that the dwellinghouse is reasonably required by the landlord for occupation as a residence for some person. That is a matter to be established by evidence before the county court judge. Another matter is that the person is engaged in the landlord's whole-time employment. That again must be established before the county court judge by evidence. Or the alternative must be established, that the person is one with whom, conditional on housing accommodation being provided, a contract for such employment has been entered into. Those are all matters which, as I say, have to be established by evidence in the ordinary way. They may be paraphrased, the last two of them, by saying that the question whether the person nominated is or is to be employed by the landlord is a matter on which the county court judge has to be satisfied by evidence in the usual way. We, therefore, get to this point. A farmer comes to the county court judge and says: A.B. is a person who satisfies those requirements, I am now going to establish the next necessary step and that is that this person who is or is to be employed by me will be employed on work of a certain character, namely, work necessary for the proper working of a holding, and I now come to the point where my evidence before you, the judge, or anybody else's evidence is incompetent because there is a statutory kind of evidence which alone can establish that point and that is the certificate and I hereby produce it. Looking

now at subpara. (ii) on the basis of that construction, the phrase "the person for whose occupation the dwellinghouse is required by the landlord is, or is to be, employed," is merely inserted for the purpose of reference. It is merely referential, referring back to the matters which have to be proved before the county court judge by the opening part of the paragraph, and it is only when you come to the words "work necessary for the proper working of an agricultural holding," that you get the point which is really the special matter for the consideration of the committee. The words can be paraphrased in this way, that the work on which the person for whose occupation the dwellinghouse is required by the landlord is or is to be employed is work necessary for the proper working of an agricultural holding. Now that leaves it in this way. It is for the county court judge on evidence in the ordinary way to be satisfied that the house is required for a person who is or is to be employed; he has to be satisfied with the certificate as to the nature of the work on which that person is to be employed; and it matters not a bit that, at the date when the certificate was obtained, no person was in contemplation.

That still leaves the second point as to what the certificate should say with regard to the nature of the work. It is pointed out that the words "the agricultural worker," are used in this certificate without specifying that he was to be a foreman, and that implies, it is suggested, that the nature of the work has not been indicated by the committee in its certificate and that ought to be done. In my opinion, although it is not necessary for the committee to mention in its certificate an actual person either by name or by something from which he can be identified, in other words, the actual person can be got later, I think it is unquestionably the duty of the committee to consider what is the work for which it is alleged a person is necessary. That is the very thing that they have to consider. I apprehend that any committee in normal practice would be bound to direct its attention to that question, and, if it did not do so, it would not be carrying out its duty. If a farmer came and said it was necessary for him to have another stockman on his farm, the committee would say: How many stockmen have you got, what is the size of your farm, how many head of cattle have you, and so forth, and then they would decide whether another stockman was necessary. They would not carry out their duty without going through that process. In the present case the certificate was not attacked before the county court judge on the ground that the particular type of agricultural worker or the type of work on which he was to be employed was not mentioned on its face. There was no attack upon that ground and no doubt for a very good reason. Before the committee the respondent was present and was represented by a solicitor. They knew perfectly well what went on. If the point had been taken before the county court judge, it would have been possible to satisfy any inquiry by identifying the work to which the certificate referred by saying: I told the committee I wanted a foreman and it was the work of a foreman that the committee had in mind when granting the certificate. That would be identifying something mentioned on the face of the certificate, and that would have been the ordinary and sensible way of dealing with the matter; or, if the county court judge was not satisfied, I apprehend he could have sent the certificate back and asked them to specify the type of worker in respect of whom the certificate was granted or the type of work he was to do. However, the appellants were not asked to do that and for the very good reason that it must have been obvious that there could be only one answer, namely, that the application to the committee had been in respect of a foreman and the committee had a foreman in mind when they granted the certificate, otherwise they would not have been doing their duty. I cannot attach any importance to the fact that, in a printed document, the words "agricultural worker" are inserted by the executive officer of this committee. He would have been better advised to have put in "agricultural foreman." Then this particular argument would not have arisen. His omission to do that and his putting in "agricultural worker" instead still leaves it open to identify the particular type of worker there referred to, and it could have been done and would have been done. There are two matters which make it clear that the type of man the appellants were requiring was a foreman. They had been advertising for a foreman, and we are told by counsel for the appellants on instructions from the solicitors who represented the appellants before the committee that they were told, as, indeed,

one would have expected, that it was a foreman that was required. Therefore, there was never any substance in this point, and it is a very good reason why nobody ever took it before. The real point before the county court judge was as to the necessity of indicating either by name or by some means of identification an actual person in existence and contemplated at the time of the certificate.

- In my opinion, for the reasons I have given, that is not the true construction of these provisions. There is authority on the matter. It is not very satisfactory. I do not mean by that that I think it was an incorrect decision. In my opinion it was correct, and, moreover, it was a decision of this court. I say unsatisfactory because there is no adequate report of it, but when such material as we have is examined it appears to me to have covered this precise point. It was *Knight v. Winter* (1) decided in this court on Apr. 24, 1942, by MacKINNON, L.J., LORD CLAUSEN, and GODDARD, L.J., that being the decision referred to at the foot of the certificate in this case. That was a case where the certificate had merely referred to "a person." There was no evidence before the county court judge that, at the date of the application to the committee, any particular person was in the contemplation of the committee or mentioned to the committee; the same was the case here. It was argued that the certificate was bad on its face and that the judge had no right to accept it for the very same reason as is given here, namely, that the certificate must name, or, at any rate, contemplate an individual identified at the time. We have been furnished with the judge's note of the evidence in that case and the certificate in that case which the county court judge in the case before us had not the advantage of having before him, and we have a very short note of the decision extracted from the ESTATES GAZETTE. From the language used it appears that the decision was in fact expressed in one or possibly two sentences. It seems to me that that decision is exactly in point, so far as it is possible to extract its terms from the papers we have had before us. In my opinion, if I may say so with great respect to those who were parties to it, that decision was right. The length of my judgment must be excused for this reason. The matter having been so fully argued before us and the only existing authority not being the subject-matter of a report, I have thought it right to examine the question *de novo* and see what, in my opinion, was the right conclusion. I have come to a conclusion without considering, in the first instance, *Knight v. Winter* (1), and, in my opinion, the conclusion I have come to is the one which is in accordance with the decision in *Knight v. Winter* (1), and the interpretation which is implicit in that judgment is the correct one.

- The only other point that was taken was that, if we decided the first point against the respondent, the case would have to go back to the county court judge because on that basis he would still have a function to perform, namely, a function under the section of the Act itself under which he has in any event to consider whether it is reasonable to make an order. It is said this court ought not to usurp the function of the county court judge and that it ought to be referred back to him to decide that matter. It is not argued that the requirement that the dwellinghouse is reasonably required by the landlords is not satisfied, but it is said there still remains a matter under sect. 3 about which the county court judge must be satisfied, that is, whether it is reasonable to make an order. We have all the evidence before us. I am prepared to go as far as to say that, on the evidence it would not be open to a reasonable man to say it was other than reasonable to make an order. There are no circumstances here except circumstances of some hardship with which one sympathises. There are no other circumstances which would justify the withholding of this house which is very urgently required for agricultural purposes for which the employee has no accommodation and can find no accommodation, or that possession should be refused merely because, and this is the only possible reason, the tenant is a lady, I do not know how old, and has a brother in not particularly good health, and also has a lodger. To give effect to those circumstances seems to me almost equivalent to bringing back as a condition the necessity for alternative accommodation which is the very thing that is dispensed with by the legislature in these cases.

Quite apart from that, the judge in his written note dealt only with the point of law which I have been discussing earlier in this judgment. If he had intended to regard the question of reasonableness as one which he would have to consider

further I cannot help thinking he would have said so. Moreover, he did mention one matter which he said would require to be further explored, namely, the question as to whether the appellants might not have made available to this foreman some cottage which they own. They own several cottages. One of them, I think, was near the work. It was a bungalow, but it was, quite obviously, a house that a foreman would not occupy and, moreover, litigation would be necessary to get the tenant out. I do not think the county court judge can have meant, when he said that the question ought to be explored, that the landlords were to be put to the trouble and expense of getting out another tenant ; that would be fantastic, and in any event before us no reliance was placed upon the matter of the cottages at all. The only reason I mention it is this. The fact that the judge did specifically mention the question of the cottages as one which might require further exploration seems to me quite clearly to indicate that he had in his mind no other question that required exploration before he could make an order. Therefore, I construe what he wrote coupled with what we are told he said, as indicating quite clearly that, apart from the question of the cottages, which drop out of the case, the only matter that prevented him from making an order was the matter of law by which he regarded himself as bound. That question having now been answered in a different way the appeal should be allowed and an order for possession should be made. A

MACKINNON, L.J. : I agree. I believe it is true that I was a party to the decision of *Knight v. Winter* (1), although I have no recollection of it whatever. It was unfortunate that a more elaborate judgment was not delivered in that case. I gather that we had stated our views as to the proper construction of the Act in the course of the argument, and in giving judgment said we had in the course of the discussion already indicated our views sufficiently and it was unnecessary to repeat them. B

I do not know whether it will be of any assistance, but I think, in regard to this section of the Act, these propositions are true : (a) It is not necessary for an applicant to the war agricultural committee to have made a contract of employment with a particular worker before he so applies ; (b) it is not necessary for him to specify any particular person with whom he proposes to contract before he so applies ; (c) it is sufficient, when he applies to the committee, to specify the class of worker whom he desires to engage ; (d) it follows, as was held by this court in *Knight v. Winter* (1), that it is not necessary for the committee in their certificate to mention the name of the proposed employee, and the committee may issue their certificate of a worker of a particular class without having any specific worker of that class in their mind. Those are, I think, propositions which really are essential. To those I would add, not as essential, but as a recommendation, as a matter of good business, for the smooth working of this machinery : (e) it is desirable for the committee in its certificate to state the class of worker in respect of whom an application has been made to them. D

In the light of those rules and usages, I see no reason why the machinery of this Act should not work in a satisfactory and businesslike way. E

DU PARCQ, L.J. : I agree on the main point. I think we are assisted by the decision in *Knight v. Winter* (1) as to the accuracy of which, if I may respectfully say so, I agree with what was said by LORD GREENE, M.R., although during the earlier part of the argument I felt there was great force in the points which were urged to the contrary view. F

I agree that the question for the committee is whether the landlord needs a workman or employee to do work necessary for the proper working of an agricultural holding. I say nothing about the later words. That is what the committee is concerned to discover, whether there is work necessary for the proper working of an agricultural holding which requires to be done, and whether it is necessary for the farmer to find somebody to do it. It is quite true, as was pointed out by counsel for the appellants, that there are other matters which the committee has to go into now by reason of the Defence (Agriculture and Fisheries) Regulations, reg. 28A. I only mention that to say those duties are, for the purpose of the county court judge's inquiry, really irrelevant. They are merely matters which have to be inquired into because in certain circumstances, which apart from that regulation would be irrelevant even to the committee's inquiry, they are entitled and bound to withhold the certificate G H

altogether. I only mention them, therefore, to dismiss them from further consideration.

A I do wish to add that I entirely agree with what has been said about the desirability of precise statements in the certificate of the agricultural committee as to the kind of worker they have been considering. In this case, as it turned out, the matter was not of importance because the evidence, to my mind, before the county court judge was quite conclusive to show that the committee had considered the question of the employment of a foreman. No suggestion to the contrary was made. I think it is really clear from the judge's note of the appellants' evidence that that is what was said, and the appellants were not cross-examined to suggest that what was said was wrong, nor did the respondent, who had been present at the meeting before the committee, suggest that it was wrong; so no difficulty arises, but difficulty easily may arise because there may be a dispute as to the precise order made and the precise matters investigated by the committee. I do not know what their procedure is. I do not know how much the matter is discussed in the absence of the parties concerned. Obviously, they are entitled to talk the matter over, as any tribunal may, in the absence of the parties. I do not know what kind of decision is announced at the end. If all that happens is the handing out of a certificate, it is most desirable that it should state the nature of the work with some particularity so that there can be no dispute before the county court judge. If a dispute should develop C I do not see what the county court judge can do except send it back to the committee. He cannot be expected to decide the matter himself because he is not required to do that or entitled to do that. That would be his only course.

On the other part of the case I only wish to say this. The overriding words are "where the court considers it reasonable so to do." I agree with counsel for the respondent that is essentially a question for the county court judge.

D If the judge has reviewed the facts and has come to the conclusion that it is not reasonable to make an order, then I think it would be generally agreed that this court ought not to interfere merely because in its view it would have been reasonable to make an order. There may be cases where there is no evidence at all on which the county court judge could say it is not reasonable to make an order, or, again, the county court judge may possibly misdirect himself as to the meaning of the word "reasonable" and then this court has jurisdiction.

E In the present case, I doubt very much whether there was any evidence on which the judge could have said that it was not reasonable to make an order, but he certainly did not say so, and I do not think he had the slightest intention of saying so. The most he said was that he might have wanted to inquire about these cottages. I am doubtful as to what he did say about that. We have only a short note of it. I agree, if he thought it would not be reasonable to make an order because the landlords might have taken steps to get rid of other tenants, that would be a hopeless ground on which to base any decision. Putting that on one side, I am quite satisfied that he had not the slightest intention of saying that there was any ground for refusing an order except the pure question of law which was so clearly raised, and with which he quite clearly dealt, and which he knew was quite likely to be the subject of an appeal, in fact, the last finding almost invites an appeal in a case of this kind.

G I only say this, not because I differ at all from what was said by LORD GREENE, M.R., but because it is of great importance that parties should understand, as I venture to think, that appeals on the ground that the county court judge was wrong in thinking that, in all the circumstances, it was not reasonable to make an order are not very likely to be listened to sympathetically in this court as a general rule.

H *Appeal allowed with costs. Order for possession in 21 days with mesne profits.*

Solicitors: *Stafford Clark & Co.*, agents for *Soanes & Welch*, Witney (for the appellants); *Preston, Lane-Claypon & O'Kelly*, agents for *Andrew Walsh & Son*, Oxford (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

Re FITZWALTER, WRIGHT v. PLUMPTRE.

[COURT OF APPEAL (Lord Clauson, du Pareq, L.J. and Bennett, J.), July 22, 29, 1943.]

Settlements—Mining Leases—Capitalisation of rent—Tenant for life not unimpeachable for waste—Leases granted by predecessor—Proportion of rents tenant for life entitled to retain—Settled Land Act, 1925 (c. 18), s. 47.

The testator, by his will, limited certain estates to the use of certain named persons successively as tenants for life without impeachment of waste, with limitations in tail after each tenant for life to his issue with provisions to the effect that the estate of every such tenant in tail born in the testator's lifetime should be cut down to an estate for life with remainder to his issue in tail. The will contained no specific words providing that the several estates for life thus limited to persons born in the testator's lifetime who would, but for the cutting down provision, be tenants in tail, should be without impeachment of waste. The questions to be determined were (1) whether on the true construction of the will the appellant, who held such a life interest in place of an interest in tail, was impeachable for waste and (2) what was the extent of the appellant's interest in the rents and royalties payable under certain mining leases of the settled property granted by previous tenants for life under Settled Land Act powers:—

HELD: upon the true construction of the will the appellant tenant for life was not unimpeachable for waste but, nevertheless, he was entitled, under the Settled Land Act, 1925, s. 47 to receive as rents and profits the residue of the rents payable under the mining leases after one fourth part only had been set aside as capital money.

Re Chaytor (3) approved.

[EDITORIAL NOTE.] The Settled Land Act, 1925, s. 47, requires part of the rent under a mining lease to be capitalised. The amount to be capitalised is either three-quarters or one-quarter of the rent according as the tenant for life is or is not impeachable for waste. In *Re Chaytor* (3) it was held that in the corresponding section of the 1882 Act, which this section replaces, the words "impeachable for waste" do not mean impeachable for waste generally, but impeachable for waste in respect of the property comprised in the lease. A tenant for life who works open mines was, apart from statute, entitled to retain the whole rent whether or not he was impeachable for waste and it was, therefore, held in *Re Chaytor* (3) that under the statute he was entitled to retain three-quarters of the rent. This decision was sought to be overruled in the present case, but the Court of Appeal have refused to overrule it both because they agree with its reasoning and because the matter in their view is also governed by the doctrine of *stare decisis*.

AS TO CAPITALISATION OF RENT UNDER A MINING LEASE, see HALSBURY, Halsbury Edn., Vol. 22, pp. 565, 566, para. 1233; and FOR CASES, see DIGEST, Vol. 34, pp. 643, 644, Nos. 402-417.]

Cases referred to:

- * (1) *Re Kemeys-Tynte, Kemeys-Tynte v. Kemeys-Tynte*, [1892] 2 Ch. 211; 40 Digest 766, 2979; 61 L.J.Ch. 377; 66 L.T. 672.
- (2) *Re Hall, Hall v. Hall*, [1916] 2 Ch. 488; 34 Digest 644, 416; 86 L.J.Ch. 59; 115 L.T. 481.
- * (3) *Re Chaytor*, [1900] 2 Ch. 804; 34 Digest 644, 414; 69 L.J.Ch. 837.
- (4) *Clavering v. Clavering* (1729), 2 P.Wms 388; 34 Digest 627, 234.

APPEAL by the tenant for life in possession from an order of SIMONDS, J., dated Mar. 11, 1943. The facts are fully set out in the judgment. The Settled Land Act, 1925, s. 47, provides as follows:

Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely—where the tenant for life or statutory owner is impeachable for waste in respect of minerals, three-fourths parts of the rent, and otherwise one-fourth part thereof, and in every such case the residue of the rent shall go as rents and profits.

Geoffrey Cross for the appellant.

Michael Albery for the respondent tenant in tail in remainder.

Lindsay M. Jopling for the respondent trustees.

Cross: If the court should be against me on the question of construction, I submit that the appellant is not impeachable as respects these particular

minerals because the mines were already opened, the leases having been granted, not by the appellant, but by his predecessor. In *Re Chaytor* (3) it was decided that the words "where the tenant for life is impeachable for waste" contained in the Settled Land Act, 1882, s. 11, mean, not "where he is impeachable for waste" generally, but "where he is impeachable for waste in respect of property comprised in the lease in question." If a mine is properly opened, whether by the settlor or by a person who has limited interests under the settlement, it is an open mine and, in default of some provision in the settlement to the contrary, a limited owner is entitled to take all the produce of the mine, except that, if the lease was granted under the Settled Land Acts, he can take only three-quarters. No tenant for life is impeachable for waste in respect of a mine which has been properly opened by somebody other than himself. In *Re Chaytor* (3) it was the settlor himself who opened the mine but the position would be the same if a mine had been opened by a previous tenant in tail. It is impossible to say that the appellant is impeachable for waste in respect of this particular mine. If these three leases were forfeited or surrendered, it could not be argued that the appellant could not keep three-quarters of the rent. In *Re Kemeys-Tynte* (1) the owner of an estate had contracted to lease coal and it was held that the tenant for life, although impeachable for waste, was entitled to the whole of the rents and royalties. When one is considering the rights of a tenant for life, a mine is considered to be open in the legal sense from the date the lease is granted. [Counsel referred to *Clavering v. Clavering* (4), and *Re Hall, Hall v. Hall* (2).]

Albery: My principal submission is that *Re Chaytor* (3) was wrongly decided. The Settled Land Act uses the words "impeachable for waste in respect of minerals" as distinguished from the words "impeachable for waste in respect of timber." One section of the Act deals with the position of a tenant for life impeachable for waste in respect of minerals and another section deals with the position of a tenant for life impeachable for waste in respect of timber. That shows that it is not sufficient merely to say "not impeachable for waste." It would be inconsistent to construe the words as meaning one thing in one section and another thing in the other section.

LORD CLAUSON [delivering the judgment of the court]: This is an appeal from an order of SIMONDS, J., of Mar. 11, 1943, on an originating summons issued by the trustees of the will of the late Lord Fitzwalter, against Francis Fitzherbert Plumtre, tenant for life in possession of the estates settled by the will of the late Lord Fitzwalter, and Fitzwalter Brook Plumtre, tenant in tail in remainder, seeking a determination of two questions; (i) whether on the true construction of the will the tenant for life is impeachable for waste, and (ii) what is the extent of the interest of the tenant for life in the rents and royalties payable under certain mining leases of the settled property granted by previous tenants for life under Settled Land Act powers.

The testator died on Dec. 6, 1875, having by his will, dated Nov. 6, 1861, limited certain estates to the use of certain named persons successively as tenants for life without impeachment of waste, with limitations in tail after each tenant for life to his issue with provisions to the effect that the estate of every such tenant in tail born in the testator's lifetime should be cut down to an estate for his life with remainder to his issue in tail. There are no specific words in the settlement providing that the several estates for life thus limited to persons born in the testator's lifetime who would (but for the cutting down provision) be tenants in tail should be without impeachment of waste and the first question is whether the will can be construed to mean that nevertheless the life estate of Mr. Francis Fitzherbert Plumtre, who was born in the testator's lifetime, namely on Mar. 23, 1864, and became tenant for life in possession on Sept. 12, 1932, is to be without impeachment of waste. It is argued that it would be capricious to differentiate as regards waste between the various tenants for life. No doubt it would be so, but this argument cannot justify the court in reading into the will words that are not there. SIMONDS, J., was of opinion, and in our judgment rightly, that the life tenancy which the present tenant for life takes under the settlement is not limited to him without impeachment of waste.

The next question is what is the extent of the interest of the present tenant

for life in the rents and royalties payable under certain mining leases granted by previous tenants for life under the Settled Land Act. The dates of these leases are not stated in the evidence, but the case was argued on the footing that they were all granted under Settled Land Act powers by previous tenants for life under the settlement. Some of the mines were not worked until after the date when the present tenant for life became tenant for life in possession. It is clear, however, from the express provisions of the Settled Land Act, 1925, s. 47, that that circumstance does not affect the rights as between capital and income in the rents received under the leases. In any case where minerals have been demised and rent is paid under the demise that rent forms part of the rents and profits of the settled land (see as to this *Re Kemeys-Tynte* (1)) and must be dealt with as such, subject, where the minerals have been demised under Settled Land Act powers, to the provisions of the Settled Land Act, 1882, s. 11, or the equivalent sect. 47 of the Act of 1925, whichever may be applicable.

Before dealing with the question of construction which arises under these sections it may be convenient to recall that it is settled law (see *Re Hall* (2), and the cases cited there) that, apart from statutory provisions, a tenant for life who is expressed to be unimpeachable for waste can open and work mines and receive all the profits arising therefrom. If he is impeachable for waste, he cannot open mines, but, if the mines in question have been opened by the settlor or by a person interested under the settlement and entitled to open mines, a tenant for life, though impeachable for waste, can continue to work the mines and receive all profits derived. Accordingly, apart from statutory provisions, the tenant for life in the present case would be entitled to all the profits of the mines in question if they had been lawfully opened by previous tenants for life, and, as explained above, to all the rents payable under mining leases properly granted by such tenants for life. His rights are, however, limited by sect. 47 of the Settled Land Act, 1925, mentioned above since the rents and royalties arise from leases granted under Settled Land Act powers. The question arising in the present case is whether so far as the mines now in question are concerned the tenant for life is impeachable for waste in respect of minerals; in which case he is entitled to one-fourth only of the income, or is not so impeachable, in which case he is entitled to three-fourths of the income.

At first sight the point seems to be simple. Under the settlement, as SIMONDS, J., and we have interpreted it, the tenant for life in question is not unimpeachable for waste, and, as one might well think, accordingly impeachable for waste generally. However, this simple construction of the position leads to difficulties when it is borne in mind that in respect of the mines in question this tenant for life, but for the Settled Land Acts, would be entitled to all the rents and profits. So far as these mines are concerned he has, apart from this statutory provision, precisely the same right of taking the whole of the profits as if he were unimpeachable for waste. It would seem odd that the legislature, in its anxiety that, where the rents and royalties arise from the exercise of Settled Land Act powers, some portion of the rents and royalties should be capitalised, should, as regards the extent of the capitalisation, differentiate between two tenants for life who, apart from the Act, would equally be entitled to retain all the profits in question. It is, on the other hand, perfectly intelligible that where a tenant for life, being impeachable for waste, has no power to open the mines in question except under the statute, he should be allowed a smaller share of the rents and profits of the mines which he opens than a tenant for life who, being unimpeachable for waste can open mines without aid from the statute, and if he does so is entitled to all the profits. This difficulty was faced by the court in *Re Chaytor* (3), where STIRLING, J., decided that, according to the true construction of sect. 11 of the Settled Land Act, 1882, a tenant for life, though not declared by the settlement unimpeachable for waste, is not as regards open mines "impeachable for waste in respect of minerals" within the meaning of that section. In other words, STIRLING, J., construed the words "impeachable for waste in respect of minerals" as "impeachable for waste in respect of the minerals which are the subject of the lease in question." A tenant for life who (but for this special provision as to capitalisation) would be entitled to take all the rents of a mineral lease properly granted can obviously not be "impeachable for waste" as regards such minerals.

This decision is not binding on us, but we agree with the reasoning on which

it is founded, and we are prepared to follow it. We should add that in any case we should hesitate to overrule a decision of this character which has stood unchallenged, and, so far as we are aware, uncriticised for 43 years. Moreover, the decision settled the construction of a section in the 1882 Act which has been re-enacted by the legislature in the same language (in all material respects) by the Settled Land Act, 1925, s. 47. The legislature must be taken to have known of the decision. Even if we had doubts as to the correctness of the decision (and we have none) we should feel bound to follow it in construing, as we have to construe, the Settled Land Act, 1925, s. 47.

The order of SIMONDS, J., will accordingly be discharged, and in lieu there will be a declaration that upon the true construction of the will of the testator the defendant tenant for life is not unimpeachable for waste and that he is nevertheless entitled to receive as rents and profits of the settled estates the residue of the rents payable under the leases of settled minerals granted under the Settled Land Acts by previous tenants for life after one-fourth part only has been set aside as capital money. These declarations appear to us to be preferable in form to those asked for in the notice of appeal.

The costs of all parties of the appeal as between solicitor and client will be retained and paid by the trustees out of capital moneys.

Declaration accordingly.

Solicitors: *Bridges, Sawtell & Co.* (for all parties).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

D WORTHING CORPORATION v. SOUTHERN RAILWAY CO. AND OTHERS.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Russell of Killowen, Lord Macmillan, Lord Wright, Lord Romer), **July 12, 13, 15, 16, August 5, 1943.**]

E Rates and Rating—Railway—Railway hereditament—Proposal for amendment of list—Railway valuation roll—Rating and Valuation Act, 1925 (c. 90), s. 37—Railways (Valuation for Rating) Act, 1930 (c. 24).

The first respondents were the owners and the second respondents the occupiers of a coal wharf which, on the first railway valuation roll, was included as a railway hereditament. As the result of a decision in the House of Lords, the appellants, the rating authority, anticipated that the coal wharf would not appear in the second valuation roll as a railway hereditament, and, on Feb. 22, 1937, they made a proposal under the Rating and Valuation Act, 1925, s. 37, for a separate assessment of the coal wharf by the assessment committee, on the ground that it was not a railway hereditament. On the second valuation roll, which was completed on Jan. 27, 1939, the wharf did not appear as a railway hereditament. The Railways (Valuation for Rating) Act, 1930, s. 18 (3), provides that the provisions of the Rating and Valuation Act, 1925, with respect to the amendment of current valuation lists shall not apply to a hereditament "for the time being shown in the railway valuation roll as a railway hereditament." The question to be determined was whether "railway valuation roll" in this subsection meant the valuation roll existing at the date of the above proposal for amendment, or the later valuation roll which, taking effect retrospectively, governed the quinquennium during which the proposal was made:—

HELD: on the proper construction of the Act of 1930, the phrase meant the railway valuation roll existing at the time when the proposal was made and, since the wharf appeared therein as a railway hereditament, the machinery for amendment of the valuation list under sect. 37 of the 1925 Act was not available. Therefore, the proposal was ineffective.

Decision of the Court of Appeal ([1942] 2 All E.R. 302) *affirmed.*

[EDITORIAL NOTE.] The discussion here has arisen out of the unavoidable delay in completing the valuation of railway properties. The premises here in question were classed as a railway hereditament in the railway valuation roll for the period ending in 1936. It seemed clear from a decision of the House of Lords given early in 1936 that this was a wrong view of the nature of the premises and in 1937 it was sought to include them in the ordinary list before a new railway valuation roll had been completed, but it is held that no such amendment could be made until the new railway valuation was completed and it was known whether or not the premises were included in it. The House have affirmed the decision of the Court of Appeal and that of UTHWATT, J., in the court of first instance, the only expression of the contrary view being by MACKINNON, L.J., in the Court of Appeal.

AS TO RATING OF RAILWAY PREMISES, see HALSEBURY, Hailsham Edn., Vol. 27, pp. 411, 412, para. 842; and FOR CASES, see DIGEST, Supp., Rates and Rating, Nos. 800a-800h.]

Case referred to:

- (1) *Westminster Corpn. v. Southern Ry. Co.*, [1936] A.C. 511; [1936] 2 All E.R. 322; Digest Supp.; 105 L.J.K.B. 537; *sub nom. Re Southern Ry. Co.'s Appeal*, 155 L.T. 33.

APPEAL by the rating authority from a decision of the Court of Appeal dated July 31, 1942, reported [1942] 2 All E.R. 302, affirming by a majority the decision of UTHWATT, J., reported [1942] 1 All E.R. 256. The facts are fully set out in the opinion of LORD RUSSELL OF KILLOWEN.

Sydney G. Turner, K.C., and *E. J. C. Neep* for the appellants, the rating authority.

W. Craig Henderson, K.C., and *Colin H. Pearson* for the respondent railway company, the owners of the coal wharf.

G. D. Squibb for the respondent occupiers of the coal wharf.

The assessment committee did not appear.

VISCOUNT SIMON, L.C.: My Lords, I have found it difficult to arrive at a confident conclusion on this appeal, especially in view of the reasoning of MACKINNON, L.J., in his dissenting judgment in the Court of Appeal and of the able argument of counsel for the appellants before this House. The difficulty in the case is that we have to apply the provisions of the Railways (Valuation for Rating) Act, 1930, to a situation which Parliament does not appear to have clearly visualised as likely to occur when the Act was passed. It cannot be supposed that the legislature intended that a rateable hereditament, such as this coal wharf at Worthing Station goods yard, should escape all liability for rates for 2 years. Yet, that is the result of the decision of the majority in the Court of Appeal, approved as it will be by the judgment of this House. We are not, of course, at liberty to write into the statute additional words in order to bring about a less surprising or inequitable result, unless the addition is fairly to be implied from the actual terms of the statute. Upon the whole, I am in agreement with the rest of your Lordships that the appeal must be dismissed, and I can adopt the detailed analysis to which the relevant clauses have been subjected by UTHWATT, J., by LORD GREENE, M.R., and LUXMOORE, L.J., in the Court of Appeal, and in the opinions about to be delivered in this House, without repeating them.

The whole trouble is due to the circumstance that the second railway valuation roll (which was to be in force from Apr. 1, 1936, to Mar. 31, 1941) was not completed before Mar. 31, 1938. If it had been, and if (as the Worthing rating authority correctly anticipated) the coal wharf was found not to be included in the second roll as a railway hereditament, it would have been possible for the Worthing Corporation by taking appropriate steps to ensure that their current valuation list should have been amended as from Apr. 1, 1936, by striking out the wharf as a railway hereditament and inserting it as a hereditament valued by the usual method of valuation for non-railway hereditaments. As a result, rates would have been payable continuously in respect of the wharf. The legislature must, I think, have proceeded on the assumption that the second railway valuation roll would be available in time to secure this result. This did not turn out to be the fact, and hence the possibility of this gap arose. All we can do is to apply the statutes as they stand, and the conclusion to which I am driven is, for reasons which others of your Lordships are stating more at length, that the proposal is not valid or effective, and that the assessment

committee are precluded from hearing and determining it.

I move that the appeal be dismissed with costs.

LORD RUSSELL OF KILLOWEN: My Lords, the question to be decided on this appeal is whether a proposal dated Feb. 22, 1937, and made by the Worthing Rating Authority (under the Rating and Valuation Act, 1925, s. 37) for the amendment of the current valuation list was valid and effective. The proposed amendment related to certain premises, viz., a coal wharf situated in the goods yards at Worthing railway station, occupied by the respondents, Hall & Co., Ltd., and owned by the respondents, the Southern Railway Co.

The part of the first railway valuation roll relating to the Southern Railway (which I will call the Southern Railway roll) included the coal wharf as part of a railway hereditament; the proposal asked for it to be separately assessed on the ground that it did not form part of a railway hereditament.

The first quinquennial period under the Railways (Valuation for Rating) Act, 1930, commenced, in relation to Worthing, on Apr. 1, 1931, and ended on Mar. 31, 1936. The relevant quinquennial period of the Worthing Rating Authority began on Apr. 1, 1933, and ended on Mar. 31, 1938. The drafting and completion of the first railway valuation roll under the Act of 1930 took a much longer time than was probably anticipated by those responsible for the statute which provided this novel method of valuing for rating purposes hereditaments occupied by railway companies. In fact the Southern Railway roll was not completed until Apr. 27, 1934. On this completion, the assessment committee for the Worthing area (hereinafter referred to as the assessment committee) would receive the proper notice under sect. 8 (4) of the Act of 1930, with the result that, by virtue of sect. 12 (1) of the same Act, the coal wharf would appear in the valuation list relating to the quinquennial period from Apr. 1, 1934, to Mar. 31, 1939, as part of a railway hereditament.

The Southern Railway roll, when completed, in fact included as railway hereditaments or parts of a railway hereditament divers premises in different parts of the country, but mainly in London, as to which appeals were brought by rating authorities (under sect. 9 (2) of the Act of 1930) to the Railway and Canal Commissioners, on the ground that the railway assessment authority had incorrectly treated them as being railway hereditaments or parts of a railway hereditament. No such appeal was brought in respect of this coal wharf.

The appeals eventually reached your Lordships' House, and on May 20, 1936, your Lordships' decision was pronounced declaring that many, if not all of the premises in question had been, within the proviso to sect. 1 (3) of the Act of 1930, "so let out as to be capable of separate assessment," and, therefore, could not be deemed to be or to form part of a railway hereditament. The pendency of these appeals no doubt suspended the revision of the Southern Railway roll. It was not revised until Sept. 24, 1936, when effect could be and was given to your Lordships' decision, by alterations made in the roll on the revision thereof. By virtue of sect. 12 of the Act of 1930 particulars of these alterations would be made known to the authorities concerned, and amendments would be made in the appropriate valuation lists by the assessment committees. It is said that as a result of your Lordships' decision it became obvious that the Worthing coal wharf was not part of a railway hereditament within the Act of 1930. I would have thought that before such a conclusion was reached, the facts of the particular case would require consideration in order to determine whether it was "so let out as to be capable of separate assessment." However that may be, it was probable or at least possible that it was not part of a railway hereditament, and for the purpose of this case I will assume that it was obviously not part of a railway hereditament. The stern fact, however, remains that under the Act of 1930 assessment committees have no power in this respect to act upon the obvious. For them the only question is, what does the railway valuation roll say? Their valuation list must echo the railway valuation roll.

I now come to the crucial question in the case. The Worthing Rating Authority made the proposal here in question on Feb. 22, 1937. By that date the first railway quinquennial period had come to an end, the Southern Railway roll had been revised, the second railway valuation roll had not even reached the draft stage contemplated by sect. 7 and Sched. III of the Act of 1930. There is no provision in the Act of 1930 for altering a revised valuation roll after the

expiration of the quinquennial period to which it applies. Sect. 10 (2) forbids it. Is it open to a rating authority in these circumstances to apply by way of proposal under sect. 37 of the Act of 1925, and ask an assessment committee to amend the current valuation list, so as to cause premises which at the date of the application appear therein as part of a railway hereditament in the occupation of a railway to cease to appear therein as such, and to appear therein separately assessed and in a different occupation, on the ground that they do not form part of a railway hereditament?

My Lords, on general principles I would have thought that the answer should be "No." It is asking the assessment committee to determine a question which they have no jurisdiction to determine. If they had jurisdiction they must have had it on Feb. 22, 1937. But they clearly had not got it then, and they cannot clothe themselves with jurisdiction by adjournments of the application.

But, in my opinion, the question is answered by sect. 18 of the Act of 1930. By subsect. (3) of that section it is enacted that :

The provisions of the Rating and Valuation Acts . . . with respect to the revision or amendment of current valuation lists by means of proposals . . . shall not apply in the case of a hereditament for the time being shown in the railway valuation roll as a railway hereditament.

One of the provisions so ruled out is sect. 37 of the Act of 1925, if this coal wharf was "for the time being shown in the railway valuation roll as a railway hereditament." The words "for the time being" point to some moment of time at which it must be ascertained whether a hereditament is then shown in the valuation roll as a railway hereditament. This moment of time for the purpose of this case was Feb. 22, 1937. On that date the only roll in existence was the first roll. It is true that the quinquennial period to which it applied had come to an end. It was no longer "in force" for the purpose of fixing liability to rates; but it is, I think, a misconception to describe it as a roll "the effect of which is spent." It is the roll which was, and continued to be, responsible for the way in which the coal wharf appeared in the current valuation list. Its effect on the valuation list continues after the end of the quinquennial period, until a new roll comes into force. It was not spent on Feb. 22, 1937, so far as concerned classification of railway hereditaments. LORD GREENE, M.R., has shown, I think conclusively, why the same words in sect. 18 (1) must refer to the most recent valuation roll in existence; and, in my opinion, both subsections refer to the valuation roll responsible for the existing condition of the current valuation list.

It was, however, contended that a different view must be taken by reason of the provisions of sect. 17 of the Act of 1930. This section, indeed, was the foundation of the dissenting judgment of MACKINNON, L.J. The section runs thus :

Any failure on the part of the railway assessment authority to complete the whole or any part of a railway valuation roll before the date upon which under the provisions of this Act the roll is to come into operation, shall not of itself render the roll or any part thereof invalid, and each part of the roll as and when completed shall for all purposes take effect as from the said date.

The section is primarily directed to giving efficacy to a completed part, notwithstanding that the whole roll has not been completed. But it is said that the last sentence compels, or at all events enables, us to construe the words "the railway valuation roll" in sect. 18 (3) as meaning the roll which though not in existence at the relevant date, will when it comes into existence "take effect" as from a date earlier than the relevant date; i.e., as meaning in reference to the present case, the new roll which though not in existence on Feb. 22, 1937, did when it was completed on Jan. 27, 1939, "take effect" as from Apr. 1, 1936. For myself, I am unable to follow this reasoning. Sect. 17 merely provides that the *operative effect* of a document (which *ex hypothesi* does not exist on a particular date) shall, when it comes into existence, relate back to that date. But the retrospective operation of a document (even if stated to be for all purposes) cannot make it "show" or fail to "show" something on a day before it in fact came into existence. The *nunc pro tunc* theory is capable of much, but it cannot do that.

For these reasons I agree with the order made by UTHWATT, J., and I would dismiss this appeal.

LORD MACMILLAN asks me to say that he agrees with the opinion which I have just read.

A LORD WRIGHT [read by LORD ROMER]: My Lords, the substantial question to be solved in this appeal is whether the proposal dated Feb. 22, 1937, was on the true construction of the Rating and Valuation Act, 1925, and the Railways (Valuation for Rating) Act, 1930, a valid and effective proposal.

B The proposal, which was made under sect. 37 of the Act of 1925, claimed an amendment of the valuation list of the assessment area on the ground that a certain coal wharf did not form part of a railway hereditament. In the first railway valuation roll the wharf was entered as a railway hereditament belonging to the respondents, the Southern Railway Co. The appellants having received from the railway assessment authority, in accordance with sect. 12 of the Act of 1930, notice that the relevant valuation roll had been completed and notice of its contents, duly "copied" (to adopt the convenient expression used by LORD GREENE, M.R.) from the roll the values and other particulars into their valuation list. The railway valuation roll was under the Act to be effective from Apr. 1, 1931, which was the appointed day, to Mar. 31, 1936. That was the quinquennium for the effectiveness of the roll. For the valuation list the quinquennial periods, so far as here relevant, were from Apr. 1, 1929, to Mar. 31, 1934, and then from Apr. 1, 1934, to Mar. 31, 1939. The second quinquennium for the railway roll thus ran from Apr. 1, 1936, but the second roll was not completed until Jan. 27, 1939. Meanwhile on May 20, 1936, this House held in *Westminster Corpn. v. Southern Railway Co.* (1) that certain hereditaments which in the roll had been entered as railway hereditaments D belonging to the Southern Railway were not properly so entered. This was so held upon an appeal brought against the relevant part of the roll in accordance with sect. 9 of the Act, which limits by subsect. (2) the period for appealing to 2 months. The appeal had not included the coal wharf. It was, however, reasonably clear that it would have been taken out of the roll if an appeal had been brought in time.

E There was considerable delay in completing the second roll, which, as already stated, was not completed until Jan. 27, 1939. That there might be delay on the part of the railway assessment authority in completing the roll had been contemplated by the Act, which by sect. 17 provided that failure to complete the roll before the date at which it was to come into operation should not of itself render the roll or any part of it invalid, but each part of the roll, as and when completed, should for all purposes take effect from the proper date for completion. F The appellants were, however, apprehensive that, if, as they rightly anticipated, the wharf did not appear in the second roll, they might be prejudiced in collecting their rates on the wharf from the actual occupier, the second respondent, for a part or the whole of the period intervening between the date at which the second roll ought to have been completed and the date at which it was completed. They, therefore, made the proposal of Feb. 22, 1937, already referred to. It is conceded that a second proposal which was in fact made by the appellants on Mar. 23, 1939, after the new roll in which the wharf was omitted G was published, the validity of which proposal was not disputed, would only take effect as from Apr. 1, 1938, and would not affect the 2 years between Apr. 1, 1936, and Mar. 31, 1938. On the other hand, if the proposal of Feb. 22, 1937, was valid and effective, it would cover these 2 years, for which otherwise the appellant would not get any rates on the wharf either from the Southern Railway Co. or the actual occupiers. The railway company would not be H liable to be rated, nor would the second respondents as occupiers, because the amendment in the valuation list would not date back to cover this period of 2 years.

The crucial question, therefore, is whether the proposal of Feb. 22, 1937, was or was not valid. The answer to this question depends on sects. 17 and 18 of the Act of 1930, in view of the fact that up to the date when the second roll was completed, and in particular on Feb. 22, 1937, the wharf was still shown on the first railway valuation roll as a railway hereditament. The decision turns primarily on the true meaning of the words of sect. 18 (3) of the Act of 1930,

"shown in the railway valuation roll as a railway hereditament." That subsection provides that the provisions of the Rating and Valuation Acts :

... with respect [*inter alia*] ... to the revision or amendment of current valuation lists by means of proposals ... shall not apply in the case of a hereditament for the time being shown in the railway valuation roll as a railway hereditament.

If the coal wharf at the date of the proposal was shown on the railway valuation roll as a railway hereditament, the proposal would be invalid (so it is argued) under the express words of sect. 18 (3) of the Act which I have just quoted. On behalf of the appellants it has been contended that this is not so, because there was in fact at the date of the proposal no railway valuation roll in existence; the first roll had ceased to be in force when the first quinquennial period had expired (this was said to follow from the provisions of sect. 3 (2)) and the second roll had not come into existence, even though, when it was completed, it would take effect though not for this purpose as from the date when the first roll ceased to be in force. On behalf of the respondents it was contended that the words of sect. 18 (3) should be construed as covering the railway valuation roll, in virtue of which the wharf had been entered as a railway hereditament on the list and on which at the time the wharf was actually shown and that that roll continued to be the roll in that particular respect until the next succeeding roll was completed. It was also said that under the scheme of the Act there cannot be a time when there is no railway roll in existence.

I think the language of the Act might well admit of improvement, but it has to be construed as it stands. I do not derive much help from considering whether there is here a *casus omissus*, whatever that vaguely and uncertainly used expression may mean. If a court of construction can fill up what appears to be a gap in a statute by giving an interpretation to the language of the section read in the light of the context as a whole, there is nothing which can be called a *casus omissus*. There is merely a problem of construction to be solved in the ordinary way. If, however, there is no relevant provision, either express or implied, there may be a gap which a court cannot supply. In the present case I think there are sufficient reasons to enable a decision to be arrived at as a matter of construction. It is not, in my opinion, true to say that a valuation roll becomes at once dead and spent at the moment when its quinquennium expires. I do not see why it should not be deemed to continue to the extent of still showing upon it a hereditament as a railway hereditament for the period while the completion of the new roll is delayed. If that were not so it would follow that there was no railway roll then in existence at all, and in that case serious administrative difficulties would arise. Merely as a matter of words, the contrast in sect. 18 (1) between "the valuation list for the time being in force" and "a hereditament for the time being shown in the valuation roll" is not without significance.

The construction is certainly difficult and the language of the sections is not happily chosen. I have been much impressed by the reasoning of MACKINNON, L.J., in his dissenting judgment in the Court of Appeal and by the able argument of counsel for the appellants. But on the whole I prefer the reasoning of UTHWATT, J., of LORD GREENE, M.R., and of LUXMOORE, L.J. I may add that, if, as I think, the proposal was invalid when it was made, the objection could not, in my opinion, be cured by the simple process of adjourning its consideration until circumstances arose which, if they had existed at the time when it was made, might have made it valid.

I would dismiss the appeal.

LORD ROMER: My Lords, I have read the opinion which has been delivered by LORD RUSSELL OF KILLOWEN. I agree with it entirely, and concur in the motion which is before the House.

Appeal dismissed with costs.

Solicitors: Sharpe, Pritchard & Co. (for the appellants); H. L. Smedley (for the respondent railway company); Braby & Waller (for the second respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION OF THE UNITED KINGDOM v. SPACKMAN.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Macmillan, Lord Wright and Lord Romer), **July 19, 20, 21, Aug. 5, 1943.**]

Medicine and Pharmacy—General Medical Council—Erasure of names from Medical Register—"Infamous conduct in a professional respect"—*Practitioner found guilty by Divorce Court of adultery—Refusal of council to hear evidence not given before Divorce Court—"Due inquiry"—Evidence Act, 1851 (c.99), s. 16—Medical Act, 1858 (c. 90), s. 29.*

On the hearing of a petition for divorce S., a registered medical practitioner, was found to have committed adultery with a married woman. The General Medical Council, at a meeting at which the erasure of his name from the medical register was considered, found that he stood in a professional relationship to the married woman at all material times and adjudged him to have been guilty of infamous conduct in a professional respect. In accordance with the council's standing orders, S. was invited "to state his case and produce the evidence in support of it." S. sought to negative the court's finding of adultery by tendering evidence which, though available, was not called in the divorce proceedings. The council refused to hear fresh evidence on the subject, and directed the erasure of S.'s name from the register. S. contended that by reason of the council's refusal to hear the evidence, the due inquiry required by the Medical Act, 1858, s. 29 had not been held and there had been a failure of natural justice:—

HELD: the refusal to hear the fresh evidence prevented there being the due inquiry required by the Medical Act, 1858, s. 29, and an order of *certiorari* should be granted.

Decision of the Court of Appeal ([1942] 2 All E.R. 150) *affirmed.*

[EDITORIAL NOTE.] The House of Lords in this case have affirmed the decision of the Court of Appeal, which affirmed the dissenting judgment of SINGLETON, J., in the King's Bench Division. The House has based its decision mainly on the construction of the Medical Act, 1858, s. 29, emphasising that, since in the first part of the section a judgment of the court is made final and conclusive in criminal cases, it follows that a decision of the court in other cases must only be *prima facie* evidence which may be contradicted by further evidence. Like the Court of Appeal, their Lordships stress the point that the council are in no sense a court of appeal. The proceedings before them are not an appeal from any court which may have dealt with the facts but are, in fact, proceedings between different parties. There can be no suggestion of estoppel or appeal and the statutory duty of the council is to hold a "due inquiry," which necessarily involves the hearing of any relevant evidence tendered by the parties. That evidence may include a decision of the High Court, but the decision is only *prima facie* evidence and it has been laid down in the Act that such a decision, except in criminal cases, is not conclusive and that the council is to hold a due inquiry into the matter.

AS TO INQUIRIES BY THE GENERAL MEDICAL COUNCIL, see HALSBURY, Hailsham Edn., Vol. 22, pp. 301-303, paras. 565-571; and FOR CASES see DIGEST, Vol. 34, pp. 543-545, Nos. 22-31.]

Cases referred to:

(1) Board of Education v. Rice, [1911] A.C. 179; 19 Digest 602, 290; 80 L.J.K.B. 796; 104 L.T. 689; *affg.* S.C. *sub nom. R. v. Board of Education* [1910] 2 K.B. 165.

(2) Spackman v. Plumstead Board of Works (1885), 10 App. Cas. 229; 26 Digest 505, 2113; 54 L.J.M.C. 81; 53 L.T. 151.

(3) Local Government Board v. Arlidge, [1915] A.C. 120; 38 Digest 97, 708; 84 L.J.K.B. 72; 111 L.T. 905.

(4) Ex p. La Mert (1863), 4 B. & S. 582; 34 Digest 544, 25; 3 New Rep. 120; 33 L.J.Q.B. 69; 9 L.T. 410.

(5) Leeson v. General Council of Medical Education and Registration (1889), 43 Ch.D. 366; 34 Digest 544, 30; 59 L.J.Ch. 233; 61 L.T. 849.

(6) Allison v. General Council of Medical Education and Registration, [1894] 1 Q.B. 750; 34 Digest 544, 24; 63 L.J.Q.B. 534; 70 L.T. 471.

(7) Dimes v. Grand Junction Canal (Proprietors) (1852), 3 H.L.Cas. 759; 38 Digest 99, 717; 8 State Tr. N.S. 85; *revsg.* S.C. *sub nom. Grand Junction Canal Co. v. Dimes* (1850), 2 Mac. & G. 285.

APPEAL by the General Medical Council from a decision of the Court of Appeal given on June 18, 1942, and reported [1942] 2 All E.R. 150, *sub nom. R. v. General Medical Council, Ex p. Spackman*, reversing a decision of the Divisional

Court (VISCOUNT CALDECOTE, L.C.J., and HUMPHREYS, J., SINGLETON, J., dissenting), reported [1942] 1 All E.R. 568. The facts are fully stated in the opinion of VISCOUNT SIMON, L.C.

C. E. Harman, K.C., and *Douglas C. Bartley* for the appellants.

Cecil R. Havers, K.C., and *Henry C. Dickens* for the respondent.

VISCOUNT SIMON, L.C.: My Lords, this appeal involves a question of importance as to the proper exercise of the statutory jurisdiction conferred on the General Medical Council (as I will call the appellants) to remove from the Medical Register a practitioner who is alleged to have been guilty of infamous conduct in a professional respect. Parliament has conferred upon the General Medical Council responsibility for the register, and has constituted the council a domestic forum for the purpose of determining whether a case is made out for striking off the list a particular name. The gravity to the doctor concerned of an adverse decision by the council needs no emphasis; but the responsibilities of the General Medical Council cannot be measured only by the effect of its decision upon an individual. The high reputation of the medical profession as a whole depends in no small measure on excluding from it those whose professional misconduct makes them unworthy to belong to it, and the confidence which the public are accustomed to put in the family doctor is intimately connected with the assurance that those who practise the art of medicine are, in all relations with their patients, individuals of the highest honour.

The facts giving rise to the appeal are as follows. Early in 1941 LANGTON, J., sitting in the Divorce Court, had before him the case of *Pepper v. Pepper* (*Spackman cited*). The original petition was that of the wife asking for her marriage to be dissolved on the ground of her husband's cruelty. The wife's allegations were supported by the evidence of the doctor who was attending her and who is the respondent in the present appeal. On this issue of cruelty LANGTON, J., in his judgment said that he disbelieved Dr. Spackman *in toto*, and he found against the petitioner. In the divorce proceedings the husband in his answer alleged that his wife had frequently misconducted herself with the doctor. The judge found that these parties had committed adultery during the years 1936, 1937 and 1938, and declared that this conclusion "is not, I think, open to any reasonable doubt at all." Consequently, the judge granted the husband a decree *nisi* of divorce, with costs against Dr. Spackman, and ordered Dr. Spackman to pay to the husband £1,000 damages. The decree *nisi* was made absolute on Aug. 26, 1941.

On Oct. 2, 1941, a letter was written to the present respondent on behalf of the appellant council giving notice that information and evidence had been received by the council, from which it appeared that:

... you committed adultery with Barbara Pepper, a married woman, of which adultery you were found guilty by a decree [of the Divorce Court] ... You stood in professional relationship with the said Barbara Pepper at all material times and that in relation to the facts so alleged you have been guilty of infamous conduct in a professional respect ... A meeting of the General Medical Council will be held ... to consider the above-mentioned charge against you and decide whether or not they should direct your name to be removed from the Medical Register pursuant to the Medical Act, 1858, s. 29.

The letter requested that any answer, admission or other communication or application which "you may desire to make respecting the said charge or your defence thereto" should be transmitted to the council 21 days before the day appointed for hearing.

The respondent did not furnish any written answer, as he was requested to do, but he attended the meeting of the General Medical Council with his solicitor. The solicitor to the council opened the case and placed before the council a certified copy of the decree absolute. Each member of the council had been provided with the shorthand notes of the proceedings in the Divorce Court, including a copy of the judgment of the judge. The respondent's solicitor admitted that his client stood in a professional relationship with Mrs. Pepper, but submitted that he should be allowed to call certain evidence which was not before the Divorce Court, with a view to challenging the correctness of the judge's conclusion on the issue of adultery. He frankly stated that the evidence which he desired to call was available at the hearing of the petition and could with reasonable diligence have been called at the trial, and added that, if he had then been advising the respondent, these witnesses would have

been called in the divorce proceedings. The legal assessor to the council pointed out that in such circumstances the Court of Appeal, in an appeal from a decision of the High Court, would not consider that there was adequate reason for allowing the further evidence to be called and that the council's practice in such cases was only to hear evidence in rebuttal if special grounds existed. The respondent's solicitor explained that the witnesses he wished to call would provide corroboration of the respondent's statements at the trial which the judge had not accepted. After the council had deliberated in private, the president announced that the council could not accede to the submission of the respondent's solicitor, and were not prepared to hear fresh evidence on the question of adultery. The respondent's solicitor then addressed the council and called evidence in support of Dr. Spackman's high reputation. Finally, after further private deliberation, the president of the council announced that the facts alleged in the charge had been proved to the council's satisfaction, and

directed that Dr. Spackman's name should be erased from the Medical Register. It is convenient at this point to set out the terms of the Medical Act, 1858, s. 29, upon which the whole question turns. It runs as follows :

If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence, or shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register.

Contrast may usefully be made between this section and the very different language of such a section as the Clergy Discipline Act, 1892, s. 1.

Application was made to the King's Bench Division on behalf of the present respondent for an order of *certiorari* to quash the direction that the respondent's name should be erased from the register, on the ground that there had been no "due inquiry." VISCOUNT CALDECOTE, L.C.J., and HUMPHREYS, J., were of opinion that the application failed and that the council had made "due inquiry." VISCOUNT CALDECOTE, L.C.J., said that he found nothing in the proceedings of the council in this case to shock his sense of justice. SINGLETON, J., was of a different opinion, and considered that, even when under a decree of the Divorce Court a doctor was adjudged to have been guilty of adultery, the council, if this finding is disputed, ought to hear evidence tendered by or on behalf of the doctor in an endeavour to establish the contrary.

In the Court of Appeal, MACKINNON, L.J., LORD CLAUSON and GODDARD, L.J., were unanimous in adopting the view which had been expressed by SINGLETON, J. MACKINNON, L.J., held, at pp. 152, 153, that :

"Due inquiry," however, does involve at least a full and fair consideration of any evidence that the accused desires to offer, and, if he tenders them, hearing his witnesses.

With this the other two Lords Justices agreed, and the order of *certiorari* was granted accordingly.

The General Medical Council was given leave to appeal to this House and the issue has been argued before us with ability and candour by both sides. It is not disputed that the General Medical Council, in exercising this jurisdiction, is not a judicial body in the ordinary sense : it is master of its own procedure and is not bound by strict rules of evidence. It is not subject to correction by the courts as long as it complies with sect. 29 of the Act of 1858. That section draws a significant distinction between a case in which the impeached practitioner has been convicted of felony or misdemeanour, and a case in which the allegation of infamous conduct is not connected with a criminal conviction. In the former case the decision of the council is properly based on the fact of the conviction, and the practitioner cannot go behind it and endeavour to show that he was innocent of the charge and should have been acquitted. In the latter case, the decision of the council, if adverse to the practitioner, must be arrived at "after due inquiry," and this, of course, means after due inquiry by the council. The question, therefore, is whether the council in this case can be regarded as having reached its adverse decision "after due inquiry" when it has refused to hear evidence tendered by the practitioner with a view to showing that he has not been guilty of the infamous conduct alleged and that the finding of the Divorce Court against him as co-respondent is wrong.

It is worth observing that this problem does not arise only in connection

with conclusions reached in the Divorce Court. A jury's verdict of justification in proceedings for slander, judgment for the plaintiff in an action for seduction, a bastardy order made by a bench of magistrates—all these, and many other, instances of adverse conclusions reached in a court of law might conceivably in certain circumstances lead to a charge against a medical man of infamous conduct in a professional respect. It seems obvious, in these other instances, that while the council might well treat the conclusion reached in the courts as *prima facie* proof of the matter alleged, it must when making "due inquiry" permit the doctor to challenge the correctness of the conclusion and to call evidence in support of his contention. The previous decision is not between the same parties; there is no question of estoppel or of *res judicata*. In such cases the decision of the courts may provide the council with adequate material for its own conclusion if the facts are not challenged before it, but, if they are, the council should hear the challenge and give such weight to it as the council thinks fit. A

The same view must, I think, be taken if the practitioner challenges the correctness of a finding of adultery by the Divorce Court. The decree provides a strong *prima facie* case which throws a heavy burden on him who seeks to deny the charge, but the charge is not irrebuttable. So much follows from the structure of sect. 29 and from the necessity, if there is to be "due inquiry," of giving the accused party a fair opportunity of meeting the accusation. Unless Parliament otherwise enacts, the duty of considering the defence of a party accused, before pronouncing the accused to be rightly adjudged guilty, rests upon any tribunal, whether strictly judicial or not, which is given the duty of investigating his behaviour and taking disciplinary action against him. The form in which this duty is discharged—e.g., whether by hearing evidence *viva voce* or otherwise—is for the rules of the tribunal to decide. What matters is that the accused should not be condemned without being first given a fair chance of exculpation. B C D

This does not mean that the council has to rehear the whole case by endeavouring to get the previous witnesses to appear before it, though in special circumstances the recalling of a particular witness, in the light of what the accused or his witnesses assert, may, if feasible, be desirable. The council will primarily rely on the sworn evidence already given at the trial. It is not required to conduct itself as a court. Its members may usefully bear in mind the language of LORD LOREBURN, L.C., in *Board of Education v. Rice* (1), at p. 182, where, dealing with the decision of an administrative body he said: E

... they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. F

The previous practice of the council recognises that there are special cases in which a finding of adultery by the Divorce Court is not to be treated as final, for, if the further evidence tendered to the council had been evidence which could not with reasonable diligence have been put before the court, the council would have heard it. This qualification has been explained as being analogous to the exceptional cases in which the Court of Appeal admits further evidence. But there is really no analogy. The council is not a court of appeal, and the rule of the Court of Appeal is based on the view that the time to call evidence is on the occasion of the trial and that before the Court of Appeal it is normally too late to do so. Here the position is quite different. The conclusion of the Divorce Court constitutes, as I have already said, a strong *prima facie* case against the doctor, but, when this much is proved, the procedure prescribed by para. 9 of the Schedule to Chapter XIV of the Standing Orders of the Council should be followed, viz.: G H

... the practitioner will then be called upon by the president to state his case, and to produce the evidence in support of it.

In weighing the value of rebutting evidence produced before it, the council is entitled to bear in mind that it is not given on oath, although (in a case like the present) it might have been brought forward under oath at the trial, and that the council cannot compel the attendance of other witnesses which might refute

it. The council is further entitled to attach to the conclusion of the Divorce Court all the weight that is due to the effect upon a trained judicial specialist of sworn testimony given, subject to cross-examination, before a tribunal which can compel attendance of witnesses and production of documents. But all this does not exonerate the council from refusing to allow the accused to put before it relevant matter in support of his denial. If it was considered desirable to make the decision of the Divorce Court conclusive and so to prevent the possibility of a second hearing on the issue of adultery, this could only be brought about by amending sect. 29.

I move the House that this appeal be dismissed with costs.

LORD ATKIN [read by LORD ROMER]: My Lords, I have had an opportunity of reading the opinion delivered by VISCOUNT SIMON, L.C., and, as I substantially agree, I content myself with making a short addition. The conduct alleged against the respondent is conduct from which the public have every claim to be protected, and there would be none more ready to afford protection than the members of the medical profession itself. But it is obvious that the gravity of the charge does not diminish the weight of the evidence necessary to establish it: it increases it. The responsibility, therefore, thrown upon the General Medical Council in such cases is grave.

It is plain that the statute throws upon the council and on the council alone the duty of holding due inquiry and of judging guilt. They cannot, therefore, rely upon inquiry by another tribunal or a judgment of guilt by another tribunal. The practitioner charged is entitled to a judgment the result of the considered deliberation of his fellow practitioners. They must, therefore, hear him and all relevant witnesses and other evidence that he may wish to adduce before them. It is not disputed that, where there has been a trial, at least before a High Court judge, the notes of the evidence at such trial and the judgment of the judge may afford *prima facie* evidence in support of the charge: for the council are not obliged to hear evidence on oath. But the very conception of *prima facie* evidence involves the opportunity of controverting it: and I entertain no doubt that the council are bound, if requested, to hear all the evidence that the practitioner charged brings before them to refute the *prima facie* case made from the previous trial. If this is inconvenient it cannot be helped; it is much more inconvenient that a medical practitioner should be judged guilty of an infamous offence by any other than the statutory body. Convenience and justice are often not on speaking terms. Nor do I accept the view put forward on behalf of the council that they are ill-qualified to form an opinion upon such a charge as the present compared with a High Court judge. I can imagine no tribunal better qualified to draw deductions from the proved conduct between a doctor and his female patient than the very experienced body of men for instance who sat on the present inquiry.

Some analogy exists no doubt between the various procedures of this and other not strictly judicial bodies; but I cannot think that the procedure which may be very just in deciding whether to close a school or an insanitary house is necessarily right in deciding a charge of infamous conduct against a professional man. I would, therefore, demur to any suggestion that the words of LORD LOREBURN, L.C., in *Board of Education v. Rice* (1), at p. 182 afford a complete guide to the General Medical Council in the exercise of their duties. As I have said, it is not correct that "they need not examine witnesses." They must examine witnesses if tendered, and their own rules rightly provide for this. Further it appears to me very doubtful whether it is true that "they have no power to administer an oath." This proposition which is found in other cases and in the judgments of the Court of Appeal in the present case appears to ignore the provisions of Lord Brougham's Evidence Act, 1851, s. 16.

The only other remark I would make is that it is reasonably plain that the council in accordance with its practice, which will now, of course, be changed, relied for its decision on the judgment of LANGTON, J., and on nothing else. They appear only to have been provided with those extracts from the short-hand notes which are exhibited to the affidavit of the registrar in the present case, which do not contain any evidence at all of adultery, but do relate to the absence of doubt in the mind of the judge. But the question does not turn upon the judge's absence of doubt, but upon whether the members of the Medical

Council are themselves convinced of their fellow practitioner's guilt. I agree with the judgment of SINGLETON, J., and those of the Lords Justices, and am of opinion that the appeal should be dismissed.

LORD RUSSELL OF KILLOWEN : My Lords, I have been asked by my noble and learned friend LORD MACMILLAN, who is unable to be present here to-day, to say that he agrees with the opinion which has been delivered by VISCOUNT SIMON, L.C.

LORD WRIGHT : [read by LORD RUSSELL OF KILLOWEN] My Lords, I concur in the opinion which my noble and learned friend VISCOUNT SIMON, L.C., has delivered. I also agree with the dissenting judgment of SINGLETON, J., in the Divisional Court, the substantial effect of which was accepted by the Court of Appeal. I merely add a few observations of my own. A

The appellants council is a statutory body and its functions are such as Parliament has conferred upon it. The particular power and duty conferred which are relevant to this case are those contained in the Medical Act, 1858, s. 29. This gives the council disciplinary powers over registered medical practitioners. It specifies two main conditions under either of which the powers of the council may be exercised : (i) if the medical practitioner is convicted in England or Ireland of any felony or misdemeanour or (ii) if he is after due inquiry judged by the council to have been guilty of infamous conduct in any professional respect. In either of these cases the council may if they see fit direct the registrar to erase the name of such medical practitioner from the register. If either condition is satisfied, the stated power may be exercised. But the exercise is discretionary : they may if they see fit. B C

The former condition is defined precisely and nothing more than the conviction is required to found the discretion, though how the discretion is exercised is left to the council. The other condition is on a different footing. There is no definition of what may constitute "infamous conduct in any professional respect." The precise meaning and scope of these words are left to the council. It has to decide whether infamous conduct has been made out to their satisfaction. It has not merely to ascertain the facts but to decide what standard to apply, and whether to hold that the particular conduct is infamous, not in the abstract but "in any professional respect." There is no appeal from their decision. Such tremendous powers, which may close a man's professional career and ruin him financially and socially, have been vested in the council by Parliament from a faith both in the members' expertness in regard to that grave issue and in their moral gravity and trustworthiness. Such is the eminence of the council and so completely representative is it of a great profession, the honour and integrity of which are of the highest importance as matters of public policy. D E

The council is not a court of law. No particular procedure is prescribed. It can determine its own procedure. It has not the usual powers of a court of law. It has no power to compel the attendance of witnesses or to take evidence on oath or to order discovery of documents or the production of documents. It is not bound by the laws of evidence. I have observed that Parliament has not provided for any appeal from the decisions of the council. F

The only control of the court to which the council is subject (apart from proceedings by way of *mandamus*) is the power which the court may exercise by way of *certiorari*. *Certiorari* is not an appellate power. Its use may nullify or discharge an order made by the council ; but the grounds on which *certiorari* may be granted are very limited. They may, I think for purposes of this case, broadly be taken to be (i) the ground that the council's proceeding was *ultra vires* (ii) the ground which without any very great precision has been described as a departure from "natural justice." The former ground is not likely to be evoked in connection with the orders of the council. Their powers are so wide and undefined that the possibility of a case of *ultra vires* is theoretical and almost fantastic. It is not to be contemplated that the council would proceed without solid *prima facie* grounds or otherwise than in good faith. The question of a failure of "natural justice" is what is to be considered in this appeal. But before considering the meaning of these words, I must first observe that they can in this case be properly taken as a description of what the council has to do, namely, to make "due inquiry," which under the statute is the governing criterion, that is an independent inquiry by the council as the body G H

responsible for its own decision.

"Natural justice" seems to be used in contrast with any formal or technical rule of law or procedure. Some light on what it connotes may be got from the authorities, to certain of which I now refer. Thus *Spackman v. Plumstead Board of Works* (2) was a case of administrative decision in a matter of local government. Under the relevant Act an architect's certificate was made conclusive for fixing a general line for buildings. The EARL OF SELBORNE, at p. 240 made some general observations, and said :

No doubt in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that *the substantial requirements of justice* shall not be violated. He is not a judge in the proper sense of the word ; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice that he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There could be no decision within the meaning of the statute if there were anything of that sort done contrary to *the essence of justice*.

I have italicised the two phrases which the EARL OF SELBORNE seems to me to use as meaning what is generally meant by "natural justice." He adds at p. 240.

... this is a matter not of a kind requiring form, not of a kind requiring litigation at all, but requiring only that the parties should have an opportunity of submitting to the person by whose decision they are to be bound such considerations as in their judgment ought to be brought before him.

I may also quote briefly from two other decisions of this House which indicate what is the duty of what are called "administrative tribunals," not perhaps very happily because the word "tribunal" suggests a court of law and a litigation, whereas what is meant may better be described as the duty of a body charged by statute with a duty of deciding. I quote first the language of LORD LOREBURN, L.C., in *Board of Education v. Rice* (1). He said at p. 182 :

Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of state the duty of deciding or determining questions of various kinds. . . . It will, I suppose, usually be of an administrative kind ; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. . . . I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial . . . The Board is in the nature of the arbitral tribunal, and a court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by *mandamus* and *certiorari*.

It had just been expressly observed by LORD LOREBURN, L.C., that the Board : . . . can obtain information in any way that they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

The words *fair* and *relevant* are to be noted. If this statement is applicable to an "administrative tribunal," it must in my opinion be applicable to the proceedings of the council, which may not inaptly be described as a professional tribunal, like so many other similar professional bodies which are invested by statute for grave reasons of public policy with disciplinary powers over members of the profession.

In *Local Government Board v. Arlidge* (3) the same general principles were applied and the language of LORD LOREBURN, L.C., in *Rice's* case (1) was approved. The case raised the issue whether the respondent had had a fair hearing. In the public inquiry, which had been held in accordance with the statute, he and his witnesses had been heard orally. But after the inquiry the Board's inspector submitted his report to the Board, who decided the matter after considering the facts and the evidence given at the inquiry and the inspector's report. The respondent claimed that he should have seen the report and been heard orally by the officer of the Board who actually decided it. He had been offered the opportunity of submitting a written statement but had not availed himself of it. This House, reversing the majority of the Court of Appeal, HAMILTON, L.J., dissenting, held that Parliament must have intended that the ordinary procedure of the Board which was the deciding body would be followed (as they

held it had been) and that the work of decision had been done judicially and fairly in the sense indicated by LORD LOREBURN, L.C. VISCOUNT HALDANE, L.C., said, at p. 132 :

... when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same.

The position of the council under sect. 29 has been considered specifically in certain cases. In *Ex p. La Mert* (4) the applicant's name had been erased from the Medical Register under sect. 29. He applied for a rule *nisi* calling on the council to show cause why a *mandamus* should not issue commanding them to restore his name to the register. He had published a book which the council held to be indecent and improper: this they had decided to be infamous conduct in a professional respect. The court refused the rule. COCKBURN, C.J., said that the legislature, considering the council to be the best judges in such a matter, had left the matter in their arbitrament and the court could not interfere. The question was whether the council were entitled to rule that, though they would hear the doctor by himself or his solicitor, they would not hear counsel. BLACKBURN, J., observed that the council had not refused to hear what the applicant had to say.

In *Leeson v. General Medical Council* (5), the decision of the council was attacked on the ground of bias. The medical practitioner had been held guilty of infamous conduct within sect. 29 because he had allowed himself to be cover to an unqualified person as if he were duly practising under the Act. The complaint of bias was grounded on the fact that of the twenty-nine persons who had held the inquiry, two were members of a body called the Medical Defence Union, one of the objects of which was to prosecute and suppress unauthorised practitioners. The proceedings had been instituted by the Union, but these two members were not of its managing body. The court refused to interfere. It held (FRY, L.J., dissenting) that the two members had not such an interest in the matter in question as to disqualify them from acting. But I ought at least to quote what was said by BOWEN, L.J., in *Leeson's* case (5), at p. 383. He said that the statute :

... certainly imports that the substantial elements of natural justice must be found to have been present at the inquiry. There must be due inquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard, and the decision must be honestly arrived at after he has had a full opportunity of being heard. With respect to the charge made, the charge of which he has notice, it is a charge of infamous conduct in some professional respect, and the particulars which should be brought to his attention in order to enable him to meet the charge ought to be particulars of conduct which, if established, is capable of being viewed by honest persons as conduct which is infamous. ... We have seen that those conditions have been fulfilled by the inquiry and by the tribunal which institutes it. The functions of the Court of Law are at an end.

The same views were expressed by COTTON, L.J. FRY, L.J., said nothing to the contrary, though he dissented in the result because he thought that membership of the Union constituted a bias which disqualified the members from sitting on the inquiry. In *Allison v. General Medical Council* (6), a Court of Appeal, comprised of LORD ESHER, M.R., and LOPES and DAVEY, L.J.J., agreed with the view of the majority in *Leeson's* case (5).

In *Arlidge's* case (3) HAMILTON, L.J., is quoted, at p. 130, as describing the phrase "contrary to natural justice" as "an expression sadly lacking in precision." So it may be and perhaps it is not desirable to attempt to force it into any Procrustean bed. But the statements which I have quoted may at least be taken to emphasise the essential requirements that the tribunal should be impartial and that the medical practitioner who is impugned should be given a full and fair opportunity of being heard. These are conditions of the validity of any decision enunciated by the council. A very strong instance of the effect of bias is afforded by *Dimes v. Grand Junction Canal* (7). A decree of the House was there set aside because one member of the tribunal had an interest in the company, unknown to the defendant. It was immaterial that, as LORD CAMPBELL said, at p. 793 :

No one can suppose that LORD COTTENHAM could be, in the remotest degree

influenced by the interest that he had in this concern. . . .

If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision. Thus in my opinion in the present case the council has to take the inquiry up afresh. There is, in my opinion, no force in certain objections which have been raised. The council very properly have treated the decree of the Divorce Judge as *prima facie* evidence; so it is, and very strong evidence too, especially considering that the respondent did not appeal but paid the £1,000 damages awarded against him. But that is no reason for refusing him the full and fair opportunity of stating his case before the council. The legislature has not made a decree of the Divorce Court conclusive on the question of adulterous conduct, in the same way as it has made a conviction of felony or misdemeanour conclusive so that in such a case all that the council has to decide on proof of the decree and the identity of the party is whether the adultery amounts to infamous conduct in a professional respect. Parliament, when it thinks fit, can clearly and effectively put a decree of adultery of the Divorce Court on the same footing for the purpose of disqualifying the offender as a conviction of treason and felony. This it has done in the Clergy Discipline Act, 1892, s. 1. In sect. 29 Parliament has not done so, but has put convictions for felony and misdemeanour in a special category by themselves. In other cases than these the offences charged must be proved independently by some evidence which the council can accept. Thus the decree is *prima facie* but no more than *prima facie* evidence, and the doctor proceeded against must be entitled to call evidence, either his own or that of other witnesses, to controvert the charge. The respondent's solicitor asked for leave to call certain witnesses who were available as he admitted at the time of the trial in the Divorce Court but were not called, though in his view they should have been called on the respondent's behalf. It is unfortunate that the council did not consider this application on its merits, but met it with a blank refusal on the ground of the council's practice not to allow fresh evidence to be called if it might have been called in the trial court which, as here, was the Divorce Court. This practice was, however, a departure from the practice adopted in the council's rules scheduled to Chapter XIV. Rule 9 provides that, if there is no complainant (as in the present case) the council's solicitor will state the facts and produce the evidence so far as the case is not admitted and the practitioner will then be called upon by the president to state his case and to produce the evidence in support of it. He may address the council either before or at the conclusion of his evidence but only once.

These rules I apprehend were merely domestic rules which the council adopted and could change; but the relevant rule as it stood satisfied, as I think, the essential requirements of justice and fair play. I do not know how it came to be changed and the present practice substituted. That practice is said to be based on the analogy of what is stated to be the practice of the Court of Appeal in admitting or rejecting fresh evidence. However that may be, I do not think there is any analogy at all between the proceedings of the council and those in the Court of Appeal. The latter are a rehearing of the case presented in the court below, and in the interest of the maxim "*ut sit finis litium*" the Court of Appeal has a discretion about admitting fresh evidence. The position of the council is entirely different. They are an independent body: they are not a court of appeal; the practitioner appears before them for the first time; the proceedings in the Divorce Court were an entirely separate proceeding; the proceedings before the council are fresh proceedings, before a different body, who are bound to hold a due inquiry on their own responsibility and make their own decision on the evidence before them. It is indeed to be regretted that the council should have for some reason and at some time departed from their former sound rule.

I am unable to see the force of the objection urged against hearing the evidence that the council is not a court of law or equipped with the machinery for ascertaining facts. Parliament has put the duty of inquiry upon them and they seem to have discharged their duty for the last 80 odd years. Most of the cases before the council must involve questions of fact which they have to decide as best they can. It can only be in comparatively rare cases that the cause

of complaint is a matter which has been decided in a court of law other than by a conviction for felony or misdemeanour. The court decision should indeed ease that duty, because the proceedings and judgment of the court at least give the council *prima facie* evidence which may be for practical purposes unanswerable by the practitioner. But he must surely be entitled to deny the charge before the council and bring his evidence if he contests the justness of the decision of the court. If the decision of the court is to be made conclusive, the law must be changed by Parliament.

In my opinion the decision which has been brought up to the court on *certiorari* ought not to stand. The council ought to take up the inquiry again. I do not seek in any way to suggest or forecast how they will hold it. The discretion and responsibility for the procedure are theirs.

I would dismiss the appeal.

LORD ROMER: My Lords, I have read the opinion delivered by VISCOUNT SIMON, L.C., and I concur in it.

Appeal dismissed.

Solicitors: *Waterhouse & Co.* (for the appellants); *Hempsons* (for the respondent).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

EARL FITZWILLIAM'S COLLIERIES CO. v. PHILLIPS (INSPECTOR OF TAXES).

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Romer), **July 6, 8, 9, August 4, 1943.**]

Income tax—Mining lease—Right to let down surface—Acreage payment as liquidated damages—"Easement"—"Rent"—Finance Act, 1934 (c. 32), s. 21 (4) (b), (c).

A colliery company, under a mining lease, contracted to pay to a lessor sums of £10 and £5 per acre of so much of the coal demised as should have been worked and gotten during the preceding half-year as liquidated damages in respect of damage to the overlying surface. It was admitted that such right or benefit as was thereby created was not a legal easement, but it was contended that it was an "easement" within the definition of that word in the Finance Act, 1934, s. 21:—

HELD [LORD ROMER *dissenting*]: the payments were "rents" payable in respect of an "easement" within the meaning of the Finance Act, 1934, s. 21.

Decision of the Court of Appeal ([1942] 1 All E.R. 648) *affirmed*.

[EDITORIAL NOTE.] The point in this case is short but difficult. *Elliott v. Burn* (1) prevented the House from deciding that the rights granted were in law an easement. This, however, does not conclude the question, for it remains to be decided whether they were an easement within the definition of that term in the Finance Act, 1934, s. 21, which includes rights which are not legal easements. In agreement with the Court of Appeal the majority of their Lordships have had no difficulty in holding that the rights in question fall within that statutory definition and that the payment in respect of them are rents payable in respect of an easement within that section.

AS TO ASSESSMENT OF SURFACE DAMAGE PAYMENT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 140, 141, para. 283; and FOR CASES, see DIGEST, Vol. 28, p. 8, No. 28.]

Cases referred to:

* (1) *Elliott v. Burn*, [1935] A.C. 84; Digest Supp.; 103 L.J.K.B. 578; 151 L.T. 526.

* (2) *Inland Revenue Comrs. v. New Sharlston Collieries Co., Ltd.*, [1937] 1 K.B. 583; [1937] 1 All E.R. 86; Digest Supp.; 106 L.J.K.B. 375; 156 L.T. 279.

(3) *Capel v. Buszard* (1829), 6 Bing. 150; 19 Digest 12, 19; *affg.* S.C. *sub nom. Buszard v. Capel* (1828), 8 B. & C. 141; 6 L.J.O.S.K.B. 267.

(4) *Coltress Iron Co. v. Black* (1881), 6 App. Cas. 315; 28 Digest 6, 13; 51 L.J.Q.B. 626; 45 L.T. 145.

APPEAL by the taxpayer from a decision of the Court of Appeal, dated Apr. 17, 1942, reported [1942] 1 All E.R. 648, affirming the decision of LAWRENCE, J., reported [1941] 3 All E.R. 296. The facts are fully set out in the opinion of LORD RUSSELL OF KILLOWEN.

H. Wynn-Parry, K.C., and *F. Heyworth Talbot* for the appellants.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), J. H. Stamp and Reginald P. Hills for the respondent.

VISCOUNT SIMON, L.C. : My Lords, I have had the advantage of studying the opinion which LORD RUSSELL OF KILLOWEN is about to deliver in this appeal. That opinion completely expresses my own view of the matter, and I content myself with saying that I accept it in its entirety. I move that the appeal be dismissed with costs.

A LORD RUSSELL OF KILLOWEN : My Lords, by a lease dated Jan. 31, 1935, and made between the Earl Fitzwilliam and the appellants, the appellants became the lessee of certain mines, seams, beds, measures and strata of coal and other minerals and brick, earth, fireclay and clay (therein collectively referred to as "the demised minerals") for a term of 99 years. By cl. 1 of the lease the demised minerals were demised in consideration of the rents and payment thereby reserved and the covenants therein contained. By cl. 2 it was provided that so far as the lessor could grant the same there were included in the demise and for the purposes thereof and for all other purposes connected with the due and proper working of the demised minerals and the disposing of the same, certain liberties of which the first ran thus :—

C (1) To work the demised minerals and in so doing and in working minerals under adjoining and neighbouring lands to withdraw support from the surface overlying the area of the demise and from any buildings or erections now or hereafter to be erected or built thereon or from any mines seams beds measures and strata of coal or other minerals (other than and except such support, if any, as shall be required to be left in pursuance of any covenant or provision hereinafter contained or may be required to be left in accordance with any contract or lease now existing or heretofore made or granted) without making any compensation for damage except as hereinafter provided.

D By cl. 5, paras. (1) and (2), of the lease it was provided that the appellants should during the said term pay to the lessor by equal half-yearly payments on July 1 and Jan. 1, in every year, a surface rent for lands and surface works, and a certain rent in respect of coal. Para. (3) of cl. 5 ran thus :—

(3) The company [i.e., the appellants] shall also pay on the half-yearly rent days aforesaid or as soon thereafter as such rents can be computed the acreage or footage rents in respect of the several seams of coal hereby demised as follows . . .

E There then follow under headings (A), (B), (C) and (D) different rents for the different seams of coal, and under heading (E) a royalty for bricks. Then follows heading (F) the text of which is as follows :—

F The sum of £10 for every acre of so much of the Parkgate seam of coal and £5 for so much of each of the other seams of coal hereby demised as shall have been worked and gotten during the preceding half-year as liquidated damages in respect of the overlying surface belonging to the lessor or land under which he has the power to work the minerals and let down and shall also pay the sum of £10 for every acre of so much of the said Parkgate seam of coal hereby demised as shall have been worked as aforesaid under the lands coloured yellow on the said plan No. 1 and referred to in part IV of the first schedule hereto provided also and it is hereby agreed and declared that such sums shall be payable in lieu of paying compensation for damage or injury which may be occasioned by subsidence consequent on the winning working and getting of the demised minerals or in the exercise of the liberties hereby granted but not in lieu of or in satisfaction for any damage or injury by smoke or noxious fumes arising from or caused by any works or spoil heaps of the company.

G The appellants are also lessees of other coal under an underlease from the Cartonwood Collieries Co., Ltd., dated May 1, 1933, which contains similar provisions as to liberty to work the coal and withdraw support from the surface lands and, for payment of a sum per acre of coal worked as liquidated damages, such sum being payable in lieu of and in substitution for compensation for any permanent damage or injury which might be caused by subsidence or otherwise consequent on the working of the coal thereby demised. It is unnecessary to refer in greater detail to the provisions of this document. It is common ground that for the purpose of deciding this appeal the Fitzwilliam lease and this underlease may be treated as identical, and only the former need be referred to.

H The point which arises for decision may now be stated. In computing their profits for the purposes of income tax the appellants claimed that the sums paid to the lessor under cl. 5 (3) (F) of the lease were allowable deductions, being moneys payable as liquidated damages in respect of the overlying surface.

The claim was resisted on behalf of the Crown on the ground that the payments were rent payable in respect of an easement within the meaning of the Finance Act, 1934, s. 21, which must under the section be treated as if it were a royalty paid in respect of the user of a patent, the result of such treatment being that it is not an allowable deduction in computing profits.

The point is a fine one and depends in my opinion solely on the question whether the effect of cl. 2 (1) of the lease is that the lessee becomes, by virtue of the liberty thereby granted, the owner of an easement within the meaning of the Finance Act, 1934, s. 21. The relevant words in that section are these:—

(1) Where rent is payable . . . in respect of any easement, and (a) the . . . easement is used, occupied or enjoyed in connection with any of the concerns specified in rules 1, 2, and 3 of No. III of Schedule A . . . the rent shall be charged with tax under Schedule D and shall, subject to the provisions of this section, be treated for the purpose of such of the provisions of the Income Tax Acts as refer to royalties paid in respect of the user of a patent as if it were such royalty . . .

(4) For the purposes of this section . . . (b) the expression "easement" includes any right, privilege or benefit in, over or derived from land; (c) the expression "rent" includes a rent service, rent charge, fee farm rent, feu duty or other rent, toll, duty, royalty or annual or periodical payment in the nature of rent, whether payable in money or money's worth or otherwise . . .

Counsel for the appellants argued in the first place that the payments under cl. 5 (3) (F) of the lease did not come within the section's definition of rent. As to this I feel no doubt. In my opinion, while they might well be said to be periodical payments in the nature of rent, they certainly fall within the word "royalty". The fact that in various parts of the lease distinctions are drawn such as "rent or payment" (cl. 6), "rent or sum of money" (cl. 8) and "rents and surface damage payments" (cl. 11), seems irrelevant. If the payment is within the section's definition, the fact that the document calls it something else, or even states that it is not rent, would seem to be immaterial.

Whether the lessee is the owner of an "easement" within the section is to me a much more difficult question. However much we might wish to do so, it is not open to us to say that the liberty granted by cl. 2 (1) of the lease confers upon the lessee an easement within the ordinary legal meaning of that word. No such hereditament has been carved out of the surface-owner's land and vested in the coalowner. The judgments and decision in your Lordships' House in *Elliott v. Burn* (1) prevent us from saying that there exists here such an easement. While the Crown might well have succeeded without relying upon the special definition clause in sect. 21 had there been no *Elliott v. Burn* (1), it was conceded by counsel for the respondent that in view of that decision he was, in order to succeed, compelled to rely on the extended meaning given to the word "easement" by the definition clause in the section.

Turning once more to the lease, the effect of cl. 2 (1) thereof is, I think, this: that the lessor grants to the lessee liberty to work the coal and to withdraw support (except as mentioned) without making any compensation except the sums payable under cl. 5 (3) (F). While I think that *Elliott v. Burn* (1) is an obstacle in the way of my holding that the lessee has any right in, over or derived from the surface land, or any benefit or privilege in or derived from the surface land, it is in my opinion (notwithstanding the powerful dissenting judgment of ROMER, L.J., in the *New Sharlston* case (2)) possible to say that cl. 2 (1) of the lease confers on the lessee a privilege over the surface land, viz., the privilege that by paying the sums mentioned in cl. 5 (3) (F) the lessee obtains freedom to work the coal without any fear of being stopped by injunction from causing subsidence to the surface land, or having to pay damages by reason of any such subsidence.

I am accordingly prepared to hold that the sums paid under cl. 5 (3) (F) of the lease are rent payable in respect of an easement within the meaning of the Finance Act, 1934, s. 21, and I would dismiss the appeal.

LORD MACMILLAN authorises me to say that he concurs in the opinion which I have read.

LORD WRIGHT [read by LORD RUSSELL OF KILLOWEN]: My Lords, this appeal involves the true construction of the Finance Act, 1934, s. 21, as applied to the circumstances of the case. The trial judge, LAWRENCE, J., and the Court of Appeal rightly held themselves bound to follow a previous decision of the Court of Appeal, *Inland Revenue Commissioners v. New Sharlston Collieries*

Co., Ltd. (2), which had not come before this House on appeal. Your Lordships have now to consider whether that case was rightly decided. This appeal has proceeded on the assumption that the circumstances of the present case are indistinguishable in principle from those of the *New Sharlston* case (2). It has also been assumed by both parties that the material facts in both these cases are indistinguishable in principle from the facts in *Elliott v. Burn* (1).

A The facts of the present appeal have been fully stated and I do not now repeat them. It is enough to say that the appellant company is the lessee of certain collieries and that the demise includes (*inter alia*) liberty to work the demised minerals and in so doing to withdraw support from the overlying surface without making any compensation for damage except as provided in the lease. The lease stipulated for certain half-yearly payments described as rents, namely a surface rent, a certain yearly rent, in respect of the coal gotten in the Parkgate seam, certain other rents described as acreage or footage rents in respect of other seams. Finally, by cl. 5 (3)(F) the lease provided (without using the word rent in that context) for certain payments in respect of every acre of the coal demised as should have been worked or gotten during the preceding half-year "as liquidated damages in respect of the overlying surface let down." It was provided also that such sums should be payable in lieu of paying compensation for damage or injury occasioned by subsidence consequent on winning the demised minerals or in consequence of the exercise of the liberties granted by the lease. Damage due to smoke or noxious fumes and damage to buildings caused by the working of the seams by the appellants were excepted. There was also a further lease which raised the same questions.

B The issue in the appeal is whether as between the appellants and the respondent, the inspector of taxes, the payments provided for by cl. 5 (3) (F) were to be treated in the assessment of tax as payments of "rent" in respect of an "easement" within the Finance Act, 1934, s. 21.

D Before your Lordships it has been conceded and assumed that the decision of this House in *Elliott v. Burn* (1) decided that no easement was actually conferred by the indenture in question in that case. Both sides have further agreed before this House in the present case, as they did in the Court of Appeal in the *New Sharlston* case (2) in respect of the lease there in question, that the lease which is now being considered is in substance and in principle indistinguishable from the lease which the House had under consideration in *Elliott v. Burn* (1). On this assumption, it follows on the authority of *Elliott v. Burn* (1) that a right of support as an easement or incorporeal hereditament in the strict sense was not conferred on the appellants under the lease between the appellants and the lessors. The respondent's claim must, therefore, fail unless it is saved by the Finance Act, 1934, s. 21. That section embodies in subsect. (4) (b) a new statutory definition of "easement" for purposes of the section.

F That definition is made applicable to certain concerns, including the collieries leased by the lessors to the appellants. The material words of subsect. 4 (b) must now be construed. They are as follows: "The expression easement" for the purposes of the section "includes any right, privilege or benefit in, over or derived from land." Do these words take the case outside the actual or assumed ruling in *Elliott v. Burn* (1), and do they cover the present case? In my opinion they do. That was so held (ROMER, L. J., dissenting) by the Court of Appeal in the *New Sharlston* case (2), which, I think, was rightly decided.

G The section is clearly of an amending or remedial character. It is essential to approach the construction of such an enactment without undue bias in favour of the strict law which the enactment is setting out to change. It is wrong to construe it in a niggardly and technical spirit, with an eye fixed on the old law. If it is approached in that spirit, it may be easy to eviscerate the enactment and deprive it of any effect. At the same time its effect must be ascertained by considering the words actually used, interpreted in a fair and reasonable way in the light of the whole tenor of the section read as forming part of the income tax legislation.

H The actual words of subsect. (4) (b) are not words of art or such as a conveyancer would use. They are popular in character; they do not suggest the idea of an easement in the strict legal sense of incorporeal hereditament or of an estate or interest in land. The words, in my opinion, would be satisfied by a

merely personal right, privilege or benefit, so long as it concerns or affects a piece of land. So far as the fair meaning of the words requires, such a right, benefit or privilege might be created by deed or by simple contract. The definition seems to me to be inconsistent with the idea of its being limited to what could properly be called an estate or interest in land. The word "any" preceding "right, privilege or benefit," points in the direction of a wide construction. I do not wish to attempt to exhaust what the definition would cover because I can conceive some borderline cases, but I am satisfied that the new statutory definition of "easement" includes more than the rights which this House held in *Elliott v. Burn* (1) not to be an easement in the strict legal sense, and that it includes whatever right or privilege over the lessors' land is given by the lease here in question. That at least includes that the appellants are granted an immunity from an action for an injunction or for any damages beyond the agreed periodical payments which are to frank whatever the appellants do in the course of working the mine in the way of letting down the lessors' surface land. The appellants get at least this qualified right or privilege in regard to withdrawing support. They cannot be restrained from doing so nor can they be held liable in damages (except for the special excepted items) beyond the stipulated periodical payments, which are described as liquidated damages. I agree with GREENE, L.J., in the *New Sharlston* case (2), at p. 612, where he states his conclusion that the lessees had acquired an easement within the definition in the subsection in that they were granted the right to act in such a way as to affect the physical condition of the surface without exposing themselves to the operation of certain of the legal remedies which otherwise would have been available to the surface owners and that that constitutes an "easement" within the language of the definition clause, having regard to the fact that it uses words of general import and not technical expressions. I agree with his further conclusion that the same meaning applies to the present case.

In my opinion the appellants were granted at least a "privilege over" the lessors' overlying land, that is in respect of the land, and this, I think, satisfies the new statutory definition.

There remains the further question whether the payments under cl. 5 (3) (F) are "rent" within the definition of the Act. That definition is very wide; it includes (*inter alia*) "a royalty or annual or periodical payment in the nature of rent." In my opinion the payments in question come within the definition as being periodical payments in consideration of the enjoyment by the appellant company of the "easement" which in my opinion was conferred by the lease. That is my opinion when I look at the substance of the matter and disregard the mere language of cl. 5 (3) (F). The description of these payments as liquidated damages cannot in my opinion prevent the respondent from insisting on their true character, if they come, as in my opinion they do, within the definition of rent given in the subsection. The Crown's right to tax cannot be affected by the mere words which the parties have chosen to use. The word "rent" is itself a word of very wide import, not always correctly employed in ordinary current use, particularly in taxing provisions. "Rent" at common law, in its strict sense, could not properly be applied to denote a rent reserved in a lease of incorporeal hereditaments because rent would not issue out of the premises (*Capel v. Buszard* (3)), but such payments would ordinarily be called rent. In *Coltress Iron Co. v. Black* (4), at p. 335, LORD BLACKBURN observes on the use, which he says is perhaps not quite accurate, of the term "rent reserved in a mineral lease" to describe what in one sense is payment by instalments of the price of minerals forming the land. In sect. 21 "rent" is defined as including the periodical payments to be made in respect of any easement within the meaning given in the section. "Royalty" is also included as an alternative category. I think that the periodical payment in this case comes within the statutory definition. It follows that it cannot be deducted by the appellants in computing their annual profits or gains because by sect. 21 (1) of the Act of 1934 it is to be treated for the purpose of so much of the provisions of the Income Tax Acts as refer to royalties paid in respect of the user of a patent as if it were such a royalty. It is, accordingly, caught by the Rules applicable to Sched. D, Cases I and II, r. 3.

I would dismiss the appeal.

LORD ROMER: My Lords, in my opinion, the Court of Appeal were unquestionably right in holding that the payments specified in cl. 5 (3) (F) of the lease of Jan. 31, 1935, are rents within the meaning of the Finance Act, 1934, s. 21. The fact that they are expressed to be payable "as liquidated damages" and "in lieu of paying compensation for damage or injury which may be occasioned by subsidence" seems to me to be quite immaterial. It cannot alter the essential nature of the payments which is plainly that of additional royalties.

A A horse may be accepted in discharge of a claim to damages. Nevertheless it remains a horse.

I cannot agree with the Court of Appeal that the "rent" is payable in respect of an "easement" within the extended meaning given to that word by subsect. (4) (b) of the section.

In forming an opinion upon this question it is essential to rid one's mind of the feeling that the appellants have acquired some sort of right to work the coal demised to them without leaving pillars or taking other means to support the overlying surface, even though they may not have acquired an easement in the strict sense of the word. The feeling is a very natural one, seeing that cl. 2 (1) of the lease purports in express terms to confer upon the appellants liberty to work the demised minerals and in so doing to withdraw support from the surface. However, loyalty to the decision of your Lordships' House in *Elliott v. Burn* (1) demands that this feeling should be sternly repressed. Either the appellants have obtained by the lease an easement in its strict sense or they have no right of any kind to let down the surface. There is no room for any other alternative. *Elliott v. Burn* (1) compels us to hold that no such easement was granted, and it necessarily follows that, if the appellants so work their coal as to cause a subsidence of the surface, they will be committing a wrongful act, and one that is neither permitted nor condoned by anything that is comprised in the lease. Were it not for the provisions of cl. 5 (3) (F) of the lease any such method of working the coal could have been restrained by injunction and any damage caused to the lessor by such method of working could have been recovered by him in an action at law. In view of the sub-clause these remedies are not open to the lessor; but I am unable to understand how the sub-clause can be said because of that to confer any right or privilege upon the lessees. It certainly gives them no right or privilege of working the coal without leaving or providing means of support to the surface. Any such working will be, as I have already pointed out, a wrongful act that is in no way sanctioned by the provisions of the sub-clause. Those provisions indeed amount to no more than this: that in lieu of his remedies by injunction and action at law the lessor agrees to accept certain additional royalties as his remedy for the wrong done to him by the lessees in depriving his surface of support. Whether or not he has thereby conferred a benefit upon the lessees time alone can show. The damages that would but for the sub-clause have been payable to the lessor by the lessees in respect of subsidence might well have been less than the total additional royalties paid in lieu of such damages. It might well happen too that the loss to the lessees by leaving pillars of coal and the cost to them of any other steps taken to prevent subsidence of the surface would together have amounted to less than the total amount of such royalties. However, assuming that it turns out to have been a benefit to the appellants to pay the royalties in lieu of being compelled so to work their coal as not to let down the surface, I fail altogether to understand how that benefit can be said to be a benefit in, over or derived from the land. It can certainly be regarded as a benefit derived from the lessor. But with all respect to those of your Lordships who think otherwise, it does not seem to me to have anything whatsoever to do with the land. I have only one other observation to make upon this topic.

H The court does not grant an injunction to restrain the commission of a threatened wrongful act if it appears that damages will provide an adequate remedy for the act if committed. Were the court for this reason to refuse an injunction to restrain a colliery lessee from causing subsidence to some part of the surface, it would, I think, be much surprised if it were told that it had conferred a benefit on the lessee in, over or derived from that surface.

My Lords, I have so far dealt only with the position that arises under the lease of Jan. 31, 1935. The position under the sub-lease of May 1, 1933, is, we are told, the same in all material respects. I need not, therefore, consider it further.

For myself I would allow the appeal.

Appeal dismissed with costs.

Solicitors: *Andrew, Purves, Sutton & Creery*, agents for *Newman & Bond*, Barnsley (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., *Barrister-at-Law.*]

ALLCHIN (INSPECTOR OF TAXES) *v.* COULTHARD
(TREASURER OF THE COUNTY BOROUGH OF
SOUTH SHIELDS).

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Romer), **June 22, 24, 28, 29, July 1, 2, 5, 6, August 5, 1943.**]

Income Tax—Local authority—Retention of tax deducted from interest payment—Separate undertakings—Whether excess of taxed income in one account can be set off against excess of interest payments in another account—Income Tax Act, 1918 (c. 40), All Schedules Rules, rr. 19, 21—Local Government Act, 1933 (c. 51), ss. 185, 194—South Shields Corporation Act, 1935 (c. xevi), ss. 112-116.

By the South Shields Corporation Act, 1935, s. 112, all the receipts of the borough were carried into the general rate fund, out of which all its obligations were discharged. Sect. 113 of that Act required the corporation to keep separate accounts for its various undertakings, and sects. 114 and 115 of the same Act enabled the corporation to apply from the rate fund to specified purposes in connection with its undertakings a sum not exceeding the excess revenue, if any, earned by that undertaking. Sect. 116 of the Act repealed the existing statutory provisions governing the application of the revenues of the undertakings and the method of keeping their accounts. The accounts of the corporation for the year 1935-36 showed that, in the case of the electricity and transport undertaking, the total income exceeded the amount of the interest payments, and, in the case of the housing account, the taxed income was considerably less than the interest payments. Upon making the interest payments, income tax had been deducted and retained by the corporation and, in so far as the interest payments had been made out of the taxed income, the corporation would not have to account to the Inland Revenue for the sum retained. The corporation contended that, in the case of the housing account, in so far as the taxed income of that account was insufficient to meet the interest payments in respect of that account, it was entitled to say that such interest payments were made out of the excess of taxed income in the electricity and transport accounts, and supported this contention by the fact that all receipts had to be brought into the general rate fund, from which alone payments could be made:—

HELD: (i) upon the proper interpretation of All Schedules Rules, rr. 19, 21, where annual payments are made out of profits and gains brought into charge, the payer may retain the tax so long as the amount retained does not exceed the amount of tax payable by him in that year. Any excess he must account for to the Crown.

(ii) the effect of sect. 116 of the 1935 Act was to abolish all previously existing statutory regulations and restrictions as to the application of the surplus revenues of the undertakings. The obligations placed upon the corporation by the 1935 Act to keep separate accounts of each undertaking imposed no restriction on the corporation as to the way in which it was to deal with the profits of each undertaking, and there were no special circumstances in the relevant sections of the 1935 Act which would prevent it from claiming that the interest must be treated as having been paid *pro tanto* out of its taxed income. Therefore the contention that the interest payments in respect of the housing account, in so far as the taxed income of that account was insufficient to meet them, were paid out of the excess of

the taxed income of the electricity and transport accounts up to the amount of that excess, was a proper one.

Decision of the Court of Appeal ([1942] 2 All E.R. 39) *affirmed*.

[EDITORIAL NOTE.] In the lower courts the discussion in this case was confined to the proper construction to be placed upon the South Shields Corporation Act, 1935 ss. 112-116. Upon this part of the case the House has adopted the judgment given in the Court of Appeal by LORD GREENE, M.R. The lower courts were, of course, bound by the decision of the Court of Appeal in *A.-G. v. Metropolitan Water Board* (3), but, in the House of Lords, the opportunity was taken to test the validity of this decision and the opinions of their Lordships, except that of LORD ROMER, who has expressly refrained from expressing any opinion on the accuracy of this decision, have dealt at length with this matter. In that case the Court of Appeal held that, when it is said that income tax is paid out of profits brought into charge, it is not the actual profits of the taxpayer which are referred to but the profits as they are assessed for income tax purposes. The House, while not agreeing with all the reasoning in that case, have agreed with the result.

AS TO PAYMENT OUT OF TAXED INCOME, see HALSBURY, Halsam Edn., Vol. 17, p. 138, para. 277; and FOR CASES, see DIGEST, Vol. 28, pp. 73, 74, Nos. 392-397.]

Cases referred to:

- * (1) *Sugden v. Leeds Corpn.*, [1914] A.C. 483; 28 Digest 74, 397; 83 L.J.K.B. 840; 108 L.T. 578; 6 Tax Cas. 211.
- (2) *London County Council v. A.-G.*, [1901] A.C. 26; 28 Digest 73, 392; 70 L.J.Q.B. 77; 83 L.T. 605; 4 Tax Cas. 265.
- * (3) *A.-G. v. Metropolitan Water Board*, [1928] 1 K.B. 833; Digest Supp.; 97 L.J.K.B. 214; 138 L.T. 346; 13 Tax Cas. 294.
- (4) *A.-G. v. London County Council*, [1907] A.C. 131; 28 Digest 73, 393; 76 L.J.K.B. 454; 96 L.T. 481; 5 Tax Cas. 242.
- (5) *Central London Ry. Co. v. Inland Revenue Comrs.*, [1937] A.C. 77; [1936] 2 All E.R. 375; Digest Supp.; 105 L.J.K.B. 513; 155 L.T. 66; 20 Tax Cas. 102.
- (6) *Birmingham Corpn. v. Inland Revenue Comrs.*, [1930] A.C. 307; Digest Supp.; 99 L.J.K.B. 299; 142 L.T. 633; 15 Tax Cas. 265.

APPEAL by the Crown from a decision of the Court of Appeal, dated May 21, 1942, reported [1942] 2 All E.R. 39. The facts are fully set out in the opinion of VISCOUNT SIMON, L.C.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.) and *Reginald P. Hills* for the appellant.

J. Millard Tucker, K.C., *Maurice P. Fitzgerald, K.C.*, and *Terence N. Donovan* for the respondent.

VISCOUNT SIMON, L.C.: My Lords, this is the appeal of the Crown against the unanimous decision of the Court of Appeal (LORD GREENE, M.R., DU PARCQ, L.J., and LEWIS, J.), reversing the judgment of LAWRENCE, J. upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts. The matter arises upon an assessment to income tax for the year 1935-36 made upon the respondent as treasurer of the county borough of South Shields, hereinafter referred to as the corporation, under the provisions of the Income Tax Act, 1918, Miscellaneous Rules applicable to Sched. D, r. 6.

In substance, the question at issue is whether certain annual interest paid by the corporation during the fiscal year 1935-36 was paid, or should be deemed to have been paid, out of profits or gains brought into charge to income tax, with the result that the corporation is not required to hand over to the Crown the income tax which it has deducted when paying such interest. Stated in figures, as set out in the case, the question may be thus propounded. In the year 1935-36 the corporation paid interest amounting in all to £132,396 on borrowed money and on making such payments deducted income tax at the standard rate. For the same year, the profits or gains of the corporation were assessed to tax at £91,504. (The language of the case is that in the year 1935-36 "the profits or gains of the corporation brought into charge to tax amounted to £91,504," but it is agreed between the parties that this refers to the assessment for the year, not to the actual profits or gains made in the year, for a portion of the total is the figure of Sched. D assessments which are based on the figures of actual profits of the preceding year). The corporation admitted that it was liable to account to the Crown for tax deducted from interest in respect of so much of the £132,396 as exceeded £91,504, viz., £40,892, but claimed to retain the rest. The appellant, however, contends that there is a further sum of tax

deducted from interest which must be handed over, viz., tax on £15,217, arrived at as follows. The profits of the corporation's electricity undertaking as assessed for 1935-36 amounted to £31,859, while the interest paid in that year on moneys borrowed for the purpose of that undertaking amounted to £19,231. The difference between these two figures is £12,628. Similarly, the profit of the corporation's transport undertaking as assessed for 1935-36 amounted to £7,778, while the interest paid in that year on moneys borrowed for the purpose of this undertaking amounted to £5,189. The difference is £2,589, and this sum together with the sum of £12,628 mentioned above makes up the £15,217, the handing over of tax on which is in dispute. A

The appellant contends that the balance of profit of each of the undertakings arrived at as above is not to be treated as a contribution to meet the interest on loans not raised for the particular undertaking, or as having been available for such a purpose, and that such interest could not lawfully be paid out of the profits of the undertaking inasmuch as the profits of that particular undertaking were dedicated by statute to specific purposes other than the payment of such interest. In support of these contentions the appellant refers to the well-known decision of this House in *Sugden v. Leeds Corpn.* (1), and especially to the two tests formulated by LORD ATKINSON in his speech, at p. 506. B

The respondent, on the other hand, relies upon certain sections of the South Shields Corporation Act, 1935, which, as he submits, make it lawful to use any part of the profits of the electricity and transport undertakings for the purpose of paying interest on moneys borrowed for general purposes, and contends that the balance of profit of each of these undertakings, as measured by the assessment of them to income tax, should be deemed to have been used in paying an equivalent part of the total interest in the year of charge. C

Before examining the South Shields Corporation Act, 1935, it is desirable to summarize the scheme of income tax collection which is now contained in the All Schedule Rules, rr. 19 and 21, and was formerly provided by the Income Tax Act, 1842, s. 102, the Income Tax Act, 1853, s. 40, and the Customs and Inland Revenue Act, 1888, s. 24 (3). The former sections were the subject of analysis by LORD MACNAGHTEN and LORD DAVEY in the decision of this House ordinarily referred to as the first London County Council case (*London County Council v. A.-G.* (2)). The present provisions take their place without any change of substance, and the general effect may be stated under three heads, though, as will hereafter appear, there remains lurking in the language of the scheme a difficulty which does not seem to have been clearly apprehended and faced in some of the earlier authorities on this subject, but which came to the surface in *A.-G. v. Metropolitan Water Board* (3). D

The three heads under which the existing scheme of collection of income tax embodied in rr. 19 and 21 may be stated are as follows:— E

(a) A person liable to pay any yearly interest of money, annuity or any other annual payment to a recipient is not entitled to deduct this payment in arriving at his profits or gains to be assessed and charged with income tax. If the amount is payable and paid out of his profits or gains, he is assessed on a sum which includes such payments, while the recipient is not directly assessed in respect of the amount at all. Consequently, the Crown gets from the payer both the tax at the standard rate which would otherwise be due from the recipient of the annual payment and the tax due from himself in respect of what is left of his profits and gains after the payment is made. F

(b) If the annual payment is payable and paid out of his profits and gains, the payer is *entitled* to deduct from the payment he makes to the recipient income tax at the current rate, and the recipient is bound to allow the deduction upon receipt of the residue and to treat the payer as acquitted of liability to him in respect of the amount thus deducted. By this means, the payer recoups himself for the tax which he has paid or will pay on the annual payment. G H

(c) If and in so far as the annual payment is not payable and paid out of profits or gains brought into charge, the person making the payment is *bound* to deduct from it income tax at the current rate and to account to the Crown for the amount deducted. In effect, the payer in such a case acts as collector for the Crown of the tax due from the recipient. The requirement that the recipient must allow the deduction and treat the payer as acquitted of liability in respect of this amount is not repeated in r. 21, but must be implied.

- Subject to the difficulty which I am about to state, this scheme seems reasonably clear. The receiver of the annual payment is chargeable in respect of annual profits or gains arising from "all interest of money, annuities, and other annual profits or gains" under Sched. D, 1 (b), but under rr. 19 and 21 the tax is collected at the source before payment to him. If the payment is made out of the profits and gains of the payer, he is entitled to reduce his payment by the amount of the tax, but the legislature is not concerned to insist that he shall do so, as the Crown will get the tax whether he does so or not. If and so far as the payment is not made out of profits and gains, the legislature insists that the payer must deduct tax and account for it, for otherwise the Crown might not receive it. The difficulty that remains to be solved arises from the fact that the figures at which profits and gains are assessed under Sched. D, cases I and II, are not normally the actual profits or gains of the year of charge, but a figure, formerly arrived at by averaging the profits or gains of 3 preceding years, and now arrived at by taking those of the preceding year. Yet, if an annual payment in any year is made "out of profits or gains," this suggests that it is made out of actual profits or gains and not out of a conventional figure arrived at from the past, which is taken to represent them for taxing purposes. What, then, is the proper meaning to put on the phrase "payable wholly out of profits or gains brought into charge" in r. 19, and on the phrase "not payable, or not wholly payable, out of profits or gains brought into charge" in r. 21? To give an illustration, if in a given year £900 of interest is paid away out of profits or gains and in that year the actual profits or gains of the payer are £1,000, while in the previous year they were £800, can the interest be regarded as wholly paid out of profits or gains brought into charge? The judgments of the Court of Appeal in *A.-G. v. Metropolitan Water Board* (3), and in particular the judgment of LAWRENCE, L.J., in that case, appear to take the view that the phrase "the profits or gains brought into charge" in a given year actually means the amount of the assessment for that year. If so, I cannot agree with this construction, though I agree with the result at which the Court of Appeal in that case arrived. The "profits or gains brought into charge" must, in my view, mean the actual profits of the year calculated with such deductions, additions, or allowances as the income tax law prescribes—the £1,000 in my illustration. The matter is put beyond doubt, in my opinion, by observing that in r. 19 these profits or gains brought into charge "shall be assessed and charged with tax": they cannot, therefore, be themselves the assessed figure. But I think that the true solution of the difficulty is to be found by treating r. 19, while predicating a payment of interest out of actual profits, as measuring these actual profits by the figure, (whether larger or smaller, or the same,) of assessment of them to tax—i.e., in my illustration, the interest is deemed to be paid out of £800. If in the following year, actual profits fell off, they would nevertheless be measured by the figure of £1,000. This amounts to saying that tax is set off against tax, the tax deducted on paying interest against the tax charged for the same year on an assessed figure of profits or gains from which the interest payment has not been deducted. This construction is in accordance with the result—though not with all the reasoning—in *A.-G. v. Metropolitan Water Board* (3). It is in line with LORD DAVEY's observation in *London County Council v. A.-G.* (2), at p. 46:

... the mortgagor cannot, of course, retain against the Crown more income tax than he has paid.

It is implied in LORD MACNAGHTEN's statement in *A.-G. v. London County Council* (4), p. 135:

- Speaking generally, all income is chargeable, but chargeable only once. Income is brought into charge at its source, and the burden is then distributed among the recipients of the income who bear their share in just proportion.

I agree with LAWRENCE, L.J., in the *Metropolitan Water Board* case (3), at p. 852 that under the provisions of rr. 19 and 21:

... no taxpayer can retain against the Crown any more income tax deducted by him in any year of assessment than he has himself paid or become liable to pay to the Crown for that year.

This, of course, includes income tax suffered by deduction at the source. The purpose behind the rules is to avoid double taxation, as LORD MACMILLAN pointed

out in *Central London Ry. Co. v. Inland Revenue Comrs.* (5), at p. 81 ([1936] 2 All E.R. at p. 379.) In the *Central London Ry. Co.'s* case (5) this House abstained from either affirming or dissenting from the decision of the Court of Appeal in *A.-G. v. Metropolitan Water Board* (3), but I think we must now indicate a final view on the construction placed on the words "profits or gains brought into charge" by the judgments in that case. As I have already indicated, in my view the conclusion in the *Metropolitan Water Board* case (3) should be approved, but the course of reasoning by which the Court of Appeal arrived at that decision calls for correction. The phrase "profits or gains brought into charge" in a given year cannot, I think, itself mean the figure of assessment in respect of them reached when those profits or gains have been assessed and charged, but, while interest may in proper circumstances be treated as payable and paid out of these actual profits or gains, the extent to which income tax deducted from such interest may be set off against income tax charged on those profits or gains is to be ascertained by reference to the assessment made upon the latter. It is to be noted that the view I have set out above is the view accepted by both sides in drawing up the case stated, which provides the subject-matter for the present appeal. The Solicitor-General, if I understood him rightly, however, claimed to go further and contended that a taxpayer who had paid interest in a particular year out of his profits or gains could not retain income tax deducted from such interest unless both the actual profits or gains of the year and the sum at which they were assessed were as large as the interest paid. This would be getting the best of both worlds with a vengeance. This contention that a taxpayer cannot be treated as paying out of profits or gains unless he has enough to cover the payment both in the figure of his actual profits in the year and also in the figure of assessment of those profits is, as far as I know, novel, and I do not find anything in the Income Tax Act to support it.

The proper interpretation of rr. 19 and 21 is to hold that annual payments paid in a particular year, which, if the profits and gains brought into charge for that year were large enough, would have been properly payable thereout, are to be treated as having notionally been paid out of the payer's assessed income for that year, and the payer is to be allowed to deduct and retain that tax on the annual payments, provided that the amount so deducted and retained does not exceed the amount of tax payable by him in that year on his assessed income. Any such excess he may not retain but he must account for it to the Crown.

The remaining question is whether, in view of the South Shields Corporation Act, 1925, it was legal to use profits from the electricity and transport undertakings in order to pay interest on moneys borrowed for general purposes. This question resembles the second question formulated by LORD ATKINSON in *Sugden's* case (1), at p. 506. I entirely agree with LORD GREENE, M.R., in his illuminating judgment that the effect of sects. 112, 113, 114, and 116 of the South Shields Act is to make it legitimate for the corporation to do what they claim to have done. The effect of the repeal contained in sect. 116 is, as LORD GREENE, M.R., said, to abolish all existing statutory regulations and restrictions as to the application of the surplus revenues of the undertakings. The result of sects. 112 to 115 is not to re-impose restrictions so as to make the decision in *Sugden's* case (1) applicable. There is no scope, in view of the repeal in sect. 116, for the operation in this case of the Local Government Act, 1933, s. 194.

The result is that there would be nothing illegal in the corporation paying this interest out of the mixed fund which contains its profits or gains. Neither is there anything in the present case which goes to show that they have precluded themselves by inconsistent action, as was the case in *Birmingham Corporation v. Inland Revenue Commissioners* (6), from being treated as paying the interest out of profits and gains brought into charge. The corporation claims to be so treated, and the claim is justified. I adopt in its entirety the exposition of LORD GREENE, M.R., on this part of the case, in which he points out how limited is the assistance for the solution of this matter which can be derived from an examination of the way in which the corporation's accounts are made up and recorded.

In my opinion the appeal fails, and I move that it be dismissed with costs.

My Lords, LORD WRIGHT authorises me to say that he concurs in this opinion.

LORD RUSSELL OF KILLOWEN: My Lords, I also concur in the opinion which has just been delivered by Viscount SIMON, L.C. I desire to add nothing thereto.

A LORD MACMILLAN [read by LORD RUSSELL OF KILLOWEN]: My Lords, in the fiscal year 1935-36 the corporation of South Shields paid a sum of £132,396 by way of interest on borrowed money. In the same year the corporation paid income tax on an assessed income of £91,504. The question is, to what extent can the £132,396 be said to have been payable out of the £91,504. The Crown admits that to the extent of £76,287, but no more, the £132,396 was payable out of the £91,504; the corporation maintains that the £132,396 was payable out of the £91,504 to the whole extent of that sum. The controversy is thus confined to the difference between £91,504 and £76,287, namely £15,217, on which last mentioned sum the Crown claims that it is entitled to income tax, in addition to the tax on £91,504. Stated in figures that is the problem presented for solution. In law, the problem is to ascertain to what extent the interest paid by the corporation in the year of assessment was "payable out of profits or gains brought into charge to tax" in that year within the meaning of the Income Tax Act, 1918, All Schedules Rules, r. 19.

C The admission by the Crown and indeed the contentions of both parties imply that in construing the rule the relevant profits or gains are not the profits or gains of the taxpayer as actually earned in the year of assessment but the profits or gains of the taxpayer as they are assessed for income tax purposes in that year. This is tantamount to an acceptance by both parties of the result of the decision in *A.-G. v. Metropolitan Water Board* (3), though not necessarily of all the reasoning on which that decision was based. I think that in the end one is driven to adopt this construction as the only practical way of making the rule work. In *Central London Ry. Co. v. Inland Revenue Commissioners* (5), I discussed at length the difficulties to which the wording of the rule gives rise owing to the failure of the draftsman to appreciate that a real payment cannot be made out of notional profits. I need not traverse again that painful maze. Bluntly, I do not think that a logical solution is possible of an illogical problem. One can console oneself verbally by saying that the profits brought into tax in any year are the actual profits of that year (though there may be none) as measured by the sum at which the profits of that year are assessed. But it still remains true that actual payments cannot be made out of assessed income.

F Accepting, however, as I do, that for practical purposes the relevant figures to be considered in the first place in the case of each assessment year are (i) the amount of interest paid by the taxpayer on borrowed money in paying which the taxpayer has deducted tax, and (ii) the sum on which the taxpayer has himself paid tax in that year, I recognise that the matter does not necessarily end there. The taxpayer may have income not subject to tax as is the case with the corporation of South Shields which has a large income from rates, and the payment of interest may have been made out of a general account to which all receipts, taxable and untaxable, are carried. This case has been described as that of payment from a mixed fund. The cardinal difficulty emerges again. How can there be a mixed fund composed partly of actual receipts, e.g., from rates, and partly of notional profits or gains? The practical solution is to deem the interest to have been paid out of the profits as assessed, unless there is any legal impediment to so deeming.

G This brings me to the last point which is the point expressly raised in the present case. The figure at which the taxpayer's profits for the year have been assessed and on which he has paid tax having been ascertained, is that figure further examinable? The Crown contends, and the authorities justify the contention, that it is, and that the taxpayer cannot be deemed to have paid interest out of profits which cannot legally be applied in payment of that interest or which he has by his own deliberate actings debarred himself from so applying. Again, the cardinal difficulty reappears in another form. If it is illegal for a taxpayer to use any particular part of his profits for the payment of interest on certain borrowed money, it can only be the actual payment out of actual profits that is illegal. How can illegality attach to payments not actually made but only deemed to be made out of a notional fund? The resources of judicial construction, already severely strained, must once more be invoked.

Payments which could not lawfully be made out of actual profits cannot be deemed to have been made out of corresponding notional profits. The profits of the taxpayer as assessed for a particular year, although they may differ widely from his actual profits for that year, are nevertheless compiled from actual figures. If an ingredient of the profits as assessed is derived from a source which precludes the application of that ingredient to the payment of interest on borrowed money, or with regard to which the taxpayer has so acted as to preclude himself from so applying it, then, to that extent, I think that the taxpayer is debarred from saying that he has paid the interest in question out of profits or gains brought into charge to tax. A

In the present case the assessed profits of the corporation include profits derived from their electricity and transport undertakings. No doubt these are in fact the profits of the preceding year but they are the profits which the law attributes to the year of assessment or by which it measures the profits of the year of assessment. So far as the assessed profits of these undertakings are deemed to have been applied to the payment of interest on money borrowed for the purposes of these undertakings no question arises. But the assessed profits include surplus profits over and above the interest due on money borrowed for the purposes of these undertakings. The Crown says that these surplus profits are so dedicated by statute, or otherwise have by the corporation itself been deliberately so applied as to preclude the corporation from maintaining that they can be deemed to have been applied in payment of the corporation's general liabilities on interest account. B C

On this part of the case I am so entirely content with the answer which LORD GREENE, M.R., has given to the Crown's contention that I have nothing to add. I am of opinion that on this point, which is the real point expressly raised by the stated case, the Crown fails. The appeal should accordingly be dismissed. D

LORD ROMER: My Lords, the Special Commissioners, LAWRENCE, J., and the Court of Appeal have very properly dealt with this case upon the footing that *A.-G. v. Metropolitan Water Board* (3), by which they were all bound, was rightly decided. The result of this has been that neither in the case stated nor in the judgments is there to be found the figure of the actual profits and gains accruing to the South Shields Corporation from all sources in the year of assessment 1935-36, or the balance of profit accruing to them in that year from their electricity and transport undertakings respectively after deduction in each case of the interest paid in the year of moneys borrowed for the purposes of such undertaking. All we are told is that the profits and gains from all sources in that year were assessed at £91,504, and that the balances of the sums at which the profits of the two undertakings for the year had been respectively assessed, after making in each case the deduction to which I have just referred, amounted together to the sum of £15,217. But the parties appearing before your Lordships were agreed, and your Lordships were accordingly informed, that for the year in question the actual profits and gains of the corporation from all sources were not less than £91,504, and the balances of the actual profits from the two undertakings amounted together to not less than £15,217. In these circumstances I am of opinion that the Court of Appeal's decision in the present case was right whether the decision in the *Metropolitan Water Board* case (3) was right or wrong, a question upon which I prefer to express no opinion. For I am satisfied for the reasons given by LORD GREENE, M.R., to which I cannot usefully add a single word, that the whole of the interest on borrowed money paid by the corporation in the year 1935-36 could properly be paid out of the profits or gains of the corporation for that year brought into charge to tax so far as such profits or gains were sufficient for the purpose, and that such interest ought, as between the corporation and the revenue, to be treated as having been so paid in fact. I would, therefore, dismiss the appeal. E F G H

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Speechly, Mumford & Craig*, agents for *Harold Agrey*, Town Clerk, South Shields (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

GARBETT v. HAZELL, WATSON & VINEY, LTD. AND OTHERS.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.JJ.), **July 22, 1943.**]*Libel—Juxtaposition of photographs—Innuendo by letterpress—Whether capable of defamatory meaning.*

The defendants, the printers, the proprietors and the publishers of a magazine, published therein on a left-hand page a photograph of the plaintiff carrying on his business of an outdoor photographer, in which he was depicted with his camera and showing pictures to two women. On the opposite page of the magazine was a photograph of a naked woman. Commencing under the first photograph and ending under the second were words stating that for an extra payment the customer could have a photograph like that of the naked woman. The plaintiff brought an action for libel claiming that the juxtaposition of the photographs and the letterpress thereunder implied that he dealt in indecent pictures:—

HELD: the photographs and the lettering were arranged in such a manner as to be capable of a defamatory meaning and were in fact defamatory of the plaintiff.

[EDITORIAL NOTE.] Though there is little authority upon the point, it has long been recognised that an action lies for pictorial libel. Here the matter is carried a step further, for the real sting in the matter here considered is the juxtaposition or the placing side by side of photographs, though the letterpress no doubt lends some aid to the innuendo. The matter is not treated by the Court of Appeal as one of first impression, but there does not seem to be any reported English decision on similar facts.

AS TO PICTORIAL LIBEL, see HALSBURY, Hailsham Edn., Vol. 20, pp. 432-435, paras. 520-523; and FOR CASES, see DIGEST, Vol. 32, pp. 64-66, Nos. 912-938.]

APPEAL by the defendants from a decision of HILBERY, J., dated Feb. 26, 1943. The facts are fully stated in the judgment of SCOTT, L.J.

W. J. K. Diplock (for Hubert Hull on war service) for the appellants.

C. L. Hauser (for H. J. Astell Burt) for the respondent.

SCOTT, L.J.: The defendants in this case, a case of libel, who are appealing to this court, are Hazell, Watson & Viney, Ltd., Pocket Publications, Ltd., and Hulton Press, Ltd. The first defendants are the printers of a monthly publication known as "Lilliput." The second defendants are the proprietors, and the third defendants, Hulton Press, Ltd., are the publishers. The plaintiff is a relatively poor man carrying on a perfectly respectable trade as an outdoor photographer with a photographer's stand and a placard attached to it, saying: "Your photo finished in 1 minute," which means that it will be handed over developed.

The defendants, Hulton Press, Ltd., published in August, 1941, their August number of "Lilliput," and on p. 92 of that publication, which has many illustrations in it, is a photograph of the plaintiff behind a camera carrying the placard, with a lady on each side of him looking at photographs which he is showing to them, and a couple of children in the front. It is a perfectly harmless photograph and perfectly useless for the defendants' purposes, because it would have interested nobody except the people who were in it. On the opposite page there is a photograph of a completely naked woman standing in a mountain stream. Whether the stream is natural or artificial is immaterial. The point is that she is completely naked. On the left-hand side of the page, under the photograph of the plaintiff, are the words "Of course, for another shilling, Madam"—the photographer is shown speaking to one of the ladies—and then the sentence continues on the opposite side of the page under the naked lady: "you can have something like this." The plaintiff gave evidence that that affected his position, as anybody would expect if he looked at those 2 photographs put together in that way in that magazine. He felt that the photograph meant that something very definitely wrong was being done by him, even though one person might put one meaning on it and another person a different one; and in his statement of claim he says that the photographs in that position with the words below them, meant, or implied, or conveyed the impression,

that the plaintiff showed to his lady customers indecent photographs, or that he had in his possession indecent and pornographic photographs, or that he was guilty of the offence of endeavouring to procure an indecent picture to be made, or that he was guilty of the offence of exhibiting an indecent picture in a public place, or that he attempted to insult females by showing them indecent photographs. I do not know how each one of those particular innuendoes might appeal to different people: all I feel is that the collocation of the pictures and the letterpress quite clearly was libellous, and so the trial judge held. The judge said that in his view it was "plainly capable of a defamatory meaning," and that a judge would necessarily leave to the jury the question whether they as a jury thought that a reasonable person, or indeed any ordinary person, a sensible, ordinary citizen, would understand that that juxtaposition of those photographs with those words was defamatory; and I think he was inclined to regard it as a representation that the plaintiff was carrying on a traffic which is recognised all over the world as the disagreeable traffic of selling pornographic pictures. The defendants appealed, the judge having given a very small amount in damages considering the cruel and wicked attack on an absolutely innocent plaintiff that was being made. He gave him only £50. I confess that I should have thought £500 much more suitable.

I want to say why I take that view. The defendants evidently wanted to exhibit this idea in their horrid publication, a publication which in my opinion is a pornographic publication, though it has a veneer of interesting photographs inserted in order to carry off the indecency that is in the mind of the people who publish it. They wanted a photograph of a real person carrying on the business of outside photography. They must have known quite well that some people carrying on that business sell indecent photographs. The plaintiff had been carrying on his business for 12 years before the war in Trafalgar Square and the Strand, going each year for a few weeks to Olympia. The defendants thought it would pay them to have a photograph of this kind with the insinuation which they indicate by the naked woman on the opposite page. They were callously indifferent as to who it was they photographed, so long as he served their purpose. They chose this unfortunate plaintiff, a poor man, carrying on business, as in the picture. I dare say they thought he would not bring them to book. It was a purely selfish, cruel thing to do.

The plaintiff was not cross-examined and his evidence stands. He was a perfectly decent man carrying on a perfectly innocuous business in an honourable way. The immediate result was that he was shunned by those who knew him. They used to call him by his christian name and then they changed within a week of the publication and called him "Smutty," a word of obvious meaning. He goes to Tooting, a place where he had carried on a flower shop in previous years and had lived, and instead of doing a trade, as he said, of about £3 per week, during the time he went there he did nothing as a result of the libel. The place where he was then living saluted him in the same way. Counsel for the defendants, in the Court of Appeal, took the point that the evidence that the plaintiff was addressed as "Smutty" instead of "Sydney" was inadmissible. I reject that submission; it was admissible because it was evidence of the measure of damage done. Fortunately, this British citizen, attacked in this way, had the courage to bring his case to the courts. In a democracy like ours the rule of law is the most important principle in public life. That any man should be able to come to the court and be sure of getting justice is the absolute condition of all democratic life. It is the condition of our freedom—the freedom for which we are now fighting. The plaintiff has done a public service in drawing attention in the courts to the way in which these defendants carry on their paper.

The appeal is dismissed with costs.

MACKINNON, L.J.: I agree that this appeal fails. Speaking for myself, I think that the trial judge decided this case quite rightly and that he rightly assessed the amount of damages. I venture to add that, because, in my view, damages for libel should bear some relation to the actual damage or loss sustained by a plaintiff, while, of course, being of sufficient amount to mark the seriousness of the occasion. In many cases—in my view in too many cases—damages for libel have been assessed on a quite different and, as I think, extravagant basis.

GODDARD, L.J. : I agree. The defendants who are primarily responsible for this publication are, of course, the publishers, Hulton Press, Ltd. They are the people who put this on the market, and the meaning of this conjunction of photographs is perfectly clear. It means that this man who carries on his business in Trafalgar Square has with him a pocketful of what are commonly called smutty photographs, which he is willing to show to people who go up to and deal with him. Everybody knows that purveyors of that class of material advertise it as "artistic camera studies." It is directly people who are minded to buy these things see this sort of nonsense about "artistic camera studies" that they go and buy them. The implication in these 2 photographs is perfectly clear, and I am only surprised that the defendants had the hardihood to defend the case, and the effrontery to bring it up to the Court of Appeal.

With regard to damages, while I agree with all that MACKINNON, L.J., has said, I think the damages in this case might well have been considerably higher, because, although they should in libel actions no doubt bear relation to what the plaintiff has suffered, damages for libel can be assessed on a punitive basis, and the only way to punish people of this sort is to hit them in their pockets, for they publish this sort of muck because it pays them to do it.

I agree that this appeal should be dismissed.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors : Theodore Goddard & Co. (for the appellants) ; A. Kramer & Co. (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

PUGH v. PUGH.

[CHANCERY DIVISION (Morton, J.), July 21, 1943.]

Wills—Family provision—Maximum amount of income applicable for dependant—Dependant given capital sum—Reasons for testator's disposition—Statements made by testator—Admissibility—Inheritance (Family Provision) Act, 1938 (c. 45), s. 1 (3), (4), (7).

The testator bequeathed his residuary estate to his widow. The only other beneficiary was an infant grandson, to whom the testator devised a farm. It was contended that, in calculating the maximum amount of income which could be made applicable for the widow, regard must be had to the fact that the widow was given the capital of the residuary estate, with which she could purchase for herself a government annuity. Evidence was tendered by the plaintiff that the testator shortly before his death had on several occasions said that he intended to leave everything to his widow. It was contended that these statements were reasons for the testator's dispositions within the Inheritance (Family Provision) Act, 1938, s. 1 (7), and, therefore, admissible in evidence :—

HELD : (i) in ascertaining the amount of income which could be made applicable for the widow, no regard should be had to the fact that she was given the capital. The amount of income which could be made applicable for her must be based on the ordinary income that capital would produce.

(ii) the statements of the testator were statements of intention and not the reasons for his dispositions within the meaning of sect. 1 (7) of the Act. They were, therefore, inadmissible.

[EDITORIAL NOTE. It is here pointed out that, where a dependant is given a capital sum by the will, he or she has the opportunity of buying an annuity with that sum and thus securing a greater income than would be obtained by simply investing the capital in the ordinary way. For this reason it was suggested that less additional income could be made applicable for that beneficiary by an order of the court. The court has rejected this contention and the decision is based upon the proper construction of the words of the Act according to their plain meaning. The Act, by sect. 1 (7), rather invites testators to give reasons for the dispositions which they make and here it was suggested that certain statements by the testator during his last illness that he had given everything to his widow were admissible as being a statement of his reasons within sect. 1 (7). This contention, however, is also rejected.]

AS TO RESTRICTION ON ALLOWANCE IN FAMILY PROVISION, see HALSBURY, Halsbury's Laws of England, Vol. 34, pp. 441, 442, para. 493 ; and FOR CASES, see DIGEST, Supp., Wills, Nos. 11163a-11163f.]

Cases referred to :

* (1) *Re Catmull*, *Catmull v. Watts*, [1943] 2 All E.R. 115 ; Digest Supp.

* (2) *Re Styler*, *Styler v. Griffith*, [1942] Ch. 387 ; [1942] 2 All E.R. 201 ; Digest Supp.

SUMMONS in an application for an order under the Inheritance (Family Provision) Act, 1938. The facts are fully set out in the judgment.

Lindsay M. Jopling for the plaintiff.

F. C. Watmough for the defendant.

MORTON, J. : This originating summons raises an interesting question as to the true construction of the Inheritance (Family Provision) Act, 1938, s. 1 (3). Before stating what that question is, it is convenient that I should state some of the facts of the case. The plaintiff, Winifred Mary Pugh, is the widow of the testator, and the defendant, William Sydney Jenner Pugh, is a grandson of the testator. The testator by his will dated Aug. 23, 1939, appointed the plaintiff sole executrix thereof ; and after devising his farm, Chapel Farm, Nash, in the county of Monmouth, to his grandson, the defendant, he devised and bequeathed all the rest of the estate to the plaintiff absolutely, subject to a charge for the payment of his debts, funeral and testamentary expenses. The testator died on Oct. 11, 1941, without having revoked or altered his will, and probate of his will was granted to the plaintiff on May 18, 1942. The testator left one dependant only in the sense in which that word is used in the Act, namely, the plaintiff. She was the testator's third wife. The testator was a farmer who seems to have been in a fairly good financial position. The plaintiff is 50 years old, and is in rather poor health. By an earlier marriage she has one son, who is 27, and married, and that son has a child aged 1½ years.

By the Inheritance (Family Provision) Act, 1938, s. 5 (1), it is provided as follows :

In this Act, unless the context otherwise requires, the following expressions shall have the meanings hereby respectively assigned to them, that is to say : "annual income" means in relation to a testator's net estate, the income that the net estate might be expected at the date of the order, when realised, to yield in a year ; "the court" means the High Court and also the Court of Chancery of the county palatine of Lancaster or the Court of Chancery of the county palatine of Durham where those courts respectively have jurisdiction ; "death duties" means estate duty, succession duty, legacy duty, and every other duty leviable or payable on death ; "net estate" means all the property of which a testator had power to dispose by his will (otherwise than by virtue of a special power of appointment) less the amount of his funeral, testamentary and administration expenses, debts and liabilities and estate duty payable out of his estate on his death . . .

According to the revised figures given in the plaintiff's statement of facts of Mar. 29, 1943, the testator's net estate, other than Chapel Farm, is of the value, in round figures, of £1,800. Chapel Farm was valued at £5,000 for probate. No one disputes that this figure may fairly be taken as correct for the purposes of the present application. Chapel Farm is let for £170 per annum, the tenant paying the rates and doing the repairs. The net income from the farm is, according to the plaintiff, £161 per annum. The defendant's father says it is about £10 less. However, the present actual income from this farm is, in my view, of no importance for the first question which I have to decide. In my view, £3 10s. per cent. is the rate of income which the testator's net estate might be expected at the present date when realised to yield in a year. The income on £1,800 at 3½ per cent. is £63 ; the income on £5,000, the value of Chapel Farm, at 3½ per cent. is £175, making a total income from the testator's net estate within the meaning of the Act of £238. Half of the annual income is thus £119.

It is contended for the plaintiff that I have power under the Act to direct that £56 per annum be paid to her during her widowhood by way of additional allowance for maintenance. Counsel arrives at this figure by the following reasoning. Sect. 1 (3) of the Act provides as follows, so far as material :

The amount of the annual income which may be made applicable for the maintenance of a testator's dependants by an order or orders to be in force at any one time shall in no case be such as to render them entitled under the testator's will as varied by the order or orders to more than the following fraction of the annual income of his net estate, that is to say . . . (b) if the testator . . . leaves a wife or husband and no other dependant, one-half.

"Dependant" is defined in sect. 1 (1) and, as I have said, there is no dependant other than the widow in this case. Under the will she gets £63 per annum out

A of the annual income of the net estate as defined by the Act; that is 63/238ths of the annual income. Counsel for the plaintiff submits that the court, therefore, has power to give her an additional income of £56 per annum so that she will receive by the joint effect of the will and the order of the court 119/238ths, or one-half of the annual income. The fact that the widow is given by the will the capital from which this income of £63 is derived is, counsel for the plaintiff submits, a material fact to be taken into account under sect. 1 (6) of the Act, but it does not in any way deprive the court of jurisdiction to order the payment to the widow of a further £56 per annum under sect. 1 (3). He suggests that £52 per annum, that is, £1 a week, would be a reasonable provision.

B Counsel for the infant defendant contends that I have no power to award the widow more than £20 per annum on the figures already stated. He arrives at this conclusion as follows. The sum of £1,800 to which the plaintiff is absolutely entitled under the will, if invested in a government annuity for the life of the plaintiff, would produce approximately £99 per annum. For the purposes of sect. 1 (3), you must reduce the capital given to the widow by the will to terms of income actual or potential; and, if the court gives the widow a further £56 she will be receiving in each year the equivalent of £99 plus £56, or £155, which is £36 more than one-half of the annual income of the net estate. In my judgment, by this argument counsel is asking me to depart from the natural meaning of the words of sect. 1 (3). The court has, first, to ask itself: to what fraction C of the annual income of the net estate as defined by the Act is the widow entitled under the will? The true answer is, in my view, that she is entitled to 63/238ths, the infant being entitled to the remaining 175/238ths. It is true that she can secure for herself a higher rate of income by buying a government annuity, but, for the purposes of the subsection, this is quite irrelevant. The court has to regard, and regard only, the annual income of the testator's net estate ascertained D in accordance with the Act. This income so ascertained is £238. Of this income so ascertained, the widow is entitled under the will to £63 and no more. If she were to buy a government annuity she would become entitled under the terms of her bargain with the government to £99 per annum, but the difference of £36 does not represent a portion of the annual income of the net estate ascertained in accordance with the Act to which the widow is entitled under the will. Thus the court has power to give the widow a further £56 in order to make up her E fraction of the annual income of the net estate to one-half.

I may add that the defendant's contention would lead to certain remarkable results if it were correct. For instance, in the present case I could give the widow no more than £20 per annum out of the infant's £175 per annum, with the result that, whether she bought an annuity or not, the widow would be getting less income than the infant; yet, according to counsel for the defendant, she would be receiving half the annual income of the net estate. Again I think F that the words "the income of the net estate" in the proviso to sect. 1 (1) must mean the same as the words "the annual income of his net estate" in subsect. (3): yet, if counsel for the defendant is right, in a case in which the testator had bequeathed capital to his widow it would be necessary to consider what annuity the widow could buy, having regard to her age, in order to see whether an application could be made to the court on behalf of the testator's G infant children. I cannot believe that the legislature had any such intentions. For these reasons I am satisfied that my jurisdiction is not limited in the manner suggested by counsel for the defendant, though I fully recognise that the possession by the widow of this sum of capital is a matter to which I ought to have regard under sect. 1 (6). In my judgment, in calculating the fraction of the annual income of a testator's net estate to which a dependant is entitled under the testator's will within the meaning of subsect. (3), the court should H disregard the fact, if it be the fact, that the testator has given to that dependant by his will not only income but also the capital upon which that income arises.

I reserved judgment upon this point because counsel for the defendant suggested that a decision against him would be in conflict with the principle of a decision of UTHWATT, J., in *Re Catmull* (1). That was a case in which the estate was under £2,000, and UTHWATT, J., had to consider what provision the court could make for the widow out of capital under sect. 1 (4), which is in the following terms:

Where the value of a testator's net estate does not exceed two thousand pounds, the

court shall have power to make an order providing for maintenance, in whole or in part, by way of a payment of capital, so however that the court, in determining the amount of the provision, shall give effect to the principle of the last preceding subsection.

UTHWATT, J., said, at p. 118 :

The principle of the maximum stated in subsect. (3) embraces the purpose, the creation of interests not exceeding life interests, for which the maximum is to be used. If this be so, one does not give effect to the principle of subsect. (3) by applying the fractions two-thirds or one-half to the capital of the estate. In my view, the point of subsect. (4) is not to increase the total amount which might be made applicable for dependants by an order, but only to enable capital instead of income to be made so applicable. It is only an altered method of payment that is provided. This view of the section does not involve any practical difficulties. The court, deciding to exercise the power given by subsect. (4), can determine the amount of income which would, on an exercise of the jurisdiction under subsect. (2), be allotted to the claiming dependant and the period for which payment of that income should continue and capitalise the sum.

Counsel for the defendant argues that, if for the purposes of subsect. (4) income has to be expressed in terms of capital, then, for the purposes of subsect. (3), any capital given by the will to a dependant should be expressed in terms of income actual or potential. This seems to me to be a *non sequitur*, but it is suggested that, if I do not give effect to this argument, my decision will in some way be at variance with the views expressed by UTHWATT, J. I do not agree with this suggestion, and in order to test it I shall assume that, in the present case, the total of the net estate is £680 instead of £6,800, and that the testator has given to his widow £180 instead of £1,800. In that event the annual income of the net estate would have been £23 16s., of which the widow would have taken under the will £6 6s. By the joint effect of my present decision and the decision in *Re Catmull* (1), the court could either give the widow a further £5 12s. income, thus making up her income to half the income of the net estate, or could give her (adopting the language of UTHWATT, J.), a capital sum assessed by reference to the widow's age and the sum of £5 12s. These two decisions work quite harmoniously together, and I can see nothing in my decision, or in my reasoning, which is in any way at variance with the reasoning or the decision of UTHWATT, J., in *Re Catmull* (1).

Before I deal with the facts of this case, I ought to give judgment on a question of law which arose in the course of the argument. There was tendered in evidence on behalf of the widow the following statement by the plaintiff :

On June 30, 1941, the testator called on his solicitors and asked them for his will saying that he was going to alter it and wished to take it home and consider it. About a week after this he told the plaintiff that he intended leaving everything to her. He mentioned this to the plaintiff frequently during the ensuing weeks. Finally, as he was passing into unconsciousness just before his death, he told the plaintiff that he intended to leave all to the plaintiff.

It is submitted that the whole of that paragraph, other than the first sentence, is inadmissible in evidence. It is to be observed that, apart from the first sentence, it consists entirely of statements by the testator as to his intentions and, as it seems to me that such evidence may be frequently tendered in the future in this type of case, it is of some importance to see whether such evidence does or does not come within the wording of the Inheritance (Family Provision) Act, 1938, s. 1 (7). That subsection is in the following terms :

The court shall also, on any such application, have regard to the testator's reasons, so far as ascertainable, for making the dispositions made by his will, or for not making any provision or any further provision, as the case may be, for a dependant, and the court may accept such evidence of those reasons as it considers sufficient, including any statement in writing signed by the testator and dated, so, however, that in estimating the weight, if any, to be attached to any such statement the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.

I am prepared to assume in favour of the widow without deciding it that, verbal statements alleged to have been made by the testator to the widow in his lifetime come within the terms of the subsection, although the inclusion of the words "including any statement in writing signed by the testator and dated" may possibly throw some doubt on that point. Making, however, that assumption in favour of the widow, I am still of opinion that the evidence in question does not come within the terms of subsect. (7). I cannot say that these state-

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ments of intention can fairly be described as the testator's reasons for not making any further provision for the dependant. It seems to me that they are statements of intention and nothing else. It was suggested by counsel for the plaintiff that they amounted in effect to a statement of his reasons, because it would appear the only reason why the testator did not make further provision was that his death intervened before he had applied himself to the task. I cannot stretch the language of subsect. (7) so far as that. It may well be that the testator hesitated, and hesitated too long, but I cannot find that the evidence so tendered can be described as the testator's reasons for not making any further provision for his wife.

I should add to the facts that I have already stated that the widow, who had for a short time been the testator's housekeeper but had ceased to be so for some time before she married him on Mar. 13, 1939, the testator then being aged 75 and the plaintiff aged 47. I should also add that the infant defendant was born on Sept. 1, 1937. I do not propose to travel through the whole of the facts, but it does appear that the plaintiff's son is not at the moment in a position to contribute to the plaintiff's maintenance, and it is in evidence that, except for the residuary estate of the testator, "a sum of approximately £140 produced by the sale of furniture belonging to the plaintiff, and a bed, bed-linen, carpet, book-case, china, chickens and personal belongings to an estimated value of £21, the plaintiff has no means." She is not at the moment in good health, but she says that when restored to health she intends to look for work and she hopes to be able to obtain a post as housekeeper or some similar domestic post.

If I had been sitting in the testator's armchair, I should have made slightly more provision for his widow than the testator in fact made, but I cannot arrive at the conclusion that the will did not make reasonable provision for the maintenance of the widow within the meaning of sect. 1 (1) of the Act. As I pointed out in *Re Styler* (2), at p. 389 ([1942] 2 All E.R., at p. 204), the Act only gives the court the right to interfere if it comes to the conclusion that the dispositions which were made were unwarranted; and I proceeded to say this:

I do not think that a judge should interfere with a testator's dispositions merely because he thinks that he would have been inclined, if he had been in the position of the testator, to make provision for some particular person. I think that the court has to find that it was unreasonable on the part of the testator to make no provision for the person in question or that it was unreasonable not to make a larger provision. I cannot arrive at that conclusion in the present case. The plaintiff was the testator's third wife; she was married to him for a short time only; the testator had this farm, Chapel Farm, and he had about £1,800 of net personalty. The history of the farm is set out in the evidence, but no contribution to the prosperity of Chapel Farm, so far as one can see, had been made by the plaintiff in this case, although contributions to its prosperity had on the evidence been made by the father of the infant defendant. Further, under subsect. (6) I have to have regard to:

... any past, present or future capital or income from any source of the dependant of the testator to whom the application relates ...

I cannot disregard the fact that the testator had given to this lady the whole of the capital of his residuary estate. She had the capital sum of over £1,800 which she could turn to account as she wished. I doubt very much, if the testator had given the widow the maximum mentioned in the Act, that is to say, £119 per annum during her life or widowhood, whether she would have considered that a provision for which she would have been willing to exchange the £1,800 whereof she had got the whole capital. I think that the testator did not act unreasonably in making no further provision for his widow, and I do not propose to make any order in her favour on this summons. I am not, however, inclined to saddle the widow with the whole of the costs of the summons, and I propose, in all the circumstances of the case, to make no order as to costs.

Order accordingly.

Solicitors: *Kinch & Richardson*, agents for *Davis, Lloyds & Wilson*, Newport, Mon. (for the plaintiff); *Lumley & Lumley*, agents for *J. C. Llewellyn & Co.*, Newport, Mon. (for the defendant).

[*Reported by* HUBERT B. FIGG, Esq., *Barrister-at-Law.*]

LORD FORRES *v.* SCOTTISH FLAX CO., LTD.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.J.J.), July 15, 16, 1943.]

Customs and Usages—Trade usage—Usage known only to purchaser—No defined market—Sale of flax crop.

By an agreement made in 1940, a farmer undertook to put 10 acres under flax and to deliver the crop as grown to a flax company. The total tonnage of the crop delivered was to be credited to the grower's account at £6 5s. per ton when the average yield of natural fibre processed by a standard method from the crop delivered was 10 per cent. of the crop weight. Provision was made for a bonus when the yield was more than 10 per cent and a reduction when it was less. The flax company contended that "natural fibre" meant only the long fibre and that there was a trade usage to that effect. They also contended that the words "by a standard method" excluded payment for short fibre since at the date of the contract there was no standard method for processing the short fibre out of flax. It was found as a fact that this meaning of the words "natural fibre" was known only to the buyers, that is the flax company:—

HELD: (i) a trade usage can only arise from a continuity of dealings subject to the usage. Here no such continuity of dealings was proved. Moreover, since the usage was known only to buyers under the contract, it did not bind the sellers and the words "natural fibre" must be given their ordinary meaning, which included both long and short fibre.

(ii) if the words "the standard method" meant a method whereby the long fibre only was extracted, that method was one which did not provide for the fulfilment of the contract. Since, upon the proper construction of the contract, the buyers were to extract both the long and the short fibre, these words could not be construed to mean a method which provided only for the extraction of the long fibre.

[EDITORIAL NOTE.] The idea of a trade usage in a market is familiar and where such a usage is established, persons who come to the market to buy or sell a commodity usually sold there are taken to contract subject to the usage. The usage, however, must be established so that it can be stated as a matter of fact that both vendor and purchaser were aware of the terms of the usage, or that its terms were so well known that they ought to have been aware of it. Once it is found as a fact that the suggested usage was known only to the buyers, then the vendors were not bound by it. There is, of course, an obligation on a party to make himself familiar with the usages of a trade by due inquiry, but it must first be shown that the usage is one accepted by and known to all persons dealing in that particular trade so that a stranger coming to deal in it must be presumed to have known the usage and to have impliedly agreed that his dealings shall be subject to it. This cannot be the case where the usage is known only to purchasers and not to vendors. The law on the point would not seem to be in any doubt, but it has seldom arisen in the form here considered.

AS TO NOTORIETY OF USAGE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 39, 40, para. 53; and FOR CASES, see DIGEST, Vol. 17, pp. 28-31, Nos. 303-339.]

Cases referred to:

- *(1) *Robinson v. Mollett* (1875), L.R. 7 H.L. 802; 17 Digest 25, 270; 44 L.J.C.P. 362; 33 L.T. 544.
- (2) *Abbott v. Bates* (1875), 45 L.J.Q.B. 117; 17 Digest 73, 744; 33 L.T. 491.
- (3) *Clayton v. Gregson* (1836), 5 Ad. & El. 302; 17 Digest 29, 310; 4 L.J.K.B. 161.
- (4) *Sweeting v. Pearce* (1861), 9 C.B.N.S. 534; 17 Digest 29, 312; 30 L.J.C.P. 109; 5 L.T. 79.
- (5) *Myers v. Sarl* (1860), 3 E. & E. 306; 17 Digest 45, 503; 30 L.J.Q.B. 9.
- (6) *Hvalfangerselskabet Polaris Aktieselskab v. Unilever, Ltd.* (1933), 39 Com. Cas. 1; Digest Supp.

APPEAL by the company from a decision of ATKINSON, J., given on Feb. 18, 1943, answering certain questions in a case stated by arbitrators under the Arbitration Act, 1934. The facts are fully stated in the judgment of SCOTT, L.J. C. T. Le Quesne, K.C., and J. A. Reid for the appellants. Patrick A. Devlin for the respondent.

SCOTT, L.J.: The claim in this case was by a farmer against a manufacturer who had agreed to buy the farmer's crop of flax before it was sown, the agreement being contained in a written contract dated Mar. 26, 1940, under which the grower undertook to put 10 acres under flax on the terms and conditions of the contract. The crop as grown was to be delivered in the dry state, free of

expense, at the buyers' flax factory in Scotland. The weight delivered was to be the weight "as taken at time of delivery at the nearest weighbridge to the flax factory." Cl. 5 (f) provided that sample lots, at least 5 per cent. of each crop, were to be taken by the manufacturers at random on delivery and separately stacked for processing to determine the seed and fibre content of the grower's whole crop. Cl. 6 provided for payment in the following manner. The total tonnage of crop delivered was to be credited to the grower's account at £6 5s. per ton when the average yield of natural fibre processed from the samples taken under cl. 5 (f) by a standard method was 10 per cent. of the crop weight. There was a provision for a bonus for more than 10 per cent., and a deduction for less than 10 per cent. as so ascertained.

Flax is a crop which was not grown much in Great Britain before this war. It was grown in Northern Ireland, to a certain extent in the Eastern counties, for instance at Sandringham, and to a certain extent in Scotland. It was then always treated by a process known as "retting" which means soaking the crop by one of various methods so as to rot the material round the fibre, which alone is of value for the manufacture of linen. In 1932 experiments were made in this country for dealing with the crop without retting, in its "natural" or "green" state. Those efforts were only experimental, not commercial, down to the year 1939. In 1939, when the war broke out, flax was wanted for war purposes, and the commercial processing of flax without retting came into use. The contract of 1940 was thus made at an early stage of that method of treating flax.

Under any method of treating flax the most valuable fibre is the long fibre, which, after a second process, is known as "line" fibre. There is also another form of the fibre, known as tow, which is not so long and not so valuable, the yield of which is smaller. But both fibres are part of the natural fibre content in the flax, and the words "natural fibre" are in the payment clause which I have read.

The dispute in the case is this. The manufacturer, after delivery of the crop and the taking of the samples, contended that he was under no obligation to pay for anything except the long fibre. He gave as his reason that there was in the trade a trade usage which assigns to the words "natural fibre" a particular meaning, viz., the long fibre or line fibre. From that he argued that he was not under any obligation to pay for the tow fibre contained in the flax delivered. The farmer in question who made the contract knew nothing about the methods of processing, and quite naturally objected to not being paid for a part of the natural fibre. That is a matter of great importance to manufacturers of flax or processors of flax, because nearly all flax is processed upon contracts in these terms. The question, therefore, is whether there was or was not a trade or customary meaning of those words "natural fibre," which would take from them, if I may use the phrase, their natural meaning. In ordinary English that clause quite clearly means, in the light of the previous clause about delivery, the fibre content of the whole crop, and that means all kinds of fibre that have a commercial use, both the long and the short, the line and the tow.

That was the main question that went to arbitration, but there was a subsidiary point that, even if the words "natural fibre" meant all natural fibre, whether long or short, line or tow, the reference to the "standard method" was a condition of the obligation of the manufacturing buyer exempting him from payment for any part of the natural fibre for which there was not at the date of the contract a standard method of processing.

The two arbitrators found these facts in relation to that question. Having stated that the agreement was on a printed form and contained the expressions I have referred to, they found that the expression "yield of natural fibre" at the date of the agreement had a particular significance known to the trade of processors of flax, by which, according to their understanding, it would be confined to line fibre only. They also found that the claimant was not a member of such trade and did not at any material time know of such particular significance, and had not at any material time any reason to suppose that the expression bore any particular meaning beyond the ordinary meaning of the words of which it is composed. That raises the question of the application of the common law rule about customary or trade meanings of words in a very clear manner.

A trade usage producing a customary meaning is a trade custom which has to be proved just as clearly and as definitely as any other trade custom. The usage in question is found to have been known only to the purchasers. The sellers of the fibre content in the flax crop delivered are not parties to any market like a corn exchange or cotton exchange, or any other market in which buyers and sellers meet together habitually, and just because they are always meeting together get into the habit of assuming that certain conditions or usages apply to all contracts that they make. In a market of that kind a usage grows up simply because everybody in the market, knowing the usages, tacitly assumes that the contract he is making, whether as buyer or seller, is subject to the usage. The binding character of such a usage is born of innumerable individual transactions entered into by the parties to them in the knowledge that certain usages are in practice habitually followed in that market.

The finding in the award, however, is that this alleged signification of the words "yield of natural fibre" was known only "to the trade of processors of flax," i.e., to the buyers. There is no suggestion of there ever having been processing sellers in that market, or of both buyers and sellers in it having been a party to any such contract; and my view is that that finding in its actual terms is not a finding of trade usage within the meaning of the cases at all. It has been said, and quite rightly said in some circumstances, that a stranger to the market may become bound by the usage of a market, whether it be a separate custom, or merely a trade meaning of a word, because he has elected to come and deal on that market. But such cases are different from the present; and even they are of two kinds. The first and ordinary one is where a stranger goes to a particular market as a principal, asking a member of the market to act as his agent in effecting a sale or a purchase of the commodity in which the market deals, such as shares on the Stock Exchange; or futures on the Liverpool Cotton Market or Corn Market. When a stranger thus comes in from outside, asking a member of the market to act as his agent, he must of necessity authorise that agent to do the particular deal in the manner in which all deals in that market are done by members of the market. There must be an implied authority from the principal to the agent to act in accordance with its rules. That has been held in many cases as regards the Stock Exchange, and that is the type of question that arose in the tallow market in *Robinson v. Mollett* (1). The second and different kind of case is where a stranger to the market comes to sell to or to buy from a member of the market without the intervention of an agent who is a member of the market. There is no case, so far as I can remember, where it has been decided that such a dealing of itself imports such a knowledge of the market as would put upon a stranger coming to sell to or to buy from a principal in the market a knowledge of or consent to all the terms of the market. That case, however, is not this case, and I express no opinion upon it. Here we have a definite finding that the trade significance of the expressions was known only to the processors, the manufacturers, who were all buyers, and only buyers. There is no suggestion of a defined market in which there are members sometimes selling and sometimes buying, according to the individual's business of the day. Here it is a case of the manufacturers on the one side and growers on the other; the growers anywhere in the country selling to a particular manufacturer who buys crops all round the neighbourhood. In my view, there is in the award no finding of such a legal or defined market as is predicated in the cases.

There is another aspect of this matter. You cannot get a trade usage growing up, unless there has been such a continuity of dealings subject to the usage as will justify a finding of fact that such a usage has become established and recognised. In the present case the method of processing adopted in 1939, which was the subject of the early contracts of 1940, i.e., dealing with the flax in its green or natural state, was wholly new; and that of itself makes it impossible to say that there was any such definite and recognised market in existence as is predicated in the cases which treat of trade usages in a defined market.

In my view, the natural construction of the words of the contract is that the average yield of natural fibre, whether long or short, line or tow, processed from the samples, is to be paid for. If that is the natural meaning of the words and there is no trade usage, *cadit quaestio*. But, even if there were a usage,

in my view the usage would be excluded by those words. There is no suggestion that the word "natural" by itself could mean anything but natural, although a usage that the word "fibre" meant fibre of a particular kind only, would be conceivable; but in my view, on any fair reading of this clause, any such usage as was alleged by the claimants is excluded as inconsistent with the express language of the contract. In addition, the award in my view excludes it, because its second finding is that this was not a customary or trade meaning.

A For these reasons, in my opinion, the answer to the question put by the arbitrators to us is, that there was no trade usage. It follows, therefore, that their conclusion in para. 9, that the words "yield of natural fibre" mean the whole of the fibre content of the natural growth of the crop—that is to say, the total yield of fibre, whether line or tow—is correct.

The other point to which I referred also depended upon the construction of cl. 6 (b). It was argued by counsel for the appellants, that the addition of the words "by a standard method" imports the addition of a condition or proviso to the obligation of the buyers to make payment in accordance with the clause, to the effect that, if there was at the time when the contract was made no "standard" method for processing the tow or short fibre out of the flax, that fact absolved them from the duty of paying for it. As was intimated by MACKINNON, L.J., during the argument, *prima facie* there would be a breach of contract if the processers failed to extract the tow or short fibre and, therefore, deprived the seller of payment in respect of it; and *prima facie* the damages would be measured by the loss of the price that he ought to have received. But it is argued that whilst there was a standard method for dealing with the long fibre, which becomes "line" fibre by hackling (a subsequent process), there was no standard method for dealing with the short or tow fibre, and, therefore, that there was no payment due. In my view, that is a forced interpretation of the clause, and is wrong. If, *ex hypothesi*, the contract was to pay for both kinds of fibre, the phrase "by a standard method" must be interpreted as meaning, either by such an ordinary method as will extract a reasonable proportion of the shorter fibre as well as of the long fibre or as a warranty that there was a standard method known for its treatment. Which-ever way you put it the result is the same; the insertion of those words does not entitle the manufacturer to get out of the fundamental obligation of the contract, to pay for the whole of the natural fibre.

E The appeal must be dismissed with costs.

MACKINNON, L.J.: I agree. The question of construction arises on cl. 6 (b) of this contract. Two questions arise: (i) what is the natural meaning of those words? and (ii) in the circumstances of this case, having regard to the personality of the parties and all the other matters: is that natural meaning to be displaced by a special meaning intended by both parties to the contract?

F As regards that second question, the facts found are, in short, these. The flax company had in their own mind that "yield of natural fibre" only meant the yield of line fibre, and, on the other hand, the farmer had nothing in his mind as to the meaning of "yield of natural fibre," except what those words reasonably mean. In those circumstances, it is impossible to establish that both parties were agreed as to the special meaning of those words, which was no doubt in the mind of one party to the contract but not in the mind of the other, and, as they were not agreed upon a special meaning, the court has to say what is the meaning, and proper meaning, of the words they have both used in the contract. The arbitrators have held, and I agree with them, that "yield of natural fibre" means the fibre content of the natural growth of the crop, and that fibre content includes tow fibre as well as line fibre.

H The contract, however, goes on to undertake that the flax company will ascertain the average yield by dealing with a sample by a process of extraction that is finally expressed by the words "processed . . . by a standard method." It is said that, at the time this contract was entered into, the flax company used a method which only extracted line fibre but did not extract the tow fibre. Therefore it is suggested that the addition of these words, "processed . . . by a standard method," limits their liability to pay for the total yield of fibre, whether line or tow, and limits it to a liability to pay only for the line, which was in fact all that was being extracted by the process they were then in fact

using. These additional words cannot bear that interpretation because, if that was their proper meaning, the position would simply be that that the buyers had no method by which to fulfil their previous promise, which was to extract both the line and the tow, and, if the return of the content that they made was a return only of the line and that was all they could get by the process they were using, the farmer would, in the form of technical damages for breach of contract by them, be entitled to claim, in addition to what they offered him for the line, the contractual value of the tow as damages, because they had not fulfilled their undertaking to use a process which would extract the line and the tow.

For these reasons I think that this appeal fails.

GODDARD, L.J. : I agree. The arbitrators have found their facts, and it would show an entire misapprehension of the cases which have dealt with trade custom and trade usage were we to hold in this case that the special meaning which these processors understand could be attached to the term "natural fibre," in the contract. There is no finding here that that is used in the trade of buying and selling flax, and because the processors may themselves in the course of their manufacture have attached some meaning to it, that is no reason why a farmer who sells his flax to a processor and who is in no way concerned with the trade of the processor should be bound by a particular meaning which the processor in his own mind may understand.

Like my Lord, I did glance at the evidence in this case, and I will be more daring than he and say that I am not surprised to find that the arbitrators came to the conclusion they did, because with regard to the trade of processing, considering this trade has only existed for a very short time, to say a particular term was attached to a contract made between a buyer and seller of flax would have been quite absurd. The arbitrators have found no such thing, and I think they were perfectly right.

Appeal dismissed with costs.

Solicitors : Ernest G. Draper (for the appellants); Parker, Garrett & Co. (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

THE TITHE REDEMPTION COMMISSION v. WYNNE.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.JJ.), July 26, 1943.]

Ecclesiastical law—Tithe rentcharge—Annuity substituted for tithe rentcharge—Jurisdiction of Tithe Redemption Commission—Whether commission have jurisdiction to decide whether land was subject to tithe rentcharge before the "appointed day"—Tithe Act, 1936 (c. 43), ss. 3 (1), 4 (1), (2), 9, 39 (3).

The Tithe Act, 1936, established the Tithe Redemption Commission and enacted that the duty of the commission was to determine what tithe rentcharges were extinguished by the Act and to determine what annuities are charged by the Act, to record particulars thereof, to apportion such annuities where necessary and generally to manage the annuities. The respondent was the owner of certain land and alleged that that land had never been subject to tithe or tithe rentcharge. He contended that the determination of the question whether such land had been so subject was not one of the matters which the Act gave the commission jurisdiction to determine. Sect. 39 (3) of the Act provided that a determination of the commission in relation to any matter which they were authorised to determine was to be binding and conclusive for all purposes :—

Held : the question whether a tithe rentcharge issued at the material time out of the land in question was an essential one in arriving at the amount of the annuity to be charged upon it, and the commission had jurisdiction to determine that question and its determination when given was conclusive.

[EDITORIAL NOTE.] The contention here is, in short, that it is a condition precedent to the jurisdiction of the commission that a tithe rentcharge shall have issued out of the land immediately before the Act of 1936 came into force. For this to be so, the question must be extrinsic to the adjudication and the Court of Appeal are clearly of opinion that the question whether a particular parcel of land was subject to tithe rent-

charge in 1936 is not extrinsic to the adjudication, but one of the matters over which the commission are given jurisdiction by sect. 3 of the Act. The difficulty is that the commission are expressly given power to determine what tithe rentcharges were extinguished by the Act. If there was no such rentcharge in existence, it could not have been extinguished and it might be said that the existence of the tithe rentcharge was essential to the jurisdiction of the commission. It is, however, decided that this question is one given to the commission to decide and it follows that their decision upon it is final.

A FOR THE TITHE ACT, 1936, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 29, p. 926.]

Cases referred to :

(1) *Bunbury v. Fuller* (1853), 9 Exch. 111; 11 Digest 77, 985; 23 L.J.Ex. 29; 23 L.T.O.S. 131.

*(2) *Colonial Bank of Australasia v. Willan* (1874), L.R. 5 P.C. 417; 16 Digest 125, 231; 43 L.J.P.C. 39; 30 L.T. 237.

B (3) *Blackett v. Ridout*, [1915] 2 K.B. 415; 11 Digest 72, 944; 84 L.J.K.B. 1535; 113 L.T. 267.

(4) *Re Ebsworth & Tidy's Contract* (1889), 42 Ch.D. 23; 19 Digest 490, 3472; 58 L.J.Ch. 665; 60 L.T. 841.

APPEAL by the plaintiffs, the Tithe Redemption Commission, from a decision of CASSELS, J., dated Mar. 3, 1942. The facts are fully stated in the judgment of SCOTT, L.J.

C *The Attorney-General* (Rt. Hon. Sir Donald B. Somervell, K.C.) and *Kenneth Diplock* (for *Hubert Hull* on war service) for the appellants.

Ralph Sutton, K.C., and *J. Jones Roberts* for the respondent.

SCOTT, L.J. : This is an appeal in an action in the High Court for 1s. 7d., but it raises an important question of principle in regard to the interpretation of the Tithe Act, 1936, which was intitled :

D An Act to extinguish tithe rentcharge and extraordinary tithe rentcharge, and to make provision with respect to the compensation of the owners thereof and rating authorities and to the liabilities of the owners of land charged therewith in respect of the extinguishment thereof . . .

For the purposes of that Act, as we know, the Tithe Redemption Commission was constituted with very wide powers for dealing in its discretion with the matters covered by the title of the Act. I have recited the title because, if there is any ambiguity in the language of the sections which we have to construe, the title is important as throwing light upon them.

E We are all familiar with the advantages, in regard to complicated subjects involving very often much detail, of having a special court, often called a commission, for the purpose of dealing finally with the various issues which may arise in carrying out the Act of Parliament under which the commission is given jurisdiction. The work of the commission is usually partly executive and partly judicial. The question raised in these proceedings is whether an apportionment of the annuity created by the Act by way of imposing liability upon those who had previously been liable to tithe rentcharge, is a good and valid apportionment; and for that purpose the commission is, in my view, given a very wide jurisdiction.

F The question raised by the proceedings comes up in this way. There is a field in North Wales numbered on the Tithe map 973; that field was divided on the map by the commission into two portions, the larger portion marked No. 1 and the smaller portion marked No. 2, the latter being at the south-western corner of the field. The respondent was the owner of the part marked No. 2. The commission, pursuant to the section to which I will refer in a moment, determined that there was charged by the Act an annuity of £1 12s. 1d. upon the whole of the field, and then apportioned the annuity so charged in the place of the previous tithe rentcharge as to £1 8s. 11d. to part No. 1, and 3s. 2d. to part No. 2. The respondent appeared before the commission and his contention was that his part of the field, No. 2, was under no liability to tithe rentcharge immediately before the Act came into operation. That representation was considered; but in spite of it the commission did in fact apportion that amount of the annuity to his part, and thereby imposed it as a liability on him.

H It is necessary to look at the provisions of the Act with care. Sect. 1 provides that on Oct. 2, 1936, all tithe rentcharges shall be extinguished; that is the "appointed day", and as from that day the land out of which any tithe rentcharge

issued immediately before that day is to be absolutely discharged and freed therefrom. Sect. 2 provides that, subject to the provisions of the Act, stock, to be called "redemption stock," shall be paid to the owners of tithe rentcharge by way of compensation; and subsect. (3) of that section provides that for the purposes of the Act the gross annual value of a rentcharge shall be taken to be the amount which bears to the amount of the rentcharge a certain percentage proportion. Sect. 3 (1) provides similarly that subject to the provisions of the Act an annuity, to be called a "redemption annuity," shall be charged in respect of the land out of which a tithe rentcharge extinguished by the Act issued immediately before the "appointed day," and that is to continue for 60 years. Then subsect. (2) of that section says:

The amount of an annuity charged by this section in respect of the land out of which a rentcharge issued shall be the amount which bears to the amount of the rentcharge

a certain relation. Sect. 4 creates the commission, and it says:

There shall be established for the purposes of this Act a commission to be called the "Tithe Redemption Commission" (in this Act referred to as "the commission"), consisting of a chairman and not more than four other commissioners . . .

Subsect. (2) prescribes their jurisdiction:

It shall be the duty of the commission, subject to and in accordance with the provisions of this Act (a) to determine what tithe rentcharges have been extinguished by this Act . . . (b) to determine what annuities are charged by sect. 3 of this Act and to record particulars thereof, to apportion annuities which are charged in respect of land in the ownership of two or more owners, and to manage annuities . . .

and so on, pending transfer to the Board of Inland Revenue. Sect. 5 (1) provides that there shall be transmitted to the commission in respect of every tithe rentcharge extinguished by the Act particulars in writing so far as they are relevant to the matters in question. I need not read the details of that section. Sect. 9, dealing with the annuities created in place of the tithe rentcharge, says:

(1) As soon as may be after the appointed day, the commission shall determine in relation to every district the amount of each annuity charged in respect of land in the district and the land in respect of which each such annuity is charged, and shall prepare a register specifying the amount of each such annuity and indicating by reference to a map the land in respect of which it is charged, and, after giving to the owners of land in the district an opportunity of inspecting the register and map and after making any amendments therein which in accordance with information furnished to them by such owners or otherwise in their possession appear to them to be requisite, shall seal two copies thereof, of which one shall be deposited at the principal office of the commission and the other shall be deposited at such place in, or in the neighbourhood of, the district as the commission may direct.

(2) Where under the subsequent provisions of this Act an annuity charged in respect of land in a district in respect of which an annuities register has been sealed is extinguished or reduced in amount, or a substituted annuity is charged in respect of land in such a district [an entry is to be made accordingly].

(3) Entries relating to an annuity in an annuities register shall be conclusive evidence that an annuity of the amount therein specified was charged in respect of the land therein indicated, as delineated in the annuities map [on certain dates which are mentioned]

(4) If it is shown to the satisfaction of the commission that any error exists in an annuities register or map, they shall forthwith amend it in such manner as appears to them to be requisite.

It is to be observed that all through that section complete discretion is given to the commission. Sect. 10 I refer to simply in order to show that it carries out that intention of Parliament to confer upon the commission that wide discretion:

(1) Subject to the provisions of this Act, the commission shall, in every case in which they ascertain that an annuity is charged in respect of land in the ownership of two or more owners, apportion the annuity as between the several parts of the land that are in different ownership in such manner as appears to the commission to be just and equitable: provided that in making any such apportionment they shall have regard to [various matters which are there indicated] . . .

(2) When the commission have apportioned an annuity, they shall make an order specifying the amount apportioned to each part of the land. . .

The last section to which I need refer is sect. 39. Subsect. (1) applies certain

provisions of the Arbitration Acts to the working of the commission ; subsect. (2) says :

Before making a determination in relation to any matter which they are authorised by this Act to determine, the commission or the board, as the case may be, shall give to any person who satisfies them that he is interested in the land or in the compensation to be made in respect of the tithe rentcharge, as the case may be, to which the determination relates an opportunity of making representations, and any person who satisfies the commission . . . or the court, as the case may be, that he is so interested may apply for the statement in the form of a special case of any question of law arising in relation to the matter.

The court that is there referred to is the court referred to in the Arbitration Acts. Subsect. (3) says :

Subject as aforesaid, a determination of the commission or of the board in relation to any matter which they are authorised by this Act to determine shall be binding and conclusive for all purposes.

In my view that series of sections indicates in quite clear language that the commission is intended by Parliament to decide all these matters upon which the register, which it is directed to keep and enter up, depends.

The primary question raised by the appeal is whether the question of whether a tithe rentcharge issued out of plot No. 2 in field No. 973 was a matter which could be dealt with by the commission. In my opinion, it clearly was, and for this reason. The commission are appointed in order to perform certain definite functions. They are obliged to ascertain whether a tithe rentcharge issues out of any land in the district for which they are acting, because without doing so they cannot determine that an annuity is created or apportion it in respect of *that* land. It is vital to the purpose of the Act that the annuity which is to take the place of a tithe rentcharge shall apply to particular land described on the map. It is essential also that the amount of the annuity should bear a certain definite mathematical relation to the old rentcharge in respect of that map, and the apportionment of a rentcharge issuing out of two pieces of land in different ownerships where the one rentcharge covers both these pieces of land, inevitably involves a decision as to whether the rentcharge did issue out of *that* land. Consequently, Parliament must have intended that that matter should be decided. It is submitted by counsel on behalf of the respondent that that is a collateral matter, over which the Act gave the commission no jurisdiction, and the trial judge, in a judgment which, quite frankly, I do not quite follow, took the same view. In my opinion, that conclusion would defeat what must have been the purpose of Parliament in passing this legislation, namely, to create a commission properly qualified to deal with all such questions for the express purpose of carrying out the change intended by Parliament in the most economical and efficient way possible. I confess to having much sympathy with the principle applied by Parliament, of creating a commission for purposes comparable to this. I think this Act is quite clear in its language, but, if there be any ambiguity, I am satisfied that it ought to be resolved in such a way as to make sure that the commission has power to deal with all those questions which are vital to the main decisions which it is directed to reach, namely, as to the amount of the annuity, and as to what the land is out of which the annuity is to be treated as issuing in substitution for the old rentcharge. In that way only is it able to ascertain the liabilities of the owners of the land.

I do not feel that it is necessary to refer to the case upon which the trial judge chiefly depended, *Bunbury v. Fuller* (1), except very summarily. It was a case under the Tithe Act, 1836, where the language is different, and I think it is only misleading to cite a case decided on an Act containing different language for the purpose of solving a difficulty of interpretation in the present Act of 100 years later. It may very well be that that very decision was present to the mind of the draftsman of the Act of 1836 when he gave this wide discretion to the commission which, as I think, the Act was to create.

For these reasons I think the appeal ought to be allowed with costs.

MACKINNON, L.J.: I agree. The commission in this case sued the respondent for 1s. 7d., and that amount quite manifestly was due from him according to the decision of the commission recorded in the document that it had to prepare.

It is provided in the Tithe Act, 1936, s. 39 (3) that :

Subject as aforesaid [that is immaterial matters about stating a case, etc.], a determination of the commission . . . in relation to any matter which they are authorised by this Act to determine shall be binding and conclusive for all purposes.

Prima facie, this determination that the respondent was liable to pay 1s. 7d. per annum tithe rentcharge in respect of this little plot of land was binding and conclusive for all purposes. It is, however, objected by counsel on behalf of the respondent that this conclusiveness under this section is limited to a matter in respect of which the commission has jurisdiction to make a determination, and he argued that they had no jurisdiction to determine this particular fact, because it was said that under the section at the beginning of the Act it is provided that the commission shall only make its finding in regard to land which on the day before the coming into force of this Act was subject to a tithe rentcharge under the old Act of 1836. It is said that this piece of land was not in fact so subject, and that, therefore, the commission had no jurisdiction to determine that it was. Obviously, in one sense, that begs the question. The whole duty conferred upon the commission is to determine what land is subject or was subject on the appointed day to such a burden, and the real point, I think, of the objection, and the fallacy in regard to it, is quite clearly shown in the case to which we were referred, *Colonial Bank of Australasia v. Willan* (2), where the matter is summed up in the headnote in two sentences :

Matters on which the defect of jurisdiction depends may be apparent on the face of the proceedings, or may be brought before the Superior Court by affidavit, but they must be extrinsic to the adjudication impeached.

This matter is not extrinsic to the adjudication impeached, but it is the very matter of adjudication which the commissioners made, and that is referred to in the next passage but one in the headnote :

The objection of defect of jurisdiction cannot be entertained if it rests solely on the ground that the judge has erroneously found a fact which was essential to the validity of his order, but which he was competent to try.

That is taken from the opinion of the court delivered by SIR JAMES W. COLVILLE, and the material sentence in regard to that is on p. 443, where he said :

But an objection that the judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it.

That is the utmost that can be said in this case. The commission had jurisdiction to try whether this land was subject to a rentcharge, and, therefore, they rightly entered upon that inquiry. To say that they made a mistake in finding that it was so subject, is merely to say that they made a mistake in the course of carrying out their duty, but it is vain to attempt to rely upon that circumstance in order to say that the commission had not jurisdiction to find that which they have found, which finding, under sect. 39 of the Act, is to be conclusive for all purposes.

In the result, I think, the trial judge was clearly wrong in saying that the appellants were not entitled to recover this small sum from the respondent.

GODDARD, L.J. : I agree, and I only want to add one thing upon *Bunbury v. Fuller* (1), which was a case upon which the trial judge relied. I think this case is materially different from *Bunbury v. Fuller* (1), because in this case, as MACKINNON, L.J., has pointed out, the very point that the commission had to decide is : what is the land in respect of which such annuity is charged ? In *Bunbury v. Fuller* (1), by sect. 45 of the Act of 1836, the commissioners were given jurisdiction to hear and determine disputes as to tithes, and their decision was final and conclusive. By sect. 90 certain tithes were withdrawn from the jurisdiction of the commissioners altogether, and the Act did not apply to them. In those circumstances, no doubt, if, when a case came before the commissioners, it was objected that the tithe in question was one which was withdrawn from the commissioners under sect. 90, or the dispute was one which related to a tithe which was withdrawn from the commissioners under sect. 90, the commissioners would have to hear what was said and give a decision as to whether they could proceed with the case or not. Upon that decision would depend whether they considered that they had jurisdiction, and if they gave a decision that the tithe

which was in dispute was one over which they had jurisdiction, their decision upon that was not final. That could be objected to in the courts, and that right could be tested in the courts. However, once it was decided in the courts that it was a matter over which the commission had jurisdiction, then the decision could not be challenged. The question here is: what is the land in respect of which this particular annuity is charged? That is a matter within their jurisdiction and once they have given a decision upon that, I do not think their decision can be challenged.

A *Appeal allowed. Judgment to be entered for the appellants and declaration that the decision of the appellants that a redemption annuity was charged in respect of the tithe area and the apportionment of the said annuity are final and conclusive. No order as to costs.*

Solicitors: *A. D. Stacks* (for the appellants); *Wigan & Co.*, agents for *Kerfoot Owen & Wearn*, Denbigh (for the respondent).

B [Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Re PRATT (deceased), BARROW v. MCCARTHY AND OTHERS.
[CHANCERY DIVISION (Morton, J.), July 12, 1943.]

Trusts—Investments—Power to vary—Bequest of specific shares on settled trusts—Trustee Act, 1925 (c. 19), ss. 1 (1), 57 (1), 69 (1).

C By her will, dated Nov. 23, 1936, the testatrix bequeathed to her trustees all her shares in a coffee estate upon trust to pay the income thereof to her nephew during his life and after his death, as to both capital and income, in trust for his child or children, and, if no such child should attain a vested interest for her two nieces as tenants in common in equal shares. There was no express trust for sale. The testatrix died on April 17, 1939, and her nephew was married, but at the date of the summons had had no children. The summons was taken out by the nephew, one of the trustees, asking that the trustees might be empowered or authorised, under the Trustee Act, 1925, s. 57, or otherwise, to sell the shares. The plaintiff contended that the provisions relating to investment in the Trustee Act, 1925, applied only where trustees were under a duty to sell or had a power to vary:—

E HELD: (i) on the proper construction of the Trustee Act, 1925, s. 1, the trustees had a power to vary the investment in this case.

(ii) since the trustee had such a statutory power there was no jurisdiction under sect. 57 (1) because such jurisdiction was given to the court only in the absence of a power to effect the desired purpose.

F [EDITORIAL NOTE. It was suggested that where a specific investment is settled, the trustees have no power to vary that investment unless there is a special provision to that effect in the instrument settling the property. The Act of 1925, however, gives power to trustees to invest in authorised securities whether or not the trust funds are in a state of investment and it is held that, where, as in the case of the settlement of a specific investment, the trust funds are already in a state of investment, that must necessarily imply a power to vary.]

AS TO TRUSTEES POWER TO VARY INVESTMENT, see HALSBURY, Hailsham Edn., Vol. 33, p. 244, para. 430; and FOR CASES, see DIGEST, Vol. 43, pp. 941-943, Nos. 3781-3806.]

G Cases referred to:

- (1) *Hume v. Lopes*, [1892] A.C. 112; 43 Digest 942, 3791; 61 L.J.Ch. 423; *sub nom. Dick-Hume v. Lopes*, 66 L.T. 425; *affg. S.C. sub nom. Re Dick, Lopes v. Hume-Dick*, [1891] 1 Ch. 423.
- (2) *Re Warren, Public Trustee v. Fletcher*, [1939] Ch. 684; [1939] 2 All E.R. 599; Digest Supp.; 108 L.J.Ch. 311; 161 L.T. 32.
- (3) *Re Warde* (1861), 2 John. & H. 191.
- (4) *Re Box* (1863), 1 Hem. & M. 552; 44 Digest 397, 2301; 33 L.J.Ch. 42; 9 L.T. 372.
- (5) *Waite v. Littlewood* (1872), 41 L.J.Ch. 636; 43 Digest 941, 3786.

H SUMMONS by a trustee of a settlement asking that the trustees might be empowered or authorised under the Trustee Act, 1925, s. 57, or otherwise to sell investments forming part of the trust funds. The facts are fully set out in the judgment.

Hubert A. Rose for the plaintiff trustee, the tenant for life.

Wilfrid M. Hunt for the defendant trustee.

J. F. Bowyer for the nieces.

MORTON, J. : The testatrix, Mary Frances Pratt, made her will on Nov. 23, 1936. By cl. 1 she appointed executors and trustees. Cl. 2, so far as material, is as follows :

I bequeath the following specific legacies free of legacy duty payable at my death . . . (c) to my trustees all my shares in the Koorghully Coffee Estates Ltd., together with all dividends and income accruing thereon at my death upon trust to pay the dividends or income thereof to my said nephew Reginald Lousada Barrow during his life and after his death (as to both income and capital) in trust for all or any his child or children who being male attain the age of 21 years or being female attain that age or marry and if more than one in equal shares and if there shall be no such child in trust for my said nieces Theodora Edwards and Vyvian Preston absolutely as tenants in common in equal shares.

She then goes on to give some pecuniary legacies free of legacy duty : she made certain specific devises, and concluded as follows :

I devise and bequeath all the residue of my property both real and personal after payment thereof of my debts funeral and testamentary expenses and the legacy duty payable on any legacies hereby or by any codicil hereto bequeathed free of duty unto my said nephew Reginald Lousada Barrow my said niece Theodora Edwards and my said niece Vyvian Preston as tenants in common in equal shares.

There was thus a gift of the residue without any express trust for sale to those three persons as tenants in common.

Reginald Lousada Barrow is still living and so far he has had no children. The testatrix died on Apr. 17, 1939, without having revoked or altered her will ; and probate thereof on June 6, 1939, was granted to the plaintiff, Reginald Lousada Barrow, and the first defendant, Captain Horace Walpole Peter McCarthy.

On May 26, 1943, a summons was taken out by Barrow asking that Barrow and the first defendant, who are the executors and trustees of the testatrix's will, might be empowered or authorised, under the Trustee Act, 1925, s. 57, or otherwise to sell the shares in the Koorghully Coffee Estates, Ltd., which were specifically bequeathed by the will. When the matter came before me in chambers it was suggested by counsel for the first defendant that the Trustee Act, 1925, s. 57, had no application in the present case because the court can only make an order under that section where a transaction :

. . . is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law . . .

In the present case counsel for the defendant trustee suggested that the trustees had, in fact, power to sell the shares in question and, that being so, the court could not make an order under sect. 57. In bringing this matter to the attention of the court counsel in no way desires to object to a sale, which, in fact, he considers beneficial, but he thought it his duty to bring this point to the attention of the court, and very rightly did so. In those circumstances, I intimated that I would hear argument upon the question in open court, and it has now been argued before me.

The question which I have to determine may be stated as follows : Have trustees power to sell an investment which is specifically bequeathed to them upon trust to pay the dividends or income thereof to A. for life and after the death of A. upon trust as to capital and income for B. and C. ? The Trustee Act, 1925, s. 1, so far as material, is in the following terms :

A trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say . . . and may also from time to time vary any such investment.

The definition section, sect. 68, does not define the meaning of " trust fund " ; and counsel for the defendant trustee was unable to find, in the time at his disposal, any other section in which the words " trust funds " were used except sect. 15 (b). Sect. 69 (1) is as follows :

This Act, except where otherwise expressly provided, applies to trusts including, so far as this Act applies thereto, executorships and administratorships constituted or created either before or after the commencement of this Act.

Subsect. (2) is as follows :

The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument. if any, creating the trust, and have effect subject to the terms of that instrument.

Looking at the matter for the moment apart from authority, I should have said that the shares in question were trust funds in the hands of the trustees, such trust funds being in a state of investment, and that, this being so and there being no contrary intention "expressed in the instrument, if any, creating the trust," the trustees would have power to invest these funds in the manner described in sect. 1; thus, it seems there must necessarily be implied a power in the trustees to sell, because clearly funds which are at the moment in a state of investment cannot be invested in another investment unless they are first sold.

The matter is not free from authority. I have been referred to *Hume v. Lopes* (1). That case has reference to a large sum which had been already invested by the trustees in Government stocks. It appears from the report of the case in the court below that the Government stocks in question had not been held by the testator prior to his death but were purchased after his death.

The respondent, Hume-Dick, who was tenant for life in possession, had requested the trustees to sell enough Government stock to raise £106,900 and to invest that sum upon mortgage of freehold estates in England. The trustees took out an originating summons for the opinion of the court whether they had power to do this. The Court of Appeal held that the trustees had the power. At that time the relevant statute was the Trust Investment Act, 1889, and sect. 3 of that Act was as follows:

It shall be lawful for a trustee, unless expressly forbidden by the instrument (if any) creating the trust, to invest any trust funds in his hands in manner following, that is to say . . . and also from time to time to vary any such investment.

The House of Lords upheld the decision of the Court of Appeal. LORD WATSON in his speech at pp. 115, 116, said:

My Lords, I entirely agree in the result at which the Court of Appeal has arrived, but I am disposed to reach that result by a shorter road. In my opinion, the expression "trust fund" occurring in the commencement of sect. 3 of the Act of 1889 signifies funds belonging to the trust, including money invested on security or otherwise, as well as uninvested cash. I do not doubt that such is the ordinary and natural meaning of the words. Unless, therefore, some rule can be found which excludes that meaning in this particular context, that meaning must be attached to them. Now, within the four corners of the Act itself, I can find nothing to suggest that the meaning of the words should be limited to actual cash waiting for investment. On the other hand, I find a good deal in the statute itself which suggests that no such limitation ought to be imposed. But then it is said that these words had previously acquired a technical meaning which the legislature must be assumed to have had in view, and to have intended to attach to their use in sect. 3. It cannot be said that the words, according to their ordinary acceptation in a court of equity, have any such limited technical meaning as cash waiting for investment. What has been suggested is, that there are similar words occurring in older statutes having the same subject-matter as the present Act, namely, the investment of trust funds, and that the words were there used in the limited sense contended for by the appellant. If there had been a series of statutes using the same expression, and it had been authoritatively construed by a series of decisions, that would have raised a case for your Lordships' consideration very different from that which is now presented to us; because, upon an examination of the authorities, the argument comes to this, that in the Vice-Chancellor's Court, upon statutes containing similar expressions, those expressions were construed in two different ways by two different judges—one giving the words their primary and natural meaning, the other giving the words the restricted meaning which I have explained. I do not think that in that state of the authorities it can be reasonably suggested that the legislature had in view any meaning of the words other than their natural and popular meaning. If that be so, *cadit quaestio*. It is admitted that so reading the statute the judgment of the court below is right.

LORD MACNAGHTEN said, at pp. 116, 117:

My Lords, I am of the same opinion. I do not myself feel the difficulty which seems to have pressed upon the Court of Appeal with regard to the earlier words of sect. 3 of the Act of 1889. That section authorises "a trustee, unless expressly forbidden by the instrument (if any) creating the trust, to invest any trust funds in his hands" in the manner there specified. I do not see why those words should be limited to cash waiting investment. They appear to me to be the widest words possible, and to include all funds belonging to the trust and under the control or dominion of the trustee. I read the words in the section as authorising a trustee to invest any trust funds in his hands, whether at the time in a state of investment or not, in the securities mentioned in the Act.

LORD MORRIS concurred entirely in the judgments which were delivered by

LORD WATSON and LORD MACNAGHTEN. LORD FIELD preferred to base his judgment upon the somewhat narrow ground which had been taken by the Court of Appeal; and LORD HANNEN, while concurring in the judgment which had been delivered by the Lords who first spoke, was inclined also to rest his decision upon the judgment given in the Court of Appeal.

It was no doubt as a result of that decision that in the Trustee Act, 1893, the words "whether at the time it was in a state of investment or not" were inserted. I was further referred, on the question of what is a contrary intention, to the decision of SIMONDS, J., in *Re Warren* (2); but, as it is not contended that in the present case there is any contrary intention expressed in the instrument, I need not refer in detail to that case.

Counsel for the plaintiff, putting his argument for the assistance of the court, submits that sect. 1 applies only where the trustees have a duty to invest. He has drawn my attention to certain earlier cases, which include *Re Warde* (3); *Re Box* (4); and *Waite v. Littlewood* (5). The effect of *Re Warde* (3) is stated thus in LEWIN ON TRUSTS, 14th edn., p. 360:

By the Law of Property Amendment Act, 1859, (commonly known as Lord St. Leonards' Act) s. 32, trustees, executors and administrators, where not expressly forbidden by the instrument creating the trust, were authorised to invest trust funds in the stock of the Bank of England or Ireland or on East India stock; but the Act was held not to apply where a particular fund was settled specifically and there was no power of varying securities.

In a footnote the author refers to *Re Warde* (3) and says:

... but see *contra Waite v. Littlewood* (5) ... in which case, however, the case before WOOD, V.-C., was not cited. By the Amendment Act s. 12, Lord St. Leonards' Act, s. 32, was made retrospective.

It would appear that *Re Warde* (3) and *Waite v. Littlewood* (5) were the cases which were referred to by LORD WATSON in his speech, which I have already read.

Counsel for the plaintiff further points out that, before the legislature intervened to increase the range of investments open to trustees, where a specific investment was settled upon trust for A. for life with remainder to B. and C., there was no power in the trustees to sell that investment, and he suggests that the provisions relating to investment in the Trustee Act, 1925, are directed only to a case in which the trustees are in a position to consider what investments they should select; in other words, a case in which they have a power of sale to exercise.

In my view, having regard to the language of sect. 1 of the 1925 Act, and to the observations of the House of Lords in *Hume v. Lopes* (1), I cannot give such a narrow meaning to sect. 1 of the 1925 Act. It is conceivable that the legislature intended to deal only with such a case as that described by counsel for the plaintiff; but, whether that be so or not, I think that the language used is wide enough to confer a power of sale upon trustees in a case such as the present. This is the manner in which I was disposed to read the Act apart from any authority, and I find no authority which in any way leads me to the conclusion that I ought to give the Act a narrower interpretation. The result is that in the present case the trustees have a power of sale.

I cannot, therefore, make the order which is asked under the Trustee Act, 1925, s. 57, because the words "by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law" are not applicable to the present case.

No order. Costs to be paid out of the trust fund.

Solicitors: *Ralph Bond & Rutherford* (for the plaintiff); *Preston & Hudson* (for the defendants).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

BRADLEY EGG FARM, LTD. v. CLIFFORD AND OTHERS.

[COURT OF APPEAL (Scott and Goddard, L.JJ., and Bennett, J.), July 13, 14, 15, 29, 1943.]

Contract—Unincorporated society—Contract to test fowls—Negligently carried out by servant—Liability of executive committee of society.

The plaintiffs, who were poultry farmers, contracted to have their birds tested for a disease called bacillary white diarrhoea. This contract was contained in six letters, those on the part of the defendants being written

on the notepaper of the Lancashire Utility Poultry Society and signed by the technical manager of that society. The society was an unincorporated body with a large number of members. The members paid a subscription of 7s. 6d. The income of the society was by the rules to be applied to its objects and no member had any interest therein. On dissolution the surplus funds were not to be divided among the members but to be given to some association with similar objects. The test contracted for was carried out by a servant of the society and through his negligence a number of birds died. As originally pleaded the action claimed against the president, the deputy president and the secretary and treasurer damages for breach of contract and an order that those officers should pay or procure to be paid such damages and the costs of the action out of the property and assets of the society, but later, when a representation order, asked for by the plaintiffs, was opposed by the defendants, the names of all the members of the executive council at the time the contract was made were added as defendants and the statement of claim was amended to allege that the contract was made with all the defendants other than the one Stuart, who, as the person carrying out the test, was sued for negligence :—

HELD [BENNETT, J., *dissenting*]: the objects of the society as set out in its rules necessitated the appointment of an executive council, and the members of the executive council were the principals of the servant carrying out this test and liable for his negligence. The fact that such a society entrusts its affairs and management to an executive council does not give that council authority to make contracts binding on all the members. The executive council were liable to the plaintiffs and the proper form of judgment was against the members of the council personally.

[EDITORIAL NOTE] The officers and committee or council of a society as such have no authority to pledge the credit of members by contracting on their behalf. Such authority must be given, either expressly or by necessary implication, by the rules, and it will be generally negatived where it is shown that a person joining such a society does not intend to incur any liability beyond the subscriptions payable under the rules. On the other hand, members are entitled to expect that the objects of the society will be actively carried out and this cannot be done without incurring liability under contracts of various kinds. The whole matter is perhaps one of construction, but clearly in most cases, according to the decision of the majority of the Court of Appeal in the present case, affirming a decision of DU PARCQ, L.J., sitting in a court of first instance, the committee or executive council of an unincorporated body are personally liable on its contracts—a liability in this case amounting to over £2,300 apart from costs. The matter is one which is the subject of little authority and the court has rested its decision upon an analogy with the club cases.

FOR LIABILITY OF AN EXECUTIVE COMMITTEE, see HALSBURY, Hailsham Edn., Vol. 4, pp. 498, 499, para. 922; and FOR CASES, see DIGEST, Vol. 8, pp. 515-518, Nos. 63-88.]

Cases referred to :

- (1) *Wise v. Perpetual Trustee Co.*, [1903] A.C. 139; 8 Digest 515, 63; 72 L.J.P.C. 31; 87 L.T. 569.
- (2) *Todd v. Emly* (1841), 7 M. & W. 427; 8 Digest 516, 74; 10 L.J.Ex. 161.
- (3) *Barker v. Allanson*, [1937] 1 K.B. 463; [1937] 1 All E.R. 75; Digest Supp.; 106 L.J.K.B. 108; 156 L.T. 135.
- (4) *London Association for the Protection of Trade v. Greenlands, Ltd.*, [1916] 2 A.C. 15; 42 Digest 976, 67; 85 L.J.K.B. 698; 114 L.T. 434.
- (5) *Re St. James' Club* (1852), 2 De G.M. & G. 383; 8 Digest 505, 1; 19 L.T.O.S. 307.
- (6) *Steele v. Gourley and Davis* (1887), 3 T.L.R. 772; 8 Digest 517, 77.
- (7) *Brown v. Lewis* (1896), 12 T.L.R. 455; 8 Digest 518, 89.
- (8) *Ideal Films, Ltd. v. Richards*, [1927] 1 K.B. 374; Digest, Practice, 414, 1126; 96 L.J.K.B. 161; 136 L.T. 295.

APPEAL by the defendants from a decision of DU PARCQ, L.J., sitting as an additional judge of the King's Bench Division, on Dec. 17, 1942. The facts are fully set out in the judgments.

F. W. Beney, K.C., and *Astell Burt* for the appellants.

F. A. Sellers, K.C., and *H. G. Robertson* for the respondents.

GODDARD, L.J. [delivering the judgment of SCOTT and GODDARD, L.JJ.]: Subject to a short addition drafted by SCOTT, L.J., in which I concur, to explain a little more fully why we differ from BENNETT, J., this is the judgment of my Lord and myself.

The action out of which this appeal arises was brought by the plaintiffs, who

are poultry farmers in a large way of business, to recover damages for the loss of a large number of fowls which, they allege, became infected with fowl typhoid by reason of a breach of contract on the part of the defendants other than Stuart, and also by the negligence of Stuart, who is said to be their servant or agent. The defendants other than Stuart are members of the council of an unincorporated association called the Lancashire Utility Poultry Society, which has among its objects the granting of expert advice to all interested in poultry breeding, and the investigating and advising upon diseases affecting poultry generally. Poultry keepers are invited to employ the testers of the society to inspect and test their birds for diseases, and it was alleged that, during a test carried out by Stuart for a disease called bacillary white diarrhoea, the plaintiffs' birds were infected with typhoid and a large number died or had to be killed. The action was tried by DU PARCQ, L.J., who held that the contract was made by the defendants with the plaintiffs, and was broken in that a substance known as antigen, which was used in the test, was impure and infected with the typhoid bacillus, and also that Stuart was negligent. The defendants, while accepting the finding as to the antigen, appeal on the ground that the contract was not made by the defendants, that Stuart was not their servant or agent, and that there was no evidence of negligence against Stuart. A

The facts were found by DU PARCQ, L.J., in a full and careful judgment and it is unnecessary to set them out in detail. Briefly, the method of testing was that Stuart with a pair of scissors made a small incision in the comb of each bird thereby extracting a drop of blood. The blood was then placed on a glass slide, on which there had already been placed separate small spots of antigen, and from which a reaction could be obtained. The only precaution taken by Stuart against the transfer of infection of any kind from an earlier to a later bird or from any other source was that he wiped the scissors between each operation with a cloth or rag, which he had in the pocket of his overall and which he had treated with spirit before he left his lodging in the morning for the plaintiffs' farm. DU PARCQ, L.J., came to the conclusion that this precaution was insufficient, especially as he used only one instrument throughout the operation, and, in our opinion, the evidence amply justified the finding. All the expert witnesses agreed that it was necessary to clean the instrument used before passing from one bird to another, and this, indeed, would seem to be an obvious precaution. While, no doubt, Stuart had no reason to doubt, and was entitled to assume, the purity of the antigen, he could not tell when he cut the comb of a particular bird whether it had the seeds of disease in its blood, and there was always the danger that a germ might be picked up from the bench or elsewhere. The degree of knowledge and skill which the plaintiffs were entitled to expect from Stuart was what might normally be required from a tester sent by a society who, as their circulars showed, kept a pathological laboratory and offered complete laboratory service for testing for disease and conducting postmortem inquiries. There was evidence that Stuart did not resoak the cloth he was using with spirit from time to time or at all during the test, and, in our opinion, considering the large number of birds that were tested, the total time necessarily occupied and the nature of the test, a finding that the precautions, if such they can be called, adopted by him were insufficient was amply justified by the evidence. B C D E F

The question then arises whether the other defendants are responsible for the default of Stuart, and this also involves the question whether it was with them that the contract was made. The plaintiffs were invited to have a test made of their poultry by letters and circulars sent on the notepaper and from the office of the Lancashire Utility Poultry Society by one Gates, who is described as their technical manager. The society is an unincorporated body with offices at Preston. It has a large number of members, some of whom are limited companies resident in various parts of the Kingdom. Membership involves a small subscription which entitles a member to receive copies of publications issued by the society and to vote in person at general meetings. Its income is to be applied towards the promotion of its objects, and no member as such has any interest therein. On dissolution the surplus funds are not to be divided among members, but are to be given to some association or institution with objects similar to those of the society. G H

The society thus has some analogy to a members' club with this important

A difference, that, whereas the property of such a club belongs beneficially to the members jointly, the members of this society have no rights in the funds or property of the society at all. Its affairs are managed by a council, composed of the defendants, who are entrusted with the management and administration of its affairs. The president, deputy president, treasurer and auditors are appointed in general meeting. The secretary is appointed by the council, and the rules do not contain any provision for the appointment of any other officers or servants. In view of the objects of the society as set out in the rules, it is plain that persons must be engaged to further them, and that this appointment and the allocation of duties among them would be part of the duties of management and administration conferred on the council.

B Gates was appointed as technical manager and laboratory officer on Apr. 21, 1939, at a meeting of the council. All of the defendant committee either voted for or knew and approved of his appointment. In our opinion, it is plain that
C Gates was employed by the council and must be regarded as their servant. Against whom but them could he claim his salary? It was argued that if he was the servant of anyone it was of the society, that is, of every member of the society, and that, if he in the course of his duties made contracts, he made them as agent for the members of the society jointly. In our opinion, this is an impossible contention. Because members of a society, especially in a case
D where they have no rights or interest in the funds or property of the society, entrust its affairs and management to a committee, that does not mean that they thereby give the committee authority to make contracts binding on them. Otherwise a person who pays a subscription of 7s. 6d. to this society might find himself involved in liabilities of an unknown amount. It is the defendant committee who are liable as Gates' principals, and they are his principals, not because they are members of the society, but because they are the committee entrusted with the function of directing the activities of this unincorporated
E body and putting them into execution. That includes the making and performing of contracts; and the manager appointed by them becomes their agent and servant to act on their behalf in making such contracts as they may direct and approve and appointing experts, etc. Exactly similar considerations apply to Stuart. They authorise his contracts and are liable upon them. He was engaged as a tester by the council and all its members knew and approved of his appointment and of his carrying out tests; payment for his services was received by the council and the moneys became part of the funds of the society of which they had the control. The council paid Stuart's salary; he was their servant or agent and they are therefore liable for his negligence.

We ought perhaps to say that, as originally framed the action was brought against three members of the committee, the president, deputy president and secretary, as representing themselves and all the members of the society, and
F against Stuart. The reason for this is to be found in a letter from the solicitors of the society which said that these three gentlemen had been nominated to represent the society. Had matters remained in that state, no question would presumably have been raised as to with whom the contract had been made, or who were responsible as principals for the acts both of Gates and Stuart. The issues would apparently have been limited merely to the questions of
G whether there had been a breach of contract, those defendants accepting liability on behalf of themselves and their fellow-members, and also for the negligence of Stuart if this was proved. This would, no doubt, have been quite satisfactory to the plaintiffs, as it would have meant that liability was accepted if the plaintiffs proved their case. But when a representation order was sought, the defendants objected to it, and thereupon the plaintiffs amended by joining all the council and framing their statement of claim so as to assert a liability in the defendants
H other than Stuart as the principals. This, in our opinion, was and is the true position in law, and the judgment was rightly given against the defendants personally and not in a representative capacity, and on the footing that they, as members of the council and not merely as members of the society, were the principals of both Gates and Stuart. The appeal accordingly fails, and is dismissed with costs.

BENNETT, J. : It is my misfortune to differ from my Lord and GODDARD, L.J., as well as from DU PARCQ, L.J., who tried this case. I would allow this appeal and order that judgment should be entered for the defendants with costs.

First of all, I want to call attention to the pleadings, for by so doing I think I may be able to make it clear why the plaintiffs' action against all the defendants except the defendant Stuart must in my judgment fail. To the writ of summons when issued four persons only were named as defendants. The first three of these were Guy Clifford, James Sutton and John Bell. These three defendants were stated in the writ to be respectively the president, deputy president and the secretary and treasurer of the Lancashire Utility Poultry Society, and the writ stated that they were sued on their own behalf and on behalf of all other members of the society. The fourth defendant was T. Ellery Stuart. The plaintiffs' claim as indorsed on the writ was against the first three defendants on behalf of all the members of the Lancashire Utility Poultry Society for (i) a declaration that the members of the Lancashire Utility Poultry Society are liable in damages to the plaintiffs for breach of contract in and about the blood testing of the plaintiffs' poultry by their servant and agent the defendant Stuart, (ii) an order that the first three defendants do pay or procure to be paid to the plaintiffs such damages and the costs of this action out of the property and assets of the said society, and (iii) against the defendant Stuart damages for negligence.

The Lancashire Utility Poultry Society is an unregistered and unincorporated body comprised of persons some of whom are natural persons and some artificial who are bound together by a set of rules, and the persons so bound together are collectively known by the name of the Lancashire Utility Poultry Society. The theory upon which the indorsement on the writ had been framed (obviously by one who is a master of his craft) was that the plaintiffs had made a contract with the society, and that the society had broken it. For this breach the indorsement was so framed as to enable the plaintiffs, if successful, to have an order made by which they would be able to get hold of the property of the society to answer their claim. The plaintiffs did not claim a personal judgment against the first three defendants or against the members of the society. The writ was issued on June 6, 1940, and the statement of claim was delivered on July 23, 1940.

In this pleading, after alleging in para. (1) who the plaintiffs were, and that the Lancashire Utility Poultry Society was an unincorporated body, the pleader went on to make in para. (2) the following allegations :

(2) The management and administration of the affairs of the society is vested in a council of which the defendants Clifford, Sutton and Bell who are respectively the president, deputy president and secretary and treasurer are and were at all times members, and they have been nominated by the society to represent them in this action. They are sued in this action on their own behalf as persons by whose authority the acts and matters hereinafter alleged were done and as representing the council and members of the society. At all material times the defendant Stuart was an official tester and one R. A. S. Gates the technical manager in the employment of the society acting by and under the authority of the other defendants.

Para. (3) of the pleading was as follows :

(3) By a contract in writing contained in the under-mentioned letters between the said R. A. S. Gates and the plaintiffs, the society agreed to carry out upon the plaintiffs' fowls the B.W.D. (bacillary white diarrhoea) test by the antigen method at the price of 1½d. per bird including the supply of antigen and equipment necessary for such test . . . The said letters are dated in Oct., 1939, from Gates to the plaintiffs, 10th, 17th and 23rd, and from plaintiffs to Gates dated 14th, 20th and 25th.

In para. (6) the plaintiffs assign a breach of this contract by supplying infected antigen and negligence on the part of the defendant Stuart in performing his duties under the contract. In para. (7) they allege damage sustained by the plaintiffs flowing directly from the alleged breach of contract and the alleged negligence. The claims against the first three defendants were (i) damages for breach of contract, (ii) damages for the negligence of Stuart, (iii) an order that the defendants do pay or procure to be paid to the plaintiffs such damages and the costs of this action out of the property and assets of the society, and against Stuart damages for negligence. It is clear that at this time the plaintiffs sued for breach of contract made on behalf of the society by their agent Gates ; also that they sued the society to recover damages for the negligence of their servant Stuart.

In Aug., 1941, the plaintiffs applied by summons for an order that the defendants Clifford and Sutton do defend the action on behalf of (i) all persons who

were members of the council of the Lancashire Utility Poultry Society on and between Oct. 10 and Nov. 2, 1939, and (ii) all the persons who were members of the Lancashire Utility Poultry Society on and between Oct. 10 and Nov. 2, 1939. Alternatively, they asked that certain named persons be added as defendants in the action. The named persons were those whose names appear in red ink on the amended writ of summons. These persons were members of the council of the society between Oct. 10 and Nov. 2, 1939.

A The order asked for in the first paragraph of the summons was asked for under R.S.C., Ord. 16, r. 9. The application was resisted by the defendants and was refused, but an order was made on the second paragraph of the summons on Aug. 27, 1941, and the members of the council of the society at the material dates were joined as defendants in the action, and on Nov. 5, 1941, a re-amended statement of claim was delivered. It was re-amended in green ink, and it was upon these claims as stated in this pleading that the action came on for trial
B before DU PARCQ, L.J., in November of last year. In para. (3) of this pleading the plaintiffs allege that the contract upon which they now sue was made by them not with the society but with the defendants other than Stuart. They allege that that contract is to be found in the same letters as those mentioned in the original pleading, and they sue the defendants other than Stuart for damages for breach of that contract upon the footing that it was made by their agent Gates on their behalf. They also claim damages for negligence against
C the defendants other than Stuart upon the footing that Stuart was their servant and that they personally employed him and are answerable for his negligence whilst carrying out his duties as their servant.

Judgment was given by DU PARCQ, L.J., against all the defendants for the sum of £2,357. As against the defendants other than Stuart he found that they personally had contracted with the plaintiffs by their agent Gates and that the contract had been broken by those defendants. He found that Stuart had been
D negligent; he found that Stuart was the servant of his co-defendants and that they were responsible for his negligence.

There is, of course, no legal entity bearing the name of the Lancashire Utility Poultry Society, but that name can as a matter of law comprehend and refer to all the persons who at some specified moment of time are as a result of agreement associated together by a set of rules. As a matter of law it is possible
E for a contract to be entered into with, and for credit to be given to, and for responsibilities to be undertaken by, such an association of persons in and by the name by which these persons have agreed to be and are known.

An association such as the Lancashire Utility Poultry Society is like a members' club of a peculiar nature to which the observations of LORD LINDLEY in *Wise v. Perpetual Trustee Co.* (1) apply. LORD LINDLEY said this, at p. 149 :
F Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed but understood by every one, that clubs are formed; and this distinguishing feature has been often judicially recognised. It has been so recognised in actions by
G creditors and in winding-up proceedings.

A person who enters into a contract with an unincorporated association by name or with a members' club by name, the contract being entered into on behalf of the association or club by a person who purports to act as their agent may or may not be acting wisely. The agent may or may not have authority to make the contract. There may or may not be difficulties in enforcing such a contract. All these questions are beside the point if the contract was in
H fact made in terms which indicate that the contract was made with the members of the association or the club.

In the present case, the contract upon which the plaintiffs sue is in writing and is contained in the six letters referred to by the plaintiffs in para. (3) of the re-amended statement of claim. The question is, with whom, upon the construction of those letters, did the plaintiffs contract?

Gates opened the correspondence with the letter of Oct. 10, 1939. This letter, and also his letters of Oct. 17 and 23, were written on letter paper headed with the full name of the society, and beneath it the address of the society. Each

of these letters was signed by Gates over the words "Technical Manager." In each of the letters the pronouns "we" and "our" are copiously used. The plaintiffs' letters in reply to these are all addressed to the Technical Manager, Lancashire Utility Poultry Society, and as a matter of construction it is, in my judgment, clear beyond doubt that the contract contained in those letters was made between the plaintiffs, a limited company, on the one side, and the person or persons known as, or comprehended within, the description of the Lancashire Utility Poultry Society on the other side, the contract being made on behalf of such person or persons by their agent R. A. S. Gates. The question then is: Who were the persons understood by the plaintiffs to be comprehended at that time within that description? The answer was given at the trial by H. F. Bliss, the plaintiffs' secretary, who wrote on behalf of the plaintiffs the three letters of Oct. 10, 14 and 25, which are three of the letters in the correspondence containing the terms of the contract.

The following questions and answers are part of the evidence given at the trial:

Did you imagine that you were making a contract with, first of all, Mr. Gates?—No.

Did you imagine that you were making a contract with the society—That is so.

And it was to the society and no one else that you were looking to be responsible for the work being done properly?—That is where I had the circular sent from, the society, and I understood the society was doing the work as they had done the previous year.

These questions and answers were put and given when Bliss was under cross-examination. He was asked, and answered some questions in re-examination, and they seem to me to confirm the view I take that the plaintiffs were contracting with the members of the association and no one else. These were the questions and answers:

Did you know anything at all about the society?—Not other than that it was a reputable society quite well-known; in fact one of the leading societies in Lancashire.

Did you know who its leading members were?—I knew the trading members of it.

Who were they?—There was Captain Clifford, Mr. Hamnett and Mr. Sutton.

Did you know the part they played in the society?—I did not know their official position; I knew they were leaders of the society.

Did you know anything about its constitution?—Nothing.

On this material it is, in my judgment, impossible to conclude that the contract upon which the plaintiffs sue was made with the defendants other than Stuart. Only one conclusion is possible, and that is that the plaintiffs contracted with and looked to the responsibility of the persons who in Oct., 1939, were members of the Lancashire Utility Poultry Society, and with and to nobody else. The defendants other than Stuart had not held themselves out as being the Lancashire Utility Poultry Society. They were not exclusively known by that style, and cannot, in my judgment, be made liable upon a contract made by the plaintiffs with that society. It may well be that Gates had no authority to bind that body. If that be the fact, it does not make the defendants other than Stuart liable upon the contract Gates purported to make. In my judgment, the action against the defendants other than Stuart for breach of contract, fails because those defendants were not in fact or in law the principals upon whose behalf Gates purported to contract. Bliss is a business man. It is clear from his answers that he knew what he was doing. If, on behalf of the plaintiffs, he made a contract which in the event proves to be unfortunate, it is not for this court to make for the plaintiffs a different contract, or one which Bliss might have made if he had thought more about what he was doing.

So far as the plaintiffs' claim arises out of the negligence of Stuart, the claim against his co-defendants must fail if the plaintiffs' contract was with the society and not with Stuart's co-defendants personally, for in performing his duties under the contract Stuart must have been acting as the servant of the society and not as the servant of his co-defendants.

My Lord and GODDARD, L.J., are of the opinion that both Gates and Stuart were the servants not of the society but of the council of the society. That depends on the terms of the contracts they made. I find no evidence which leads me to that conclusion or which warrants it. Gates' own view of the matter, stated in evidence, was that he was employed by the society. The plaintiffs'

own view when they delivered their original statement of claim was that Gates was employed by the society. This was still their view when they interrogated the defendants in Mar., 1942, and put to them the fourth interrogatory, an interrogatory and an answer which were put in by counsel for the plaintiffs at the trial. It may not be easy to determine the question who are the masters of servants popularly spoken of as club servants or the servants of an unincorporated association. It is not necessary, in my view, to determine it, but I would point out this, that, whilst committees of clubs and associations come and go, servants of such bodies remain, not perhaps for ever, but often from early manhood to a ripe old age. Whose servants are they?

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I can now pass to the issue whether Stuart was negligent, upon which again it is my misfortune to differ not only with DU PARCQ, L.J., but also with my Lord and GODDARD, L.J. I do not doubt that the antigen used by Stuart contained live typhoid bacilli. There was ample evidence to establish the fact that the outbreak of fowl typhoid amongst the plaintiffs' fowls was caused by the use by Stuart of this antigen. One of the matters about which I am not satisfied is that infection was carried from the antigen to the fowls by Stuart's scissors. No witness said that it was, or that in his opinion as an expert it was. Stuart was entitled to conduct his operations upon the footing that he had been provided with pure antigen. He was operating in a movable hut. He operated upon 4,522 birds in four days. It is obvious that at the end of a day's work there must have been in the hut a horrid mess of blood and feathers and used antigen. In these circumstances, infection from the impure antigen might have been conveyed to the plaintiffs' fowls by other ways than Stuart's scissors.

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The plaintiffs charged the defendant Stuart with negligence in two respects. The first was that he did not sterilise his scissors immediately before he nicked a bird's comb. The second was that he did not sterilise or disinfect the glass slide he used. The second charge of negligence broke down completely. The plaintiffs' expert witness said it was not necessary to do so. The first charge, therefore, alone remains. The question is: Did the plaintiffs prove that Stuart's failure to sterilise his scissors as alleged was negligence which caused the plaintiffs' loss?

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Stuart's negligence must be determined upon the footing that he was using uninfected antigen. The reasonable, prudent man doing what Stuart was doing need do nothing to prevent antigen getting from his scissors into the blood of a bird *via* its comb. If pure antigen does get in, it will do no harm. Is there any other source of infection against which the reasonably prudent man, doing what Stuart was doing, would normally take precautions? We are dealing not with human beings but with fowls. It is surely not right in the absence of any evidence to regard the organism of a fowl as exactly similar to that of a human being. Every day in any farmyard where there are fowls, these birds can be seen drinking, without, apparently, any ill results, the foulest water, and picking for their food upon the farmyard midden. I am not prepared to hold, and I do not think it right to hold in the absence of evidence, that infection can be carried from the comb of one fowl to another by a pair of scissors used, without sterilisation, to nick both combs. It is against the risk of such infection (if any) that the reasonable, prudent man would be bound to take precautions. No witness said that, in his opinion, there was any such risk. The practice adopted by Stuart was the one commonly adopted by those who test fowls for B.W.D. in the field.

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Stuart was found liable by DU PARCQ, L.J., because he failed in his duty to take reasonable precautions, but he nowhere states what the reasonable precautions were which Stuart should have taken. I can find nowhere in the evidence any statement by any witness that Stuart did anything which might spread infection from fowl to fowl, assuming that the antigen with which he had been supplied was pure antigen. For Stuart the finding against him may be a serious matter. He is surely entitled to know at the end of a trial in which he is charged with negligence, and in which he is found to have been guilty of negligence, first what his duty was, and secondly in what respects he had failed to do it. A finding that a man has failed to take reasonable precautions takes one nowhere, and tells one nothing, unless one knows what the reasonable precautions are which should have been taken. Stuart never sterilised his scissors before he nicked a bird's comb; but nobody proved that that was the thing a reasonably

prudent man would have done. I am myself unable to gather from the evidence what was the act of negligence of which he was found guilty. In my judgment, upon the evidence before the court, the defendant Stuart should have been acquitted of negligence.

SCOTT, L.J. : Since the joint judgment of GODDARD, L.J., and myself was written, I have read that of BENNETT, J., and given to it the careful consideration it deserves, but I find myself unable to agree with his two conclusions. I will try to explain why. He says, justly, that the plaintiffs purported to contract with the society, and then concludes that, as there was no such corporate body they must be treated in law as having contracted with all the members. This, logically, is, in my view, a plain *non sequitur*. The members were not the society, for the society had no existence. It was nothing ; or rather, it was a mere name to describe the purposes which existed in the minds of a congeries of persons, some natural, some juridical, like His Majesty's Stationery Office, or the Preston Farmers' Co-Operative Society, Ltd., who had associated themselves together to achieve those purposes. A B

That the plaintiffs intended to make a real contract with somebody is beyond doubt ; but it is equally beyond doubt that they had never formed any intention in their own minds beyond the vague one of making a contract with the person or persons the law would hold responsible on the contract. They did not, of course, think about it at all ; they merely assumed, with the confidence natural to a nation which normally carries out its contracts, that somebody would be responsible. They expected performance and not breach ; but the rest was assumption which they never even began to think out. C

In these circumstances, what is the function of the law ? Surely it is to imply an intention on the plaintiffs' part to make their contract with the person or persons to whom alone in the circumstances of the case the law regards as the persons responsible. That cannot be the society, for it does not exist. The law, therefore, has to choose from the various persons associated together under the umbrella of the society's name, those most concerned in the function of making contracts, those of the associated persons who were most directly concerned, and to discard those who were, for any reason, least directly concerned. In the latter category stand the mere members who, under the society's rules, have no liability beyond their annual 7s. 6d. membership subscription, and have no right to participate, now or on winding up, in the funds of the society. But the body of members want to see the purposes of the society implemented, almost in the same way as in the case of a charity (in the popular sense) ; and they appoint an executive council to carry out those purposes. Making a contract, whether for employment of servants, for purchase of office furniture, for keeping a bank account, or for carrying out tests to assist the branch of farming which produces utility poultry, is essentially a function which cannot be performed without somebody accepting personal responsibility to perform the contract and pay money ; and the business men who accept the office of being on the executive council, seem to me to be the persons whom the law must regard as pledging their own credit in order to perform the duties which they voluntarily undertake for their so-called "society" ; just as do the committee men of a club. This reasoning seems to me to solve the difficulties to which BENNETT, J., has drawn attention. D E F G

His second conclusion is that there was no evidence of negligence. On that question he does not do justice to the evidence given of the importance of sterilisation. For what purpose did Stuart himself sterilise his cloth before starting for the work ? Obviously because of the danger of unknown infection. It is a matter on which the court is entitled to use its common knowledge. If the instrument which is used to cut any man or any animal is infected, the infection may be conveyed. Such a distinction of kind as BENNETT, J., seeks to draw between men and animals in regard to aseptic medicine and surgery seems to me contrary to the whole trend of modern scientific agriculture. Economic reasons may no doubt necessitate some difference of degree, but not of kind ; and the care to avoid risk of infection which requires that no bird shall have an unsterilised instrument inserted into its blood vessels is a vital rule of aseptic practice, which cannot be rejected without drawing just such a distinction of kind between men and animals, as I deprecate. To-day to H

establish that rule of practice hardly needs expert evidence, for *res ipsa loquitur*; but, if proof be needed, there was sufficient in the evidence given before *DU PARCQ*, L.J.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Hewitt, Woollacott & Chown*, agents for *Rawsthorn Ambler & Booth*, Preston (for the appellants); *Richards, Butler & Co.* (for the respondents).
[Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.]

In re SCHEBSMAN, *Ex parte* THE OFFICIAL RECEIVER.
THE TRUSTEE v. CARGO SUPERINTENDENTS (LONDON), LTD.,
AND OTHERS.

[CHANCERY DIVISION (Uthwatt, J.), July 12, 1943.]

Bankruptcy—Agreement to pay sums on retiring employee's death to his widow and daughter—Bankruptcy and death of employee within two years—Whether sums interceptable by bankrupt's trustee in bankruptcy—Whether agreement a settlement void under Bankruptcy Act, 1914, s. 42—Bankruptcy Act, 1914 (c. 59), s. 42.

Contract—Implied term—Contract to pay sum to third party—Right to intercept payment to third party—Implication of term that payment should be made as party directs.

S. was for many years employed by a Swiss company and its subsidiary, an English company. His employment came to an end on Mar. 31, 1940, and by an agreement dated Sept. 20, 1940, made between S. and the two companies, it was agreed that, in consideration of his loss of employment, the English company would pay to S. the sum of £2,000 immediately and a further sum of £5,500 by instalments over a period of 6 years and that, if he should die within that period, certain sums would be paid to his widow over a number of years, and, if she should die during that time, payments would be made to his daughter. S. was adjudicated bankrupt on Mar. 5, 1942, and died on May 12, 1942. His trustee in bankruptcy claimed that the sums payable under the agreement to the widow or possibly the daughter formed part of the deceased bankrupt's estate. The contention was based on the ground that S. always had the right to intercept the sums in question and this right was now vested in the trustee in bankruptcy. Alternatively it was contended that the provision made by the agreement for the widow and the daughter was a voluntary settlement and void under the Bankruptcy Act, 1914, s. 42, by reason of S.'s bankruptcy within two years of the date of the settlement:—

HELD: (i) in respect of the payments to the widow and daughter S. was neither a trustee nor an agent of those persons to receive those sums on their behalf.

(ii) the terms of the contract itself, the circumstances in which it was made and the objects to which it was directed made it impossible to imply a term under which S. or his sequels in title could have a right to intercept the payments, and, therefore, the trustee in bankruptcy had no right to intercept them.

(ii) S. had not become entitled in respect of the sums in question to anything except the right to require payment of those sums to third parties, and there was, therefore, no property settled by him within the meaning of the Bankruptcy Act, 1914, s. 42.

[EDITORIAL NOTE.] The first question debated in this case discusses again the question of the rights arising when third parties are given benefits by a contract to which they are not parties. It is held that a contract between A and B that A shall pay certain sums to C does not make B a trustee for C, and it is a question of construction of the contract itself whether the payment to C is the only method of performance which is open to A or whether the contract is that payment shall be made either to C or as B directs. In the latter case B would be in a position to intercept the money and on B's bankruptcy, his trustee in bankruptcy who would then stand in his shoes would have a right to intercept the money and thus secure it for the benefit of the creditors. Here, however, it is held upon the construction of the contract that B had no right

to direct how the payment should be made. The only method of performance allowed by the contract was payment to C and, therefore, the trustee in bankruptcy had no rights. The second point was equally interesting. It was suggested that in substance this was a payment by A to B and then a gift from B to C and, therefore, a voluntary settlement by B which would be made void under the Bankruptcy Act, 1914, s. 42. It is held, however, that, in this case, B was never entitled to receive the money. His only right was to require payment to C. For this reason he never had any property in the money and there was no settlement of any property of the bankrupt within the section.

AS TO EFFECTS OF BANKRUPTCY ON RIGHTS ARISING OUT OF CONTRACTS, see HALSBURY, Halsham Edn., Vol. 2, p. 214, para. 282; and FOR CASES, see DIGEST, Vol. 5, pp. 930-934, Nos. 7616-7632.]

Cases referred to:

- (1) *Re Engelbach's Estate, Tibbetts v. Engelbach*, [1924] 2 Ch. 348; 43 Digest 567, 165; 93 L.J.Ch. 616; 130 L.T. 401.
- * (2) *Re Stapleton-Bretherton, Weld Blundell v. Stapleton-Bretherton*, [1941] Ch. 482; [1941] 3 All E.R. 5; Digest Supp.; 110 L.J.Ch. 197; 166 L.T. 45.
- (3) *Cleaver v. Mutual Reserve Fund Life Assn.*, [1892] 1 Q.B. 147; 43 Digest 657, 903; 61 L.J.Q.B. 128; 66 L.T. 220.
- (4) *Shirlaw v. Southern Foundries (1926), Ltd.*, [1939] 2 K.B. 206; [1939] 2 All E.R. 113; Digest Supp.; 108 L.J.K.B. 747; 160 L.T. 353.
- (5) *Re Mathieson*, [1927] 1 Ch. 283; Digest Supp.; *sub nom. Re Mathieson, Moore (Trustee) v. Mathieson*, 96 L.J.Ch. 104; *sub nom. Re Mathieson, Ex p. Trustee*, 136 L.T. 528.

MOTION by the deceased debtor's trustee in bankruptcy for a declaration that certain sums payable to third parties under a contract entered into by the bankrupt formed part of the bankrupt's estate.

J. Pennycuik for the plaintiff, the trustee in bankruptcy.

W. A. L. Raeburn for the defendant company.

A. T. Denning, K.C., and *C. R. F. Morris* for the other defendants, the bankrupt's wife and daughter.

UTHWATT, J.: S. was for many years in the employment of La Societe Generale de Surveillance S.A., a Swiss company, and its subsidiary Cargo Superintendents (London), Ltd., an English company. His service ended on Mar. 31, 1940, and arising out of the end of his connection with the companies an agreement dated Sept. 20, 1940, was made between S. and the two companies which provided for certain payments being made by the English company to S. and after his death within a certain period (which happened) to his widow and, in an event which may or may not happen, to his daughter. S. was adjudicated bankrupt on Mar. 5, 1942. He died on May 12, 1942, with the result that, according to the terms of the agreement, certain sums became payable to S.'s widow and, if she should die before a certain date, to S.'s daughter.

S.'s trustee in bankruptcy claims in this motion to which the widow, the daughter and the two companies are respondents, a declaration that all sums payable under the agreement form part of the estate of the bankrupt, the dispute being confined to the sums payable to the widow and possibly payable to the daughter. The English company is, and always has been, desirous of paying the sums in question in accordance with the terms of the contract. The claim of the trustee in bankruptcy is based on two independent grounds. First, it is said that, notwithstanding that the sums in question are by the agreement to be paid to S.'s widow or the daughter, S. always had the right to intercept the sums in question and that this right is now vested in his trustee in bankruptcy. Secondly, it is said that, if S. did not have this right, the provision made by the agreement for S.'s widow and daughter is a voluntary settlement made by S. which is avoided by reason of S.'s bankruptcy within two years of the making of the agreement.

The agreement between the two companies and S. recites that S. under his agreement with the Swiss company was bound to serve wherever the Swiss company directed, that S.'s services had been lent by them to the English company whom he had served as cargo superintendent for many years. It then recites that negotiations took place whereby S.'s employment should be terminated on Mar. 31, 1940, and compensation paid to S. for his loss of employment, and that the terms discussed between the parties in February had then been finally agreed and the desire of the two companies of making compensation for

S.'s loss of employment with the English company. It further recites that the Swiss company has agreed with the English company that, in consideration of the Swiss company entering into the agreement, the English company should make the said compensation to S. The substance of the agreement is expressed as an agreement between the three parties as to the matters set forth in the various clauses. Cl. 1 provides for an immediate payment by the English company to S. of £2,000 less £600 to be retained for the purpose of the discharge of certain liabilities of S. Cl. 2 and the schedule provide for the payment of certain sums, including the sums in issue. I will return to that issue at a later stage. Cl. 3 provides for mutual releases between the two companies and S. By cl. 4 S. agrees with the two companies that for a period of 10 years he will not be interested as cargo superintendent in any business, and by cl. 5 the English company is given the right to withhold further payments on breach of any of the stipulations contained in cl. 4. Cl. 6 provides that the English company will make all payments due to S. or his widow or daughter under the agreement. Under cl. 7 S. agreed with the two companies to keep up the premiums on a policy on his life pledged with his indebtedness, and, on failure so to do, the companies are given the right to pay the premiums and "to withhold payment of any further moneys due to S. as provided in the schedule" until they have reimbursed themselves out of the retained moneys. Cl. 2 of the agreement runs as follows:

In consideration of the agreement which has already been made between the parties hereto the English company also agree to pay by way of compensation for loss of Schebsman's employment a sum of £5,500 to be paid to the persons at the dates in the amounts and subject to the conditions more particularly specified in the schedule hereto.

The schedule begins with a list of 6 several sums—4 sums of £1,000 each and two of £750 each. The first sum is to be paid for the year ending Mar. 31, 1941, and the other sums for the years ending the 5 succeeding anniversaries of that day. These sums total £5,500. The last payment would be made for the year ending Mar. 31, 1946. The schedule then in lettered paragraphs provides also for the making of payments to the widow and daughter in certain contingencies. Para. (a) provides that, if S. dies on or before Mar. 31, 1941, the company will pay S.'s widow £500 for each of the years ending Mar. 31, 1941, 1942, 1943 and 1944, and £375 for each of the years 1945, 1946, 1947 and 1948. The total sum payable under this head is £3,500. The subsequent paras. (b) to (h) provide for the payments to be made to the widow in the event of the death of S. during subsequent conventional years ending Mar. 5. The details are not important. On the death of S. during the conventional years 1941-1942, 1942-1943, 1943-1944, the payments extend over the period ending Mar. 5, 1948. On the death of S. during the conventional years 1944-1945, 1945-1946, the payments cover the period ending Mar. 5, 1950. Provision is then made that, if the widow should die before Mar. 31, 1950, the schedule is to be read (which can only mean is thereafter to be read) as if the daughter's name had throughout appeared instead of the name of the widow, and (para. (i)) that, on the death of the survivor of S. his widow and daughter the payments are to cease. Lastly, it is provided that all payments shall be made by equal weekly instalments.

One may observe upon the terms of the agreement that it is nowhere provided in words that any payment is to be made to S. at all or that S.'s death is material except that his death is an occasion giving rise to payments being made to the widow or daughter, and that he is a member of the group mentioned in para. (i) of the schedule. It is, however, beyond dispute that no one other than S. is on the construction of the agreement entitled to receive the sums stated in the list with which the schedule begins, and the case has been argued on the footing that on S.'s death within any conventional year the sums stated in the list to be payable in respect of subsequent conventional years are not payable. On this footing the total sums possibly payable by the company (assuming the obligation to pay does not cease under para. (i) of the schedule) is £5,500 if S. outlives Mar. 31, 1946, but if he dies on or before that date range between approximately £3,500 and approximately £7,500. One other matter may be here mentioned. The provisions of cl. 2 fall under the agreement expressed to be made "by and between the three parties to the agreement." The English company is obviously the only person bound to make the payments stipulated for by that clause.

There can be no doubt that they are so bound to S., but there is also to my mind a question whether on the true construction of the agreement they are not also bound to the Swiss company to make the stipulated payments. No argument was addressed to me on this question of construction or on the bearing which it might have upon the matter at issue. I do not propose to express any opinion upon this question, and I will deal with the case on the footing that S. was the only obligee under the stipulations to pay.

Certain evidence was given as to the circumstances in which the contract was made. The recitals in the agreement were accepted as correct. The English company had no pension scheme, but it was the practice of the company in proper cases on an employee retiring from their service to give him a pension and—the course of business was not quite clear—payments were sometimes made to widows after the death of an employee. The making of a provision for S.'s widow and daughter was in line with that practice. The evidence as to the reason why the contract contained provisions in favour of S.'s wife and daughter comes to this: an amicable separation with S. was desired; and the making of a provision in favour of the wife and daughter was suggested by the company and was so suggested in order to make the arrangement more acceptable to S. That provision was, to adopt the phrase used in evidence, the trump card to get S. to accept the arrangement. The motives of the company were, as one might expect, mixed. S. was a spendthrift. He had a bad expectation of life. He was separated from his wife, to whom he made an allowance, and his daughter did not live with him. Both were dependent on him. The company desired that they should be provided for. Neither the wife nor the daughter had ever been connected with either company and they were not consulted in the negotiations that led to this bargain.

In my opinion, S. was not in any way a trustee for his wife or daughter. Trusts can only arise from the intention to create a trust expressed by, or imputed to, the person to be considered its founder, or from the acts—generally the wrongful acts—of the party to be charged as a trustee. There must be either an intention duly carried into effect or facts which create an estoppel precluding the denial of trusteeship. There is not, I think, any other way of creating a trust. In this connection I was referred to PROFESSOR CORBIN's interesting article in *THE LAW QUARTERLY REVIEW*, Vol. 46, on "Contracts for the benefit of third persons" and have considered the cases to which he refers, but I am unable to see that they justify the conclusion at which he arrived that, in some cases of the class now under consideration, a fiction has been resorted to in order to raise a trust. The cases no doubt are hard to reconcile, but, to my mind, the explanation of them is that different minds may reach differing conclusions on the question whether the circumstances sufficiently show an intention to create a trust—and inferences as to intent may vary, as the cases on general charitable intent well show. In the present case, there can be no question of any estoppel, and there is nothing—except the terms of the contract itself—on which to ground an inference that there was an intention to create a trust and that the intent was duly put into effect. With ROMER, J., in *Re Engelbach* (1) and SIMONDS, J., in *Re Stapleton-Bretherton* (2), I do not think that any such inference can properly be drawn from such facts. The only inference I draw is the obvious one, that the parties thought the contract would be carried out.

Next it is clear—and the contrary has not been contended—that S., in making the contract, was not acting as agent either for his wife or daughter. The result of this position is as follows. S. was free to agree to release or vary the contract in any way he thought fit, and free to waive performance or to accept substituted performance. The wife and daughter could not sue upon the contract or require S. or rather his sequels in title to sue. If the stipulated sums were not paid to the wife or daughter, S.'s legal personal representative or other sequels in title could retain any damages that might be recovered, and the widow and daughter could have no claim thereon. I find it unnecessary to express any opinion on the question whether more than nominal damages could be recovered. In respect of all these matters, S.'s trustee in bankruptcy now stands in S.'s shoes. As regards the position of the wife and daughter, there is nothing either in the contract or the surrounding circumstances to suggest that the wife and daughter were not intended by both parties to take

beneficially such sums as might be paid to them. Indeed, everything points to beneficial ownership by them of such sums being intended.

A The question then arises : what in law is the effect of the instrument in its application to the sums agreed with S. to be paid to his wife and daughter ? The question may be put in various ways. Was the company to be regarded as a mandatory of S. authorised to make payment to the wife and daughter ? Was payment to the wife and daughter only one of several permissible methods of performance of an obligation which was in substance an obligation to pay to S. ? Ought there to be implied a term that S. was to have a right to intercept payments falling to be made to the wife and daughter ? Ought the instrument upon its true construction in light of the surrounding circumstances to be read as if in the covenant to pay to the wife the words "or as S. may direct" were inserted after her name ?

B Whichever way the question be stated, the point involved is the same. The last method of stating the question to be solved appealed to SIMONDS, J., in *Re Stapleton-Bretherton* (2), and with his view I respectfully agree. Construction, as appears from the judgment of SIMONDS, J., embraces the implied term. The result is that, where the instrument cannot properly be construed as involving the suggested phrase, performance may be duly made and can be required to be made only in accordance with the written terms. This conclusion can only be displaced if it be a rule of law that persons are unable to make a contract C under which a payment is to be made to a third party to enure for the benefit of that third party or, if it be a rule of law that in such a contract exact compliance with its terms by the obligor is a breach of the contract where the obligee requires some other method of performance. There are, in my opinion, no such rules of law. Third-party contracts are not unknown in commerce and they D now frequently arise under pension schemes where employees having only contractual rights to a pension are authorised to allocate and do allocate a part of the expected pension to dependants. No lawyer would, I think, suggest that such contracts might not be duly made. The second supposed rule again need only be stated to be rejected. An obligor is bound only to perform his bargain according to the terms agreed or implied. Is there any reason for excluding third-party contracts from the application of this principle ? I see E none. Where the performance is to be made by payment to a third party, the treatment of the performance in the agreed manner as due performance, whatever changes of mind the obligee may undergo, does not involve acceptance of the view that the third party has rights under the contract—he has none—but is necessitated by adherence to the fundamental principle that the obligor is bound only to perform in the way agreed and cannot have some other method of performance put upon him at the wish of the obligee. The rule that the F third party may not sue and, therefore, has under the contract no rights is, to my mind, irrelevant. What is relevant is that, subject to considerations of public policy, parties freely bargaining may make such contracts as they please, and are bound only to perform such contract and no other.

G The decision of SIMONDS, J., renders it unnecessary for me to deal with the other cases which may be thought to bear upon the topic under consideration. I propose only to say that I disagree with the *dictum* of LORD ESHER, M.R., in *Cleaver's* case (3) to the effect that as between Maybrick's executors and the insurance company the stipulation for payment to Mrs. Maybrick would have no effect and agree with the *dictum* of FRY, L.J., in the same case, at p. 157, as to the effect of the contract ; and that I regard the decision in *Engelbach's* case (1) as justified by the view that the insurance company were only mandatories of the parent to pay the sum assured to the daughter.

H It was argued that the principle of the decision in *Stapleton-Bretherton's* case (2) was that, upon the facts, the destination of the sums there in question was to the covenantor an essential part of the bargain and that, unless I was able to come to a similar conclusion in this case, the suggested term ought to be implied. I do not so read the judgment. The principle laid down is that, unless as a matter of construction the covenant can be read as if the words "or as the covenantee may direct" were inserted in the covenant after the name of the payee, the only performance called for by the contract is that expressly stated in it. The application of the principle was that where performance in accordance with the written terms is to the covenantor an essential part of the bargain, it

was not right to make the implication. The search in *Re Stapleton-Bretherton* (2) was for the true intendment and meaning of the contract. No doubt in approaching the construction of a contract one has in mind that, in a matter which does not financially or otherwise really affect the obligor, he will have no particular views, and would be willing to agree to any reasonable course directed to the performance of the substance of the bargain and, indeed, might think that performance in some reasonable alternative manner at the request of the obligee was implicit in the bargain. Nevertheless, whether or not the suggested term is to be implied depends on the terms of the contract read in the light of the relevant surrounding circumstances. It would be excluded by an express provision that payment was to be made to the stranger and in no other manner, even though the method of payment was of no importance to the obligor and the only question which would then remain for decision—a question which does not turn on the terms of the contract—would be whether the stranger received the sums for account of the obligee or on his own behalf. It may, I think, equally be excluded by the circumstances of the case, although the matter is not of importance to the obligor. The formal question is not “is the suggested term to be excluded?” but “is the suggested term to be implied?” That is the way in which the matter was dealt with by SIMONDS, J.

I now come to the question of construction. In construing the contract it is not, I think, legitimate to take into account the consequences which follow in law from non-performance and to assume that the parties had knowledge of all the legal consequences of their bargain and non-performance of it and contracted with reference to them. Contracting parties are not troglodytes who regard a breach of contract as the normal and proper result of its making. They contract with a view to performance and not non-performance and the contract should be construed accordingly. Moreover, the assumption of knowledge is probably untrue in fact, and a contract in the form of the present contract made with knowledge of the lack of elegance of the rule in English law as regards the enforcement of third party contracts and on the basis that those rules were to determine its construction is almost unthinkable. Therefore, in construing the contract, I exclude those rules from consideration.

I have stated the facts and summarised the contract. I may observe upon the contract that no further activities on the part of S. were called for by the deed, for the only consideration on the part of S. contained in it was an obligation to abstain from competing services. Indeed, the substance of the real consideration lay in his past services. He had played his part. His affairs were settled. Debts of his were to be paid and his policy was to be kept up. If S. failed to reap to the full the payments contemplated in his favour, his wife and daughter were provided for. The provision was to be for the living and not the dead. The total sums payable might vary with the date of the death of S. or of the survivor of his wife and daughter. It was the company who made the proposition that the widow and daughter should be provided for, not S. The company did, on my view of the facts, have in mind as a distinct part of the bargain they proposed that payments expressed to be payable to the widow and daughter were to be made to them alone. And so also, in my view, did S., attach whatever weight one pleases to the ineradicable desire of the ordinary man to keep his dependants under his thumb. The common intent directed to the point in issue which is to be inferred from the contract and the circumstances in which it came into being and the object to which it was directed was that the wife and daughter alone should be the recipients. To my mind, it is impossible in these circumstances to imply a term—for that is what it comes to—under which S. or his sequels in title were to have a right to intercept the payments. The provision for the widow and daughter had been made once and for all, not until further order by S. and the whole matter had been completed. There is no uncertain answer if one applies the test suggested by MACKINNON, L.J., in *Shirlaw's* case (4). The intrusive bystander who interested himself in the bargain sought to be made and asked “If S. changes his mind, is he to be able to lay his hands on the widow's money?” would certainly get a testy answer. It would not be “Of course.” The first point taken, therefore, fails.

The second point is based on the Bankruptcy Act, 1914, s. 42, which provides that any settlement of property (not falling within certain categories which are out of the question in the present case) shall, if the settlor becomes bankrupt

within two years after the date of the settlement, be void against the trustee in bankruptcy. For the purposes of this point, it is assumed that the trustee fails on the first point.

- The avoidance of the transaction as a whole against the trustee in bankruptcy does not, of course, interest the trustee, and the argument is that the transaction embodied in the agreement can properly be and ought to be split into two elements. First, that the settlor became entitled to a chose in action, namely, an obligation to pay a sum of money; secondly, an assignment of an interest in that chose in action effected by the bankrupt simultaneously with the acquisition by him of the chose in action, the interest assigned consisting in the selection of the wife and daughter as persons to whom payment for their own benefit might be duly made. That assignment is, it is argued, a settlement and is avoided by the section and the result desired by the trustee in bankruptcy is achieved. In my view, if the transaction can properly be split up in the manner suggested, the conclusion sought to be drawn by the trustee follows. As regards the substance of the transaction, all the provisions made by the agreement find their origin and consideration in the past activities of the debtor and the promises by him as to his future conduct; he is ultimately the economic source of all the stipulations in the agreement, and the provisions made in form for the widow and daughter are provisions in respect of him. Further, the definition of property, contained in the Act, places no obstacle in the way of the argument, for, after defining property as including things in action, it proceeds to include "every description of interest arising out of or incident to property as above defined." A dissection of the transaction in the manner suggested is indeed necessary if the trustee is to succeed on his contention under sect. 42, for, as is clear from the terms of sect. 42 and the decision of the Court of Appeal in *Re Mathieson* (5), it is only settlements of property of the debtor which are avoided by the section. In my opinion, the transaction is not capable of being dissected in the way suggested. The short answer to the argument is that S. never in form or substance became entitled in respect of the sums in question to anything except the right to require payment of those sums to third parties. That right, with all its consequences remained vested in him and is now vested in his trustee in bankruptcy. No settlement was, therefore, made of property as defined in the Act in which S. ever had any interest. The so-called dissection results in an entirely different transaction from that which was entered upon and acceptance of it would attribute to both parties intentions which are not expressed in the contract and which are not suggested by any relevant surrounding circumstances, however wide the net of relevancy be cast. The result is that the motion fails.

Motion dismissed with costs.

- Solicitors: *Tarry, Sherlock & King* (for the plaintiff, the deceased's trustee in bankruptcy); *Morris, Ward-Jones, Kennett & Co.* (for the defendant company); *Albert M. Oppenheimer* (for the other defendants, the wife and daughter of the bankrupt).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

ATLANTIC SMOKE SHOPS, LTD. v. CONLON AND OTHERS, ATTORNEY-GENERAL OF CANADA AND OTHERS (INTERVENERS).

[PRIVY COUNCIL (Viscount Simon, L.C., Viscount Sankey, Viscount Maugham, Lord Atkin, Lord Russell of Killowen, Lord Wright, Lord Romer),
May 4, 6, 10, 11, 13, 14, 17, 18, 20, 21, 24, July 30, 1943.]

- Privy Council—Canada—Dominion and provincial legislation—Right of province to pass taxation Act—Tax payable by consumer or his agent at time of purchase—Direct taxation—Customs and excise—British North America Act, 1867 (c. 3), ss. 92 (2), 121, 122—Tobacco Tax Act (New Brunswick), 1940 (c. 44), ss. 4, 5.*

The Tobacco Tax Act (New Brunswick), 1940, s. 4, provides that a tax, to be paid by the consumer, should be imposed on the retail purchase of tobacco in the province; and sect. 5, that any person ordinarily resident or carrying on business within the province who brings into, or receives delivery

in the province of tobacco for his own consumption or as an agent for such consumer shall pay a similar tax. On the question whether such legislation was *ultra vires* the legislative power of the province under the British North America Act, 1867, as being (i) an attempt to impose an indirect tax and, (ii) as to sect. 5, an attempt to impose a customs and excise duty contrary to sects. 121 and 122 of the Act:—

HELD: (i) the imposition of a tax to be paid by the person or the agent of the person who eventually bears the burden is a direct tax within the meaning of sect. 92 (2) of the Act. A

(ii) sect. 5 imposed a tax on the consumer and not the commodity, the tax, therefore, was not a customs or excise duty.

[EDITORIAL NOTE.] Generally speaking a sales tax is a form of indirect taxation. In this case the tax was so imposed that it fell directly upon the consumer of the article sold and could not be passed on by him to any other person. In these circumstances the tax is held to be a direct tax. It will be noted that the meaning of the words "direct taxation" in the British North America Act, 1867, is arrived at by a consideration of the definition in MILL'S POLITICAL ECONOMY, since the author of that work was the leading exponent of that science at the time when the British North America Act was considered and passed by the Imperial Parliament. The tax was also attacked as being a customs duty, but here it is shown that it is not such a duty because it is not imposed upon the article without reference to who ultimately bears the burden of it, but is imposed so that the consumer must bear it. B

AS TO POWER OF PROVINCIAL LEGISLATURES, see HALSBURY, Hailsham Edn., Vol. 11, pp. 91-94, paras. 156-158; and FOR CASES, see DIGEST, Vol. 17, pp. 434-445, Nos. 131-180.] C

Cases referred to:

- * (1) *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575; 17 Digest 435, 136; 56 L.J.P.C. 87; 57 L.T. 377.
- * (2) *Brewers and Maltsters' Assn. of Ontario v. A.-G. for Ontario*, [1897] A.C. 231; 17 Digest 435, 138; 66 L.J.P.C. 34; 76 L.T. 61. D
- * (3) *A.-G. for British Columbia v. Kingcome Navigation Co., Ltd.*, [1934] A.C. 45; Digest Supp.; 103 L.J.P.C. 1; 150 L.T. 81.
- (4) *Halifax Corp. v. Fairbanks' Estate*, [1928] A.C. 117; Digest Supp.; 97 L.J.P.C. 11; 138 L.T. 162.
- (5) *A.-G. for British Columbia v. McDonald Murphy Lumber Co., Ltd.*, [1930] A.C. 357; Digest Supp.; 99 L.J.P.C. 113; 143 L.T. 1.
- (6) *A.-G. for Manitoba v. A.-G. for Canada*, [1925] A.C. 561; Digest Supp.; 94 L.J.P.C. 146; 133 L.T. 193. E
- (7) *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Ltd.*, [1933] A.C. 168; Digest Supp.; 102 L.J.P.C. 17; 148 L.T. 300.
- (8) *A.-G. for British Columbia v. Canadian Pacific Ry. Co.*, [1927] A.C. 934; Digest Supp.; 96 L.J.P.C. 149; 137 L.T. 745.
- (9) *R. v. Caledonian Collieries*, [1928] A.C. 358; Digest Supp.; 87 L.J.P.C. 94; 139 L.T. 525.
- * (10) *Gold Seal, Ltd. v. Dominion Express Co. and A.-G. for Alberta Province* (1921), 62 S.C.R. 424; Digest Supp. F

APPEAL by the plaintiffs from a decision of the Supreme Court of Canada dated Oct. 7, 1941. The facts are fully stated in the judgment of the Board delivered by VISCOUNT SIMON, L.C.

D. N. Pritt, K.C., and *E. Holroyd Pearce* for the appellants.

J. Millard Tucker, K.C., and *Frederick Grant, K.C.* for the respondents, and G
for the Attorney-General for Prince Edward Island.

F. Gahan for the Attorney-General for Canada.

Sir Walter T. Monckton, K.C., and *Patrick A. Devlin* for the Attorney-General for Quebec.

F. W. Wallace for the Attorney-General for Manitoba and Saskatchewan.

Patrick A. Devlin for the Attorney-General for Ontario.

S. A. Kyffin for the Attorney-General for Nova Scotia. H

VISCOUNT SIMON, L.C. [delivering the judgment of the Board]: This appeal from a judgment of the Supreme Court of Canada raises the important and difficult question whether the Tobacco Tax Act of New Brunswick, 1940, and the regulations made thereunder are within the powers of the provincial legislature as constituting direct taxation within the province, or whether, on the contrary, all or any part of these provisions must be held to be *ultra vires* having regard to the distribution of legislative powers effected by the British North

America Act, 1867, and to the bearing of sects. 121, 122 of the Act upon provincial taxing powers.

The New Brunswick Tobacco Tax Act, 1940, is entitled: "An Act to provide for imposing a tax on the consumption of tobacco," and it is necessary to set out *seriatim* sects. 2-10 of the statute. They are as follows :

INTERPRETATION

2. In this Act, unless the context otherwise requires,

- A (a) Consumer or Consumer of Tobacco means any person who, within the Province, purchases from a vendor tobacco at a retail sale in the Province for his own consumption or for the consumption of other persons at his expense or who, within the Province, purchases from a vendor tobacco at a retail sale in the Province on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other persons at the expense of such principal.
- B (b) Minister means the Provincial Secretary-Treasurer.
- (c) Package means package, box, tin or other container in which tobacco is contained or sold.
- (d) Purchaser means any person who, within the Province, purchases from a retail vendor tobacco at a retail sale in the Province.
- (e) Retail Sale means a sale to a consumer for purposes of consumption and not for resale.
- (f) Retail Vendor means any person who, within the Province, sells tobacco to a consumer.
- C (g) Tobacco means tobacco in any form in which tobacco is consumed and includes snuff.
- (h) Vendor includes both wholesale vendor and retail vendor.
- (i) Wholesale Vendor means any person who, within the Province, sells tobacco for the purpose of resale.

LICENSES OF VENDORS

- 3.—(1) No person shall sell any tobacco in the Province for resale unless he holds a wholesale vendor's licence issued to him under authority of this Act and such licence is in force at the time of sale.
- D (2) No persons shall sell any tobacco in the Province at a retail sale unless he hold a retail vendor's licence issued to him under authority of this Act and such licence is in force at the time of sale.
- (3) No wholesale vendor shall sell any tobacco in the Province for resale in the Province to a person who is not a vendor duly licensed under this Act.
- E (4) Vendors' licences and such other licenses as may be prescribed by the regulations shall be issued annually by the Minister upon payment of such fee or fees as may be required by the regulations. All licenses shall expire on the thirtieth day of June following the issue thereof.
- (5) The Minister may cancel or suspend any licence for failure to comply with any of the provisions of this Act.

TAX ON CONSUMER

4. Every consumer of tobacco purchased at a retail sale in the Province shall pay to His Majesty the King in the right of the Province for the raising of a revenue, at the time of making his purchase, a tax in respect of the consumption of such tobacco, and such tax shall be computed at the rate of ten per centum of the retail price of the tobacco purchased.
- F 5. Every person residing or ordinarily resident or carrying on business in New Brunswick, who brings into the Province or who receives delivery in the Province of tobacco for his own consumption or for the consumption of other persons at his expense or on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other persons at his expense shall immediately report the matter to the Minister and forward or produce to him the invoice, if any, in respect of such tobacco and any other information required by the Minister with respect to the tobacco and shall pay the same tax in respect of the consumption of such tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province at the same price.
- G 6. The tax shall be computed to the nearest cent and one-half cent shall be considered one cent. The minimum tax payable shall be one cent.
- H

ABSORPTION OF TAX PROHIBITED

7. No retail vendor shall advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retail vendor or that it will not be considered as an element in the price to the consumer or, if added, that it or any part thereof will be refunded.

COLLECTION OF TAX

8. The tax shall be collected, accounted for and paid to the Minister by such persons, at such times and in such manner as the regulations may prescribe.

9. The Minister may make such allowance as the Lieutenant-Governor in Council

may determine to vendors for their services in collecting the tax.

CONSUMER LIABLE TO TAX UNTIL PAID

10. A consumer shall be and remain liable for the tax imposed by this Act until the same has been collected.

There are thus four applications of the tax provided for by sects. 4 and 5.

(a) In its main and simplest form the tax is to be paid by anyone who purchases tobacco, as defined, for his own consumption (or for the consumption of other persons at his expense) from a retail vendor in the province. The tax amounts to 10 per cent. on the retail price charged on the sale; by regulations made under sect. 20 of the Act it is to be collected by the retail vendor, who is constituted an agent of the Minister for the collection of the tax, and has to give a receipt for the tax to the customer and account to the Tobacco Tax Commissioner for the tax thus collected, subject to the allowance of 3 per cent. as remuneration.

(b) Secondly, if the purchase from the retail vendor is made by an agent acting for a principal, who desires to acquire such tobacco for his own consumption (or for the consumption of other persons at his expense), the tax is payable by the agent: it is, however, clear that, if the agent has not already been put in funds by his principal, he will be entitled to be indemnified by his principal for the tax, no less than for the purchase price.

In both the above cases the tax is payable at the time of making the purchase.

(c) If a person residing or ordinarily resident or carrying on business in New Brunswick brings into the province such tobacco, or receives delivery of it in the province, for his own consumption (or for the consumption of other persons at his expense), he is to report the matter to the Minister, with any invoice and other information required, and he becomes liable to pay the same tax as would have been payable if the tobacco had been purchased at a retail sale in the province.

(d) Lastly, if such a person as is last described brings the tobacco into the province, or receives delivery there, as agent for a principal who desires to acquire it for his own consumption (or for the consumption of other persons at his expense), the agent is put under a similar obligation to report and to pay an equivalent tax. It may be noted that, in this last case, the principal is not in express terms limited to a principal within the province: this is perhaps implied, but, in any event, the instance of an agent within the province acting for a principal outside can seldom occur.

A striking difference of opinion has disclosed itself in the Canadian courts as to the validity of this taxing legislation. In the Supreme Court of New Brunswick, BAXTER, C.J., and his two colleagues, GRIMMER and RICHARDS, JJ., held that the tax was valid. Applying the definition of a direct tax which was used by LORD HOBHOUSE in *Lambe's case* (1), and which is derived from JOHN STUART MILL'S "PRINCIPLES OF POLITICAL ECONOMY" (BOOK V, c. 3) as "one which is demanded from the very persons who it is intended or desired should pay it," they held that the tax in all its forms was a direct tax and within the power of the provincial legislature to impose. On appeal to the Supreme Court of Canada conflicting views were expressed and these need to be carefully analysed. On the first and main form of the tax, SIR LYMAN DUFF, C.J., and DAVIS, J., held that the tax was not direct. SIR LYMAN DUFF, C.J., considered that the tax was a tax on tobacco in respect of the commercial dealing between the retail vendor and the purchaser; he says that

... the payment of the tax is not only a condition of legal purchase; it is an integral element in the transaction of sale and purchase passing from the purchaser to the vendor as part of the price to the purchaser.

In effect, the argument is that this is a sales tax and that, being a sales tax, it is necessarily indirect. RINFRET and CROCKET, JJ., maintained the opposite view and agreed with the judgment of the Supreme Court of New Brunswick that the tax in all its forms was *intra vires*. KERWIN, J., took up an intermediate position; he considered that the tax in the form (a) was valid, but that the attempt to impose the tax on an agent failed as being indirect taxation. He further held that the tax in the forms (c) and (d) was also invalid as being an infringement of the British North America Act, 1867, s. 121. HUDSON, J., held that the tax was valid save so far as it imposed a liability on an agent—i.e., that (a) and (c) were valid, but that (b) and (d) were not—and TASCHEREAU, J., took the same view.

In the result, therefore, the majority of the Supreme Court of Canada decided that the tax in the forms (a) and (c) was valid, but that it was invalid in the forms (b) and (d) since these latter forms involved taxation of an agent, whereas the burden of the taxation would fall on his principal. The arguments addressed to the Board, which included arguments on behalf of the Attorney-General of Canada supporting the appellant and of other interveners representing Quebec and five other provinces supporting the respondents, ranged over all aspects of the tax, and their Lordships are requested to reach a conclusion as to the validity or non-validity of the tax in all its forms.

Their Lordships must first consider whether the tax in the form (a) is a valid exercise of provincial legislative powers. It has been long and firmly established that, in interpreting the phrase "direct taxation" in head 2 of the 1867 Act, the guide to be followed is that provided by the distinction between direct and indirect taxes which is to be found in the treatise of John Stuart Mill. The question, of course, as LORD HERSCHELL said in *Brewers and Maltsters' Assn. of Ontario v. A.-G. for Ontario* (2), at p. 236, is not what is the distinction drawn by writers on political economy, but in what sense the words were employed in the British North America Act, 1867. MILL'S POLITICAL ECONOMY was first published in 1848 and appeared in a popular edition in 1865; its author became a Member of Parliament in this latter year and commanded much attention in the British House of Commons. Having regard to his eminence as a political economist in the epoch when the Quebec resolutions were being discussed and the 1867 Act was being framed, the use of Mill's analysis and classification of taxes for the purpose of construing the expression now under review is fully justified. In addition to the definition from MILL'S POLITICAL ECONOMY already quoted, citation may be made of two other passages in Book 5, c. 3 as follows:

Direct taxes are either on income or on expenditure. Most taxes on expenditure are indirect, but some are direct, being imposed not on the producer or seller of an article, but immediately on the consumer.

Again, in c. 6, in discussing the comparative merits of the two types of tax, he takes as the essential feature of direct taxation that "under it everyone knows how much he really pays."

Their Lordships, therefore, consider that this tobacco tax in the form they have called (a) would fall within the conception of a "direct" tax, and ought so to be treated in applying the British North America Act, 1867. It is a tax which is to be paid by the last purchaser of the article, and since there is no question of further resale, the tax cannot be passed on to any other person by subsequent dealing. The money for the tax is found by the individual who finally bears the burden of it. It is unnecessary to consider the refinement which might arise if the taxpayer who has purchased the tobacco for his own consumption subsequently changes his mind and in fact resells it; if so, he would, for one thing, require a retail vendor's licence. But the instance is exceptional and far-fetched, while, for the purpose of classifying the tax, it is the general tendency of the impost which has to be considered. So regarded, it completely satisfies Mill's test for direct taxation. Indeed, the present instance is a clearer case of direct taxation than the tax on the consumer of fuel oil in *A.-G. for British Columbia v. Kingcome Navigation Co.* (3), for fuel oil may be consumed for the purpose of manufacture and transport, and the tax on the consumption of fuel oil might, as one would suppose, be sometimes passed on in the price of the article manufactured or transported. Yet the Privy Council held that the tax was direct. In the case of tobacco, on the other hand, the consumer produces nothing but smoke.

Counsel for the appellants argued that the tax is a sales tax and that a sales tax is indirect because it can be passed on. The ordinary forms of sales taxes are undoubtedly of this character, but it would be more accurate to say that a sales tax is indirect when in the normal course it can be passed on. If a tax is so devised that (as Mill expresses it) the taxing authority is not indifferent as to which of the parties to the transaction ultimately bears the burden, but intends it as a "peculiar contribution" upon the particular party selected to pay the tax, such a tax is not proved to be indirect by calling it a sales tax. Previous observations by this Board as to the general character of sales taxes

or of taxes on commercial dealings ought not to be understood as denying the possibility of this exception.

There remains on this first head the question whether, notwithstanding that the tax in the form (a) is "direct" within Mill's test, it is none the less beyond the powers of the province to impose as being in the nature of "excise" in the sense that the attempted imposition would be an alteration of the "excise laws" of New Brunswick which the provincial legislature are debarred from affecting under the British North America Act, 1867, s. 122. "Excise" is a word of vague and somewhat ambiguous meaning. Dr. Johnson's famous definition in his dictionary is distinguished by acerbity rather than precision. The word is usually (though by no means always) employed to indicate a duty imposed on home-manufactured articles in the course of manufacture before they reach the consumer. So regarded, an excise duty is plainly indirect. A further difficulty in the way of the precise application of the word is that many miscellaneous taxes, at any rate in this country, are classed as "excise" merely because they are for convenience collected through the machinery of the Board of Excise—the tax on owning a dog, for example. Their Lordships do not find it necessary, in the present case, to determine whether this tobacco tax in the form (a) is for any purpose analogous to an excise duty, for it is enough to accept and apply the proposition laid down on behalf of this Board by LORD THANKERTON in the *Kingcome* case (3), at p. 55 :

... that if the tax is demanded from the very persons who it is intended or desired should pay it, the taxation is direct, and that it is none the less direct, even if it might be described as an excise tax . . .

In the course of reaching this conclusion, LORD THANKERTON carefully examined the only two cases which might be thought to contain any suggestion to the contrary effect, namely, *Halifax Corpn. v. Fairbanks' Estate* (4) and *A.-G. for British Columbia v. McDonald Murphy Lumber Co.* (5), and pointed out that the customs or excise duties on commodities ordinarily regarded as indirect taxation referred to in the judgments in these two cases, are duties which are imposed in respect of commercial dealings in commodities in such a form that they would necessarily fall within Mill's definition of indirect taxes. Their Lordships are of opinion that the reference of LORD CAVE in his judgment in the *Fairbanks'* case (4), at p. 124, to "two separate and distinct categories" of taxes, namely, those that are direct and those which cannot be so described, should not be understood as relieving the courts from the obligation of examining the real nature and effect of the particular tax in the present instance, or as justifying the classification of the tax as indirect merely because it is in some sense associated with the purchase of an article. With the greatest respect to the view of SIR LYMAN DUFF, C.J., their Lordships are unable to take the view that a valid distinction is to be found between the directness of the tax in the *Kingcome* case (3) and the quality of the tax in the present instance, on the ground that, in the former case, the tax was on every person who had consumed fuel oil, whereas the tax in the present case is on every person who buys tobacco in order to consume it. In both instances, the circumstance which makes the tax direct is the same, namely, that the person who pays the tax is the person who actually bears it, and this arises necessarily from the circumstance that purchase for resale is not taxed. Their Lordships, therefore, conclude that the tax in form (a) is valid.

Next comes the question whether the tax, though direct when the principal deals personally with the retail vendor across the counter, ceases to be "direct" if the purchase is made by an agent acting for his principal. Their Lordships have already pointed out that, in this case also the person who bears the tax is really the principal, either because he has already given his agent the money to pay it or because he is bound forthwith to repay his agent for the expense incurred with his authority and on his behalf. This indemnification does not follow because there is any fresh transaction analogous to resale after the purchase by the agent has been made; it is part and parcel of a single transaction. The agent pays the tax for and on behalf of his principal. If, indeed, the agent gave the name of his principal to the vendor, the contract of sale would be with the principal; if there was anything to complain of in the quality of the article, it would be the principal, whether named or not, who might have a remedy against the vendor. It is said that the tax in this second form is not direct

because the agent who is personally liable for the tax and has to pay it when receiving the tobacco is distinct from the principal who bears the burden of the duty. But, in their Lordships' opinion, this circumstance does not, according to the distinction laid down by Mill, prevent the tax from being a direct tax.

A There is an obvious distinction between an indirect tax, like an ordinary customs or excise duty, which enters into the cost of an article at each stage of its subsequent handling or manufacture, and an impost laid upon the final consumer, as "the particular party selected to pay the tax," who produces the money which his agent pays over. This is mere machinery, and resembles the requirement in British income tax that in certain cases A is assessed for tax which B really bears—a circumstance which does not make income tax indirect.

B The test for indirect taxation which Mill prescribed is the passing on of the burden of a duty by the person who first pays it through subsequent transactions to future recipients in the process of dealing with the commodity, or, at any rate, the tendency so to pass on the burden. Here the position is quite different. It is really the principal who in this case also both pays the tax and bears it. Their Lordships find it impossible to suppose that, in applying the economic distinction which is at the bottom of Mill's contrast, it would be correct to call this tax "direct" if a man bought a packet of cigarettes over the counter by putting his hand in his pocket and paying price and gave himself to the vendor, but "indirect" if he stood outside the shop and gave his wife the necessary amount to get the cigarettes and pay the tax for him.

C It is argued that the decision of this Board in the Grain Futures case, *A.-G. for Manitoba v. A.-G. for Canada* (6), goes to show that a tax imposed on agents dealing in a commercial article for their principals must be indirect. Their Lordships are of opinion that the actual decision does not justify so wide and general a deduction. The tax in that case as VISCOUNT D HALDANE pointed out, became a charge against the amount of the price which was to come to the seller in the world market and was thus indirect. Similar considerations governed the view taken by this Board in *Lower Mainland Dairy v. Crystal Dairy* (7), *A.-G. for British Columbia v. Canadian Pacific Ry.* (8), and *R. v. Caledonian Collieries* (9). In all these instances the tax was indirect because of its tendency to affect the price paid by persons other than the taxpayer for the commodity as an article of trade. Nothing of the sort happens here. E The production of the money to pay the tax by the agent is a mere piece of machinery unconnected with any subsequent commercial dealing with the tobacco. Notwithstanding that an agent is employed, it is the principal who really finds the money for the tax and he throughout bears the burden of it—*qui facit per alium facit per se*.

F Their Lordships, therefore, take the view that the tax imposed by sect. 4 of the Act is valid both in the form (a) and in the form (b).

G For the same reasons, and apart from other considerations which apply only to sect. 5, their Lordships are of opinion that the tax is valid in the forms (c) and (d). But the tax imposed by sect. 5 raises difficulties of a different order. It is manifest that sect. 5 is enacted merely as a supplementary provision, to guard against the methods of avoidance of sect. 4 which might otherwise remain available. At the same time, the validity of sect. 5 must be judged according to its terms, and, if its enactment by the provincial legislature be beyond the powers of that legislature, it cannot be justified on the ground that it is needed to make the whole scheme water-tight. Objection is taken to the validity of sect. 5 on the alleged ground that it offends against two sections of the British North America Act, 1867, namely, sects. 121, 122. These sections are as follows:

H 121.—All articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the union, be admitted free into each of the other Provinces.

122.—The Customs and Excise laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada.

When the scheme of Canadian federation is considered as a whole, the purpose and effect of these two sections seem plain enough. Previous to the date of federation, each province was a separate unit raising part of its revenue by customs duties on certain commodities imported from outside—it might even

be from another province. One essential purpose of federating such units is that they should cease to maintain customs barriers against the produce of one another, and hence sect. 121, supplemented by sect. 122, established internal free trade from July 1, 1867, which was the date proclaimed for the union. It was not, however, practicable to abolish Provincial customs entirely on that date. Ordinary customs and excise are, as Mill's treatise shows, the classical examples of indirect taxation and thus fell, thenceforward, within the exclusive legislative competence of the Dominion Parliament. But until the Dominion had imposed and collected sufficient taxes on its own account, it was desirable to continue to gather in the revenue arising from the customs and excise laws of the provinces (with the exception of inter-provincial import duties), though it would appear from the British North America Act, 1867, s. 102, that, after federation the proceeds passed into the Consolidated Revenue Fund of the Dominion. A Dominion tariff has long since been enacted and the customs and excise laws of the different provinces have been brought to an end by Dominion legislation. A

The question, therefore, on this part of the case, which has to be determined is whether sect. 5 of the New Brunswick Act is invalid as amounting to an attempt by the province to tax in disregard of the restrictions contained in sects. 121 and 122 of the constitution. If sect. 5 purports to impose a duty of customs, it is wholly invalid: and if it denies free admission of tobacco into New Brunswick, it is invalid so far as this refers to tobacco manufactured in another province of Canada. B

Their Lordships have reached the conclusion that sect. 5 does not impose a customs duty, and they adopt the reasoning on this point of RINFRET and CROCKET, J.J. The argument to the contrary is the argument that failed in the *Kingcome* case (3). LORD THANKERTON pointed out the distinction in his judgment in that case when he said, at p. 59: C

Customs and excise duties are, in their essence, trading taxes, and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted. D

Here the tax is not imposed on the commodity as such at all, and is not imposed on anyone as a condition of its lawful receipt. The "particular person" from whom the tax is exacted is the recipient in the province only if he is the prospective smoker. And, as LORD HOBHOUSE said in *Bank of Toronto v. Lambe* (1), at p. 584: E

Any person found within the province may legally be taxed there if taxed directly. Their Lordships agree with the majority of the Supreme Court that this is not a duty of customs.

Similar considerations dispose of the contention that, as applied to the recipient of tobacco manufactured in another province, the tax offends sect. 121. Here, again, it is important to remember the special feature of the tax that it is imposed as a direct tax on the consumer. Sect. 121 was the subject of full and careful exposition by the Supreme Court of Canada in *Gold Seal, Ltd. v. A.-G. for Alberta* (10), where the question arose whether the Parliament of Canada could validly prohibit the importation of intoxicating liquor into those provinces where its sale for beverage purposes was forbidden by provincial law. The meaning of sect. 121 cannot vary according as it is applied to Dominion or to provincial legislation, and their Lordships agree with the interpretation put upon the section in the *Gold Seal* case (10). DUFF, J., at p. 456, held that: F

... the phraseology adopted, when the context is considered in which this section is found, shows, I think, that the real object of the clause is to prohibit the establishment of customs duties affecting inter-provincial trade in the products of any province of the Union. G

At p. 466 ANGLIN, J., said: H

The purpose of that section is to ensure that articles of the growth, produce or manufacture of any province shall not be subjected to any customs duty when carried into any other province.

The purpose of the section was described by MIGNAULT, J., as being to secure that admission of the articles described should be "without any tax or duty imposed as a condition of their admission." These considerations make it clear that, if sect. 5 of the Tobacco Tax Act is not obnoxious to the British North America

Act, 1867, s. 122, it is also free from objection on the score of sect. 121.

That the tax is taxation within the province is, their Lordships think, clear for the reasons given by TASCHEREAU, J.

A Their Lordships will humbly advise His Majesty that the appeal fails and that the Tobacco Tax Act, 1940, is, in all respects, a valid exercise of the powers of the legislature of the Province of New Brunswick. The order of the Supreme Court must, therefore, be varied by omitting the words "with the exception of the provisions thereof making the agent liable for the tax." The appellant must pay the respondents' costs of the appeal. The interveners will, of course, bear their own costs.

Appeal dismissed with costs. Intervenors to bear their own costs.

B Solicitors: *Duncan Morris Oppenheim* (for the appellants); *Blake and Redden* (for the respondents and the Attorneys-General for Ontario, Manitoba, Saskatchewan and Prince Edward Island); *Charles Russell & Co.* (for the Attorney-General for Canada); *Lawrence Jones & Co.* (for the Attorney-General for Quebec); *Burchells* (for the Attorney-General for Nova Scotia).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

C TRITONIA, LTD., AND OTHERS v. EQUITY AND LAW LIFE ASSURANCE SOCIETY.

D [HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Macmillan and Lord Clauson), **March 8, July 26, 27, 1943.**]

Emergency Legislation—Mortgage—Sale—Collateral mortgage—No obligation to pay mortgage debt—"Person liable . . . to perform the obligation"—Courts (Emergency Powers) (Scotland) Act, 1939 (c. 113), s. 1 (2), (3).

Practice—House of Lords—Right of audience—Company—Representation by counsel.

E In 1937 the respondents advanced £10,000 to the appellants, Tritonia, Ltd. The company and a director thereof, the appellant Blair, entered into a personal obligation jointly and severally to repay the loan by half-yearly payments of £1,000 and they also undertook to meet the stipulated interest as it accrued. As security for the loan the appellants Greig & Millar, Ltd., charged to the respondents an heritable property belonging to them, but entered into no obligation to pay the sum secured. The
F appellants being in default prior to and subsequent to the outbreak of war in 1939, the respondents applied for and obtained leave of the court under the Courts (Emergency Powers) (Scotland) Act, 1939, s. 1 (2) to do diligence for the recovery of the debt and to exercise the power of sale in respect of the heritable property. The debtors appealed and on Mar. 8, upon the appeal coming before the House, the appellant Blair indicated his intention of appearing on his own behalf and on behalf of the
G other two appellants by whom he had been duly authorised. The House refused to hear Blair on behalf of the appellant companies, but granted an adjournment in order that they might be represented by counsel:—

HELD: (i) when an appeal is argued before the House of Lords, no one has a right of audience except counsel instructed on behalf of a party or, where the litigant is a natural person, the party himself.

H (ii) the appellants, Greig & Millar, Ltd., not having entered into any obligation to pay the secured debt, were not the persons liable to perform the obligation in question within the meaning of the Courts (Emergency Powers) (Scotland) Act, 1939, s. 1 (3), and were not entitled to invoke the statutory relief.

[**EDITORIAL NOTE.** The opinion herein discusses the right of audience in the House of Lords both upon the substantial appeal and upon proceedings before the Appeal Committee. The difficulty is that a corporation cannot appear in person and must, therefore, appear by such person as the House allows to appear on behalf of someone else. The orders allow only counsel to appear on behalf of another and,

therefore, a corporation can be represented only by counsel. The point on the Courts (Emergency Powers) Act would, if it were still subsisting, approve the decision of the Court of Appeal in the *Leicester Temperance Building Society's* case (3), but the circumstances of that case have now, so far as England is concerned, been specially provided for by statute.

AS TO THE HEARING OF APPEALS IN THE HOUSE OF LORDS, see HALSBURY, Hailsham Edn., Vol. 24, pp. 211, 212, paras. 385, 386; and FOR CASES, see DIGEST, Vol. 3, p. 318, Nos. 38-45.]

Cases referred to:

- (1) *Nairn v. St. Andrews University*, [1909] A.C. 147; 42 Digest 644, 498; 78 L.J.P.C. 54; 100 L.T. 96.
- (2) *Douglas and Others v. Pirie and Others*. Unreported. Lords Journal, Nov. 17, 1913.
- * (3) *Re Leicester Temperance and General Permanent Building Society's Application (Gough)*, [1942] 1 Ch. 340; [1942] 1 All E.R. 580.
- (4) *Young v. Hamill's Executrix* [1940], S.C. 421.

APPEAL by the debtors against leave to proceed granted to the creditors under the Courts (Emergency Powers) (Scotland) Act, 1939. The facts are fully set out in the opinion of VISCOUNT SIMON, L.C.

H. H. Hanworth for the appellant companies.

Louis Blair, appellant, in person.

J. L. Clyde, K.C., and *R. S. Johnston* (both of the Scottish Bar) for the respondents.

VISCOUNT SIMON, L.C.: My Lords, there are three appellants in this case, viz. (i) Tritonia, Ltd., (ii) Greig & Millar, Ltd., and (iii) Louis Blair, who is a solicitor practising in Glasgow.

On Mar. 8 upon the appeal being called on, Blair came to the Bar of the House and indicated his intention not only to argue on his own behalf in person (which, of course, he was entitled as a party to do) but also to argue on behalf of the two other defendants. He read to us resolutions of the boards of these two companies appointing him their agent for the purpose. It was pointed out to Blair that his right to be heard on behalf of the two companies did not depend merely upon whether they had authorised him to argue on their behalf, but depended on the rule and practice of the House governing representation of a party on the argument of his appeal.

When an appeal is argued before the House of Lords, no one has any right of audience except counsel instructed on behalf of a party or (when the litigant is a natural person) the party himself. In the case of a corporation, inasmuch as the artificial entity cannot attend and argue personally, the right of audience is necessarily limited to counsel instructed on the corporation's behalf. An apparent exception to these rules arises in the case of the Appeal Committee, whose practice, except when dealing with petitions for leave to appeal (presented pursuant to the Administration of Justice (Appeals) Act, 1934), is to hear agents and not counsel, as stated in para. 23 of the Directions to Agents, which are a summary of procedure issued by the Parliament Office and in no way binding on the committee who have on some occasions allowed counsel to be heard. The practice of hearing agents, which can be traced back to 1813 when an order was made for agents to attend the committee, has never been embodied in a Standing Order of the House, and, relating as it does only to incidental petitions and other matters dealt with by the committee, and not to the argument on the substantive appeal, cannot be said to constitute a real exception to the long-established rule that an appeal cannot be argued on behalf of a party by any one except the party himself (if not a corporation) or by counsel.

Our attention has been called by the authorities of the House to the course taken on two previous appeals, in which it might at first sight appear that there was a departure from this rule, and, indeed, the entries in the journals of the House almost suggest it. But, rightly understood, these precedents give no support to Blair's claim to argue on behalf of the appellant companies. *Nairn and Others v. University of St. Andrews and Others* (1) was the appeal of four ladies who were graduates of the University of Edinburgh and who claimed as such graduates the right to vote in the election of the parliamentary representative of that university. The appeal was argued by two of these ladies in

person, and the order of the House dismissing the appeal recites that, when counsel were called on :

. . . no counsel appearing for the said appellants, Miss Jessie Chrystal Macmillan and Miss Frances Helen Simpson (two of the said appellants) were heard at the Bar on behalf of themselves and the other appellants.

A The situation there was, however, that each of the four ladies had identically the same case ; if one succeeded they all succeeded ; strictly speaking, each of the two ladies named argued her own case and, since the House does not permit multiplicity of argument from each of a list of appellants who are all making the same contention, the argument of the two ladies named sufficiently presented the case which each of the four were present to make. Similarly, in *Douglas and Others v. Pirie and Others* (2), when no counsel appeared for the appellants, one of them, a lady, is described in the Lords Journal as being " heard at the Bar on behalf of herself and the other appellants." This also is not an accurate expression. There were three appellants who were trustees under a will, and the contention raised by the lady who argued was exactly the same as that which would have been raised by or on behalf of her co-trustees. Strictly speaking, she was arguing on her own behalf, and this also is no departure from the well-established rule that argument at your Lordships' Bar on behalf of one individual by another is only permitted if that other is briefed as counsel. Such a rule, limiting a right of audience on behalf of others to members of the English or Scottish or Northern Irish Bars, secures that the House will be served by barristers or advocates who observe the rules of their profession, who are subject to a disciplinary code, and who are familiar with the methods and scope of advocacy which are followed in presenting arguments to this House.

D Your Lordships accordingly refused to hear Blair on behalf of the two appellant companies, but granted an adjournment in order that the companies might, if so advised, instruct counsel to represent them. On the appeal again coming before the House on July 26, counsel appeared on behalf of the two appellant companies and Blair appeared solely on his own behalf. The position having thus been regularised the hearing proceeded and counsel was heard on behalf of the two companies and Blair was heard for himself. On the conclusion of the arguments for the appellants your Lordships did not find it necessary to call on counsel for the respondents.

E I now address myself to the merits of the question at issue. The respondents, a well-known life assurance company, seek in these proceedings, to obtain the leave of the court to do diligence for the recovery of a debt due to them and to exercise the power of sale conferred by a heritable security which they hold for their debt. The debtors being in default, these remedies would, in ordinary course, have been available to the respondents at their own hands, but in consequence of the enactment of the Courts (Emergency Powers) (Scotland) Act, 1939, it is now necessary for them to obtain the leave of the court. Sect. 1 (2) of the statute enacts as follows :

G Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court (a) to do any diligence . . . (e) to exercise any power of sale conferred by a heritable security. (3) If on any application under . . . subject. (2) of this section for leave to . . . exercise any right or remedy, the appropriate court is of opinion that the person liable . . . to perform the obligation in respect of which such right or remedy arises, is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the appropriate court may refuse leave . . . to exercise the right or remedy or give leave therefor subject to such restrictions and conditions as the court thinks proper . . .

H The respondents accordingly presented a petition to the Lord Ordinary craving the necessary leave. In their petition they set out the deeds constituting the debt owing to them and the security held by them and stated that default had been made in the payment of the sums, capital and interest, due to them. The present appellants each lodged separate answers to which the respondents lodged replies. The Lord Ordinary, after hearing parties on their pleadings, granted leave to proceed as craved without delivering an opinion. The appellants reclaimed to the Second Division of the Inner House which, without calling upon the respondents, unanimously affirmed the Lord Ordinary's inter-

locutor. The decision of the Court of Session was pronounced on the relevancy of the appellants' averments. The appellants did not ask leave to lead any evidence or to amend or amplify their written answers. Beyond producing an unvouched and not informative statement of the affairs of Tritonia, Ltd., as at May 15, 1942, they tendered no balance sheets, profit and loss accounts or other financial documents. Admitting their inability to pay and accepting the position that under the statute the burden lay upon them to establish that their admitted inability to pay was due to circumstances directly or indirectly attributable to the present war, the appellants maintained that, on their answers, with such oral explanations as they put forward at the Bar, the court ought to have exercised its discretion in their favour by refusing to the respondents the leave which they craved.

Your Lordships are now asked to hold that the Court of Session acted wrongly in refusing to exercise their discretion in favour of the appellants. A brief survey of the facts thus becomes necessary.

It appears that the appellants Tritonia, Ltd., were incorporated with a capital of £750 for the purpose of exploiting an engineering invention relating to deep-sea diving. Premises were rented in Govan and works were installed there. In view of the exiguous capital resources of the company it was necessary to borrow money and in 1937 £10,000 was advanced by the respondents in two sums of £5,000 each. The documents embodying this loan transaction need not be detailed. It suffices to say that the company, the appellant Blair and two other individuals not parties to the present proceedings entered into a personal obligation jointly and severally to repay the loan and to meet the stipulated interest as it accrued. They also undertook to make half-yearly payments of £1,000 on Oct. 10 and Apr. 10 in each year in reduction of the principal sum until the whole was repaid. In security of the loans certain life policies were assigned to the respondents and the appellants Greig and Millar, Ltd., disposed to the respondents a heritable property belonging to them in Govan which included the premises in which Tritonia, Ltd., were carrying on their business. The willingness of Greig and Millar, Ltd., to pledge their property in aid of Tritonia, Ltd., is no doubt explained by the fact that Blair and a Mr. Demetriades were the directors of both companies.

Before the outbreak of war in September, 1939, payments of interest and instalments of capital fell due on four half-yearly occasions. On no one of these occasions was any payment made by Tritonia, Ltd. Certain of the policies of assurance assigned in security of the loan were realised and the proceeds were applied in reducing the debt. On Aug. 31, 1938, the interest and the instalment of principal due on Oct. 10, 1937, were paid by one of the personal obligants not a party to the present proceedings. Statutory notices dated Oct. 11, 1938, were served calling up the bond. Repeated application for payment proved entirely unavailing. The actual sum outstanding due at the date of the presentation of the respondents' present petition is not stated but appears to have exceeded £7,000.

At the outbreak of war accordingly Tritonia, Ltd., had had the use of the respondents' money for over two years and had completely failed to fulfil their obligations to the respondents. The fact that default has occurred before the outbreak of war is not necessarily conclusive that the inability of the debtor to fulfil his obligations after the outbreak of war is not due to circumstances attributable to the war and it is conceivable that the position of the debtor might be shown to have been improving so substantially at the outbreak of war that, but for the impact of war on his affairs, he had a reasonable prospect of meeting his liabilities at an early date. But the fact that there has been pre-war default is highly significant, especially if, as here, it has been both complete and prolonged. The burden on the debtor of showing that his continued default is attributable to the war is in such a case heavily increased. All that Tritonia, Ltd., are able to say is that they believe that, but for the war, the potentialities of their business would have been realised. This falls far short of establishing that their inability to pay is attributable to the war. In point of fact, the company has turned over to the production of war materials and has secured presumably remunerative contracts from the Ministry of Supply and others, betokening an improvement rather than a deterioration of their position. The

Lord Justice-Clerk was, in my opinion, justified in his conclusion that the company :

... have completely failed to disclose any sufficient reason for enabling us to hold that their inability immediately to meet their obligations is due to circumstances directly or indirectly attributable to the war.

A I turn next to the case of Blair. So far as his financial difficulties are due to his having embarked his money in the venture of Tritonia, Ltd., what I have said as to that company equally affects Blair as a creditor of the company. In his answers the only averment special to himself is that certain houses belonging to him in Clydebank have been destroyed by enemy action. That averment is relevant but insufficient. The destruction of those houses appears to have entailed a diminution of £100 in Blair's income. Beyond this no further light is afforded on his financial position, and I agree with the Court of Session that he also has failed to make out a case for the exercise of the court's discretion in his favour.

C The position of Greig & Millar, Ltd., is quite distinct from that of the other appellants. They are under no personal obligation to the respondents. All that they have done is to pledge their heritable property in security of the debt owed by the other appellants and their co-obligants. No doubt they are concerned that they should not lose the property which they have chosen thus to hazard, but their case does not fall within the language of sect. 1 (3) of the Act which authorises the courts to grant relief to "the person liable to perform the obligation" in question. In *Re Leicester Temperance and General Building Society's Application* (3), the Court of Appeal, construing the identical provision of the corresponding English statute (at first and for a brief period applicable to both England and Scotland) held that a person who was not liable to perform an obligation was not entitled to invoke the statutory relief. (See also *Young v. Hamill's Executrix* (4)). In 1942 Parliament saw fit to remedy this *casus omissus* so far as England was concerned by passing the Courts (Emergency Powers) Amendment Act, 1942, which widened the scope of the original Act so as to cover the case of any person appearing to the court to be affected by the exercise of a mortgagee's rights or remedies. But as yet no corresponding amendment of the Scottish statute has been made. If the interests of justice called for an amendment of the law in England, the legislature may well think it desirable to effect a similar amendment in the case of Scotland. This House, however, has to administer the law of Scotland as it stands, and I am of opinion that the Lord Ordinary and the judges of the Second Division rightly refused to grant any relief to the appellants Greig & Millar, Ltd.

F The result is that the appeal should be dismissed and the interlocutors appealed from should be affirmed with costs to the respondents. I so move.

My Lords, LORD ATKIN, LORD THANKERTON and LORD MACMILLAN desire me to say that they concur in this opinion.

LORD CLAUSON : My Lords, I also concur in the opinion which has been tendered to your Lordships by VISCOUNT SIMON, L.C.

Appeal dismissed with costs.

G Solicitors : Ince, Roscoe, Wilson & Glover, agents for Symington & Blair, Glasgow, agents for Manuel, Menzies & Paton, Edinburgh (for the appellant companies) ; Rooper & Whateley, agents for Murray, Beiter & Murray, Edinburgh (for the respondents).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

SYNDIC IN BANKRUPTCY OF NASRALLAH KHOURY v. KHAYAT.

[PRIVY COUNCIL (Lord Russell of Killowen, Lord Wright, Lord Porter, Sir George Rankin, Sir Madhavan Nair), **March 15, May 4, 1943.**]

Privy Council—Palestine—Money—Currency—Promissory notes payable in Turkish gold pounds—Paid in Palestinian currency—Date for calculating exchange—Binding effect of decisions of the Supreme Court of Palestine—Palestine Order in Council, 1922, Art. 46.

The respondent brought an action against the appellant claiming 1,140,500 Turkish gold pounds and interest as the balance due, after certain payments on account made between 1934 and 1937 in Palestine currency, on three promissory notes which matured at dates in 1929 and 1930. The appellant did not deny the execution of the instruments, but contended that they were not promissory notes but undertakings to deliver the quantity of bullion represented by the specified coins; he resisted the claim for interest and further contended that the rate of exchange to be applied to the moneys due and the moneys already paid on account should be the rate at the dates of the maturity of the instruments and not, as the respondent alleged, that at the dates of the payments made on account:—

HELD: (i) the instruments were unconditional promises to pay a sum certain in money and, therefore, were promissory notes and the respondent was entitled to interest.

(ii) the rate of exchange to be applied was that at the date of the maturity of the bill or note and not the date of any actual payment.

(iii) the Palestine Order in Council, 1922, does not make decisions of the Supreme Court of Palestine which are subject to appeal to His Majesty in Council, authorities to establish finally a rule of law contrary to English Law.

[EDITORIAL NOTE.] The law now in force in Palestine is the common law and doctrines of equity in force in England subject to the provisions of the Ottoman law in force in Palestine on Nov. 1, 1914, certain later Ottoman laws, Orders in Council and Ordinances in force in Palestine and to certain modifications necessitated by local circumstances. It appears to have been thought the decisions of the Supreme Court in Palestine which are subject to appeal to the Privy Council were binding upon the Supreme Court although they were shown to be contrary to the English common law or equity and not covered by any of the other matters mentioned above. This view their Lordships have held to be misconceived and the duty of the Supreme Court in such a case is to refuse to follow the previous decision.

AS TO DAMAGES EXPRESSED IN FOREIGN CURRENCY, see HALSBURY, *Hailsham Edn.*, Vol. 10, pp. 150-152, para. 191; and FOR CASES, see DIGEST, Vol. 35, pp. 169-176, Nos. 11-63.]

Cases referred to:

- (1) *R. v. International Trustee for Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500; [1937] 2 All E.R. 164; Digest Supp.; 106 L.J.K.B. 236; 156 L.T. 352.
- (2) *Feist v. Societe Intercommunale Belge d'Electricite*, [1934] A.C. 161; Digest Supp.; 103 L.J.Ch. 41; 150 L.T. 41.
- (3) *Ottoman Bank of Nicosia v. Chakarian*, [1938] A.C. 260; [1937] 4 All E.R. 570; Digest Supp.; 107 L.J.P.C. 15; 158 L.T. 1.
- (4) *Di Ferdinando v. Simon, Smil & Co., Ltd.*, [1920] 3 K.B. 409; 17 Digest 159, 604; 89 L.J.K.B. 1039; 124 L.T. 117.
- (5) *Celia SS. v. Volturmo SS.*, [1921] 2 A.C. 544; 17 Digest 159, 602; 90 L.J.P. 385; 126 L.T. 1.
- (6) *Ahmad Hassan Abu Laban v. Bergman* (1932), 2 Rotenberg's Reports, 658.
- (7) *Abu Labban v. Lieder and Fisher* (1932), 2 Rotenberg's Reports, 664.
- (8) *Apostolic Throne of St. Jacob v. Saba Eff Said*, [1940] 1 All E.R. 54.
- (9) *Mamur Awqaf of Jaffa v. Palestine Government*, [1940] A.C. 503; Digest Supp.
- (10) *Sheik Suleiman v. Michel Habib*, unreported.

APPEAL by the defendant to an action claiming moneys due on certain promissory notes. The facts are fully set out in the judgment of the Board delivered by LORD WRIGHT.

T. F. Davis for the appellant.

The respondent was not represented.

LORD WRIGHT [delivering the judgment of the Board]: This is an appeal from a judgment of the Supreme Court of Palestine, sitting as a court of civil appeal, delivered on Apr. 24, 1940, confirming a judgment of the district court of Haifa dated Jan. 17, 1940.

A The respondent who was resident in Jezzin, Syria, commenced the action on Oct. 27, 1937, claiming 2,347 Turkish gold pounds as due upon three promissory notes. One disputed issue is whether these three instruments were or were not promissory notes. One was for 2,000 Turkish gold pounds and matured on May 23, 1930, the second was for 300 Turkish gold pounds and matured on May 23, 1930, the third was for 47 Turkish gold pounds and matured on Oct. 21, 1929.

B The appellant who is the syndic in the bankruptcy of the firm S. N. Khoury, merchants of Haifa, Palestine, did not deny the execution of the instruments but contended that they were not promissory notes but undertakings to deliver certain commodities, namely, the quantity of bullion represented by the specified Turkish gold coins or the corresponding number of Turkish notes; he resisted the claim for interest; he further contended that the rate of exchange to be applied to the moneys due should be as at the dates of maturity of the instruments, and not, as the respondent alleged, at the actual dates of payment.

C The Supreme Court, affirming the district court, held that the instruments were promissory notes and that interest was payable from the dates of maturity, but not beyond the date of the adjudication in bankruptcy. The court further held that the dates of payment of the notes were the dates at which the exchange was to be taken. Any claim for interest under art. 305 of the Code was reserved for further decision in Palestine and is not now before the Board.

D There had been considerable changes in the rates of exchange of Turkish gold pounds into the currency of Palestine. At the dates of maturity the rate stood at LP 0·875 mils in Palestine currency to the Turkish gold pound. At the dates of the actual payments made on account of the debt between Aug., 1934, and Sept., 1937, the rates fluctuated between LP 1·485 and LP 1·510 to the Turkish gold pound. There is thus a considerable difference in the balance due upon the notes according as the dates of maturity are taken on the one hand or the dates of actual payment on the other. The payment actually made was made in the currency of Palestine and totalled in that currency LP 1·780, which
E sum, deducted from LP 2,052 the equivalent of 2,347 Turkish gold pounds exchanged at the rate of LP 0·875 to the Turkish gold pound left due and owing LP 272·375 which the appellant paid into court. On the other hand, the respondent claims that the original debt of 2,347 Turkish gold pounds has been only reduced by the payments on account which are brought in as totalling 1,206·500 Turkish gold pounds if the actual payments which were made in the currency of
F Palestine were exchanged into Turkish gold pounds at the rates actually ruling at the several dates of those payments. The respondent accordingly claimed that there was still owing a balance of 1,140·500 Turkish gold pounds which represented a debt of LP 1,722·155 if exchanged at the date of the claim, at the then local currency equivalent of the Turkish gold pound which was LP 1·510 to the Turkish gold pound.

G The judgments under appeal accept the respondent's contentions and apparently accept her figures of claim, although no definite sum is stated in the judgments. It may be, however, that the precise figures were left for subsequent ascertainment, like the figures of interest due up to the date of adjudication. But since their Lordships for reasons which will appear later do not agree with the view of the Supreme Court that the relevant dates for the exchange are the dates of actual payment, but are of opinion that the proper dates are the dates of maturity of the instruments, they see no reason to differ from the figures put
H forward by the appellant. These first state the amounts of the debts exchanged into Palestine currency at a rate which apparently is not disputed if the appellant is correct in taking the dates of maturity of the instruments as the basic dates. From this figure of total debt in terms of Palestine currency the payments made and accepted in Palestine currency have been deducted, leaving the balance admitted to be due in the same currency.

Their Lordships will deal with the questions of principle which arise on the judgments appealed from.

On the first question, whether the instruments in suit were promissory notes

or undertakings to purchase a commodity, that is, either gold or Turkish notes taken at their gold value, their Lordships agree with the judgments of the courts below. The form of the instruments is obviously that of promissory notes. The first as translated from the Arabic runs simply :

On May 23, 1930, I shall pay to the order of Mrs. Mary Khayat of Jezzin the sum specified above [that is, in the heading] i.e., two thousand gold Turkish pounds. Value received in cash, Haifa, Oct. 11, 1929.

It is signed by the appellant, and duly stamped. The others are *mutatis mutandis* in identical terms.

What seems to be relied on by the appellant is the description of the subject-matter of the obligation as "gold Turkish pounds." It is contended that Turkish gold coins are not currency in Palestine; however, it is clear that they are currency in Turkey and Syria, where the respondent was resident. Syria was at the material times a former Turkish territory mandated to the French. A promise to pay a sum expressed in Turkish money, made in Palestine, is not outside any of the recognised definitions of a promissory note. It is a promise to pay in a currency even though it is not that of the country where the note is made or payable. It is very common to have bills of exchange in a currency foreign as regards one of the parties or as regards the place where the bills are issued or payable. Generally in that case one of the parties is in the country in which the stipulated unit of account (such as pound or dollar) is in current use and payment is to be made in that country. It is true that, in proceedings to enforce payment, the debt, being expressed in foreign currency, must be translated into the corresponding amount of the local currency if judgment is to issue. But all the same the promise is a promise to pay money. What is peculiar here is that the note is both made and payable in Palestine, so as to make it appear strange that Turkish currency is chosen. But then the payee is resident in Syria where the unit of account in use is Turkish. In their Lordships' judgment the three instruments are promissory notes.

Nor were the notes any the less negotiable instruments because of the word "gold." That word does not here import an obligation to deliver gold or pay in gold. What it does is to import a special standard or measure of value. This special measure of value may be described sufficiently, though not with precise accuracy, as being the value which the specified unit of account would have if the currency was on a gold basis. It is equivalent to a gold clause. "Such clauses" were said by LORD MAUGHAM in *R. v. International Trustee for Protection of Bondholders* (1), at p. 562 ([1937] 2 All E.R., at p. 184), to have been :

... intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed.

Gold clauses were discussed and explained by the House of Lords in the opinion delivered by LORD RUSSELL OF KILLOWEN in *Feist v. Societe Intercommunale Belge d'Electricite* (2). Such clauses often specify a standard of value based on a particular weight and fineness of gold. In this case it is taken without objection that the Turkish gold pound has an established value. The distinction between the Turkish pound and the Turkish gold pound was illustrated in *Ottoman Bank of Nicosia v. Chakarian* (3). In that case a contract which included an obligation to pay in Turkish pounds had been made at a time when Turkey was on the gold standard. Before the date when payment became due Turkey went off gold and the pound depreciated. It was held that the payee was only entitled to be paid at the depreciated rate and could not claim to be paid in gold pounds, that is, in undepreciated currency.

In their Lordships' opinion the courts in Palestine were right in holding that the three instruments were promissory notes whether the definition applied is that contained in the Ottoman Commercial Code, art. 145, or in the Bills of Exchange Ordinance, 1929, s. 84 (1), which corresponds with the English Bills of Exchange Act, 1882, s. 83 (1), in particular because the notes were unconditional promises to pay a sum certain in money.

Their Lordships think that the appeal fails on this issue and the respondent is, therefore, entitled to interest from the date of maturity, though the interest will not run beyond the date of adjudication.

There remains the more serious question which is : At what dates must the rate of exchange be calculated ? There can, their Lordships apprehend, be now no doubt as to the English law on this point. It is true that different views have been taken at different times and by different systems of law. Indeed, there are at least four different alternative rules which might be adopted. The rate of exchange might be determined as at the date at which payment was due, or at the date of actual payment, or at the date of the commencement of proceedings to enforce payment, or at the date of judgment. English law has adopted the first rule, not only in regard to obligations to pay a sum certain at a particular date, but also in regard to obligations the breach of which sounds in damages, as for an ordinary breach of contract, and also in regard to the satisfaction of damages for a wrongful act or tort. The general principles on which that rule has been based are explained by the Court of Appeal in *Di Ferdinando v. Simon, Smits & Co.* (4), a case of an ordinary breach of contract. The rule, however, was established many years before then. It was again enunciated by the House of Lords in *SS. Celia v. SS. Volturno* (5), where the claim was for damages in tort consequent on a collision. It was there contended that the date of the judgment was the proper date for translating the Italian currency in which the damages were assessed into English currency capable of being put into the judgment of an English court, and some reference was made to different views expressed in the United States. LORD SUMNER, however, holding that the date when the obligation accrued was the date of the breach and that it was at that date that the exchange was to be taken, said, at p. 555 :

The agreed numbers of lire are only part of the foreign language in which the court is informed of the damage sustained, and, like the rest of the foreign evidence, must be translated into English. Being a part of the description and definition of the damage, this evidence as to lire must be understood with reference to the time when the damage accrues, which it is used to describe.

This can be applied directly to a case where the damage claimed arises from failure to pay a sum in foreign currency, like the Turkish gold pounds here. It is true that LORD SUMNER does not deal specifically with and seems to reserve the question of what is the rule where there is a contractual obligation for the payment of fixed or calculable sums in a foreign place and (their Lordships would prefer " or ") in a local currency. He does, however, observe, at p. 558, that :

Waiting to convert the currency till the date of judgment only adds the uncertainty of exchange to the uncertainty of the law's delays.

At p. 548 LORD BUCKMASTER rejects summarily the idea that the date of the writ or of the commencement of the action is the proper date. His view, in their Lordships' opinion, is summed up by his statement on p. 549 that, in regard to damages which have been :

... assessed in a foreign currency the judgment here, which must be expressed in sterling, must be based on the amount required to convert this currency into sterling at the date when the measure was properly made, and the subsequent fluctuation of exchange, one way or the other, ought not to be taken into account.

In the case of bills of exchange (which include promissory notes) the English Bills of Exchange Act, 1882, s. 72 (4) enacts that the amount of the foreign currency is to be translated into United Kingdom currency according to the rule of exchange for sight drafts at the place of payment on the day the bill is payable. The Act was a codifying Act and did not purport to change the law, but to declare it, and the Palestine Ordinance expressly states that it declares the law. It is true that the Act and Ordinance state the rule as being applicable to bills drawn out of and payable in the United Kingdom or Palestine as the case may be, but not expressed in the currency of the United Kingdom or Palestine. But their Lordships think that the essence of the rule applies in a case where the sum is not expressed in the United Kingdom or Palestine currency, and is payable in the United Kingdom or Palestine. Their Lordships accordingly consider the Ordinance to involve an authoritative declaration of the proper rule to apply to the calculation of the exchange in a case like this. Nor do their Lordships think it necessary to consider whether the Ordinance (see sect. 72 (4)) applies to all the three notes or only to the notes which matured before the date of the Ordinance. The Ordinance only declares what the English rule is and as it is so it has been for many years.

The reason why the Supreme Court refused to apply the English rule and, instead, held that the dates of actual payment were to be adopted in converting the currency, was that the decisions of the courts in Palestine bound them to adopt the latter principle. The Supreme Court, while not contesting what the English rule was, added: "As far as Palestine is concerned, however, as the learned President [of the District Court] pointed out in his long and careful judgment, the balance of authority is the other way." What the President had said was :

... we must treat the decisions of the Supreme Court of this country as part of the law of Palestine and binding on us, unless and until the principles laid down by such decisions have been varied by legislation or the opinions of the Privy Council.

Their Lordships agree with this view and must determine what should be, or more precisely is, the rule in Palestine.

The Supreme Court held that in Palestine the principle that the exchange should be taken as at the date of actual payment had been established "since at any rate 1932." But the court does not quote any authority except the Palestine decisions which do indeed in the words of the court :

... lay down the proposition that in an action on a promissory note the conversion into Palestine currency should be at the rate of exchange prevailing at the actual date of payment.

These decisions were *Ahmad Hassan Abu Laban v. Bergman* (6), *Abu Labban v. Lieder and Fisher* (7), and an unreported decision of the Supreme Court, No. 79 of 1936. The Supreme Court also refer to *Apostolic Throne of St. Jacob v. Saba Said* (8), decided in 1939 by this Board, where the issue was whether the bond was or was not a gold bond. It appears from the headnote to the report that the courts in Palestine had taken the rate of exchange as at the date of payment, but no issue was raised on this point before this Board and the judgment shows that it was not considered by the Board. The case cannot be regarded as a decision of the Board on this point.

Their Lordships accordingly have now to decide the question as one which is open to their consideration. Their conclusion is that the English rule should prevail in Palestine. The Palestine Order in Council, 1922, art. 46, must be considered. It was adverted to in a judgment delivered by SIR GEORGE RANKIN by this Board in *Mamur Awqaf of Jaffa v. Government of Palestine* (9), and in an unreported case of *Sheik Suleiman v. Michel Habib* (10). In the latter case LORD ATKIN, delivering the judgment of the Board, observed that, under art. 46, the courts in Palestine were to exercise their jurisdiction "in conformity with the substance of the common law and the doctrines of equity in force in England." This was to be subject to the provisions of the Ottoman law in force in Palestine on Nov. 1, 1914, and certain later Ottoman laws and such Orders in Council and Ordinances as were in force in 1922 and are subsequently in force, and to modifications necessarily required by local circumstances. In the present case, it is not suggested that there were any provisions of Ottoman law relevant to this point and no Ordinance can be quoted except the Bills of Exchange Ordinance, 1929, to which reference has already been made, and this Ordinance, as already pointed out, is in substance contrary to the view taken by the Palestine courts. The Order in Council does not mean that decisions of the Supreme Court which are subject to appeal to His Majesty in Council, are, in themselves, authorities to establish finally a rule of law contrary to English law. A rule of law to have this consequence must be one laid down in Imperial Acts or Orders in Council or in Ordinances applicable to Palestine or in the former Ottoman law, that is in the various Ottoman Codes, the Mejlle or other authoritative sources of Ottoman law, so far as not superseded by Ordinances of Palestine.

As no rule of law is so laid down, their Lordships are, therefore, of opinion that, on this issue, it should be held to be the law of Palestine that in such a case as the present the correct date for calculating the exchange should be the date of the breach by non-payment, that is, the date of maturity of the bill or note, and not the date of any actual payment. The Board may further observe that the English decisions seem to consider the date of actual payment as one which cannot properly be taken for converting the exchange. One effect of adopting it would be that a judgment or execution under it could not fix a definite sum

because, until actual payment, the rate could not be ascertained. The date of judgment was rejected by the House of Lords in the *Celia v. Volturmo* case (5). To adopt the date of payment would be to place the rate of exchange in the control of the debtor who could at his will or convenience delay payment and thus benefit or attempt to benefit by the fluctuations of exchange.

The sum of LP 272-375 paid into court on Dec. 13, 1937, is not sufficient to cover interest due from dates of maturity to date of adjudication.

A Their Lordships will humbly advise His Majesty that the appeal should be allowed and the decrees of the courts in Palestine set aside; that the plaintiff should have judgment for LP 2,052-375 with interest at 9 per cent. per annum (a) on LP 2,012-500 from May 23, 1930, to Oct. 27, 1930, and (b) on LP 39-875 from Oct. 21, 1929, to Oct. 27, 1930, less a sum of LP 1,780 paid on account in the years 1934-7: this judgment to be without prejudice to any future claim for interest under art. 305 of the Code. Liberty to either party to apply to the trial court to withdraw the money paid into court or any part thereof.

B The appellant must pay the plaintiff's costs of the action. The plaintiff must pay the appellant's costs of the appeal to the Supreme Court and of this appeal.

Declaration accordingly.

Solicitors: *Bulcrraig & Davis* (for the appellant).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

Re D. (INFANTS).

D [CHANCERY DIVISION (Bennett, J.), July 9, 1943.]

Infants—Guardians—Appointment by the court—Jurisdiction—Infant aliens resident in England—Parents abroad—No property belonging to infants within the jurisdiction which the court is asked to administer.

E Four infants, who were not of British nationality, were brought to England in July, 1939, by a society for aiding refugee children from Germany. They were brought to England partly at the request of the Council of German Jewry and partly at the request of two relatives of the children. The parents of the children were resident abroad and as the relatives were unable to maintain them the infants were placed in a hostel by the society. In January, 1943, the relatives obtained possession of the children and failed to return them to the hostel. On a summons taken out on behalf of the children by their next friend for the appointment of guardians of the infants, the question arose whether the court had jurisdiction to make the appointments in view of the fact that the infants had no property of their own and no property had been settled on them which the court could be asked to administer:—

F HELD: the jurisdiction of the court to appoint a guardian of an infant is based on the infant's need for protection. It is not, therefore, necessary that there should be property to be administered on the infant's behalf if in all the circumstances the appointment of a guardian is desirable.

G [EDITORIAL NOTE. There has long been a practice of making a nominal settlement upon an infant when it is desired to make an infant a ward of the court and it was thought that the existence of property which the court was asked to administer was the foundation of the jurisdiction to appoint a guardian of an infant. An examination of the authorities however, has shown that that is not the true view and there is jurisdiction to appoint a guardian whenever it is desirable that one should be appointed and this is so in the case of any infant, whether or not he or she is a British subject, residing within the jurisdiction.

H AS TO APPOINTMENT OF GUARDIANS BY COURT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 695, 696, para. 1437; and FOR CASES, see DIGEST, Vol. 28, pp. 286-290, Nos. 1396-1449.]

Cases referred to:

* (1) *Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42; 28 Digest 286, 1397; 1 L.T.O.S. 250.

(2) *Nugera v. Vetzer* (1866), L.R. 2 Eq. 704; 28 Digest 288, 1410; 35 L.J.Ch. 777; 15 L.T. 33.

SUMMONS for the appointment of guardians of the persons of four infants. The infants, who were not of British nationality, were brought to England in July, 1939, by a society for aiding refugee children from Germany partly at the request of the Council for German Jewry and partly at the request of two relatives of the children. The parents of the children were resident abroad and, as the relatives were unable to maintain them, the infants were placed in a hostel by the society. In January, 1943, the relatives obtained possession of the infants and failed to return them to the hostel.

H. B. Vaisey, K.C., and *I. M. Phillips* for the applicant.

Donald H. Cohen for the relatives.

BENNETT, J. : The application now before me is an originating summons in which the court is asked to appoint guardians of four infant children. The four children are all of tender age who were brought into this country from Germany on July 26, 1939. Their parents, German subjects of the Jewish persuasion, are still living. When the children came over here, their parents were living in Germany. I think that to-day their parents are in Italy. The children were brought to England in order that they might escape persecution in the country from which they came. They are without property of their own, and no property has been settled upon them for the purpose of founding jurisdiction to appoint a guardian.

Originally the originating summons was entitled, "In the Matter of the Guardianship of Infants Acts, 1886 to 1925," but, when the case first came before me, I was told that I was not being asked to exercise any jurisdiction conferred upon this court by those Acts. The summons has, therefore, been amended by striking out from the heading the reference to those Acts; and it is now headed simply, "In the Matter of the four infants."

The question for determination is whether this division of the High Court of Justice has jurisdiction to appoint guardians of infant children, the infant children having no property of their own—no property settled upon trust for them which the court is asked to administer on their behalf. I am satisfied by the authorities to which I have been referred that in such a case the court has jurisdiction to appoint a guardian.

I was a little puzzled at first because of the practice—with which ever since I was at the Bar I have been acquainted—of making a nominal settlement upon an infant when it was desired to make an infant a ward of court; and I was brought up to believe that the existence of property which the court was asked to administer was the foundation of the court's jurisdiction to appoint a guardian of an infant; but the fact, I think, is that the jurisdiction is based, not upon the existence of the property in which the infant is interested and which the court is asked to administer, but upon the need of an infant for protection. It is the need of an infant for protection which, in my judgment, having regard to the authorities, gives this division of the court jurisdiction to appoint a guardian. I think the matter is best stated in a passage to be found at the beginning of the speech of LORD LANGDALE, in *Johnstone v. Beattie* (1) His opening words, at p. 145, are these :

Amidst the differences of opinion which exist in this case, it is satisfactory to me that no doubt is thrown upon the jurisdiction of the Court of Chancery to appoint guardians for any infant residing in *England*. The whole property of an infant may be situate in a foreign country, and tutors and curators of the person and estate of the infant may have been duly appointed according to the law of the country where the property is; and yet it may be evident that, without the authority of a guardian duly appointed here, and subject to the control of the Court of Chancery, the infant may be without the protection which may be absolutely necessary for its welfare, and even for its safety. The jurisdiction being indisputable, the exercise of it in particular cases becomes a matter of discretion and expediency, depending on the peculiar circumstances of each case.

His Lordship then goes on to deal with the facts with which that particular case was concerned. The opening sentence of LORD LANGDALE that no doubt is thrown upon the jurisdiction of the Court of Chancery to appoint guardians for any infant residing in England is sufficient, I think, to show that this court has jurisdiction even in a case where the infant has no property settled upon it, or belonging to it, which the court is asked to administer; and the fact that the infant is a foreign subject seems to me to be irrelevant if the source of the juris-

diction is the necessity of the infant to be protected, because the fact that it is a foreign subject does not make it unnecessary to protect the infant, and the jurisdiction to appoint a guardian of an infant not a British subject is established by the decision of SIR W. PAGE WOOD, V.C., in *Nugent v. Vetsera* (2).

A As an instance of the exercise of the jurisdiction in a case where an infant is without property, I have been referred by MASTER HOLLAND to an order made by CLAUSON, J., as he then was, sitting in chambers, where he appointed guardians of an infant whose mother was out of the country, his mother being a widow. The infant was to be educated at Bedford School, and I understand it to be the fact that it is or was desired by the authorities of that school that there should always be a guardian of an infant pupil resident in England. The order made by CLAUSON, J., upon an application by originating summons merely asking for the appointment of a guardian appointed two persons to act jointly with the mother as guardians of the infant for such time as the infant should be a pupil at the school in question. That seems to me clearly to support the view which I have taken, that this court has jurisdiction, although an infant had no property of its own, to appoint a guardian of the person of the infant in a case in which it is shown that in all the circumstances it is desirable that such an appointment should be made.

C In this case there are circumstances which make it desirable that a guardian of these infants should be appointed; and, having been satisfied by the arguments of counsel that there is jurisdiction to make the appointment, I shall proceed to consider the particular facts of the case, and who in all the circumstances are the right persons to appoint.

Order for the appointment of guardians of the infants to be made after selection of suitable persons.

D Solicitors: *Edward Frank Iwi* (for the applicant); *Adler & Perowne* (for the relatives).

[*Reported by* HUBERT B. FIGG, Esq., *Barrister-at-Law.*]

E FENDOCK INVESTMENT TRUST CO. v. INLAND REVENUE COMMISSIONERS. ALPORTENO INVESTMENT TRUST CO. v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Scott, MacKinnon and Luxmoore, L.JJ.), **June 9, 1943.**]

F *Income Tax—Sur-tax—Investment company—Apportionment of income—Taxpayer not member at the end of the year—Whether commissioners have jurisdiction to direct that income of company is deemed to be income of taxpayer—Finance Act, 1922 (c. 17), s. 21.*

G The appellants were an investment company which, throughout the financial year 1938-39, was under the complete control of Murray. Pursuant to the Finance Act, 1922, s. 21, and the Finance Act, 1939, s. 15 (7), Murray was assessed to sur-tax for that year in respect of the company's income. No argument was raised on that assessment. Shortly before Dec. 8, 1939, the company's accounting year was altered so as to be coincident with the financial year, and on that date the control of the company passed to persons who were trustees for Murray's children. On behalf of the appellant company it was contended that the commissioners had no jurisdiction to direct that the company's income should be deemed to be the income of its members unless the members occupied that position on the last day of the year under consideration:—

H **HELD:** there was no such limitation on the jurisdiction of the commissioners.

[**EDITORIAL NOTE.** The taxpayer here argued that he could not be made subject to "company sur-tax" unless he was a member at the end of the tax year, basing his contention solely on the construction of the Acts. This contention is rejected by the court.

AS TO UNDISTRIBUTED PROFITS OF COMPANIES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 289, 290, paras. 574, 575; and FOR CASES, see DIGEST SUPP., Income Tax, Nos. 674g-674cc.]

APPEALS by the companies from decisions of MACNAGHTEN, J., dated Jan. 14, 1943. It was agreed that, as the questions in the two appeals were identical, the decision in the second appeal should follow the first. The facts are fully stated in the judgment.

Cyril King, K.C., and J. S. Scrimgeour for the appellants.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), J. H. Stamp and Reginald P. Hills for the respondents.

SCOTT, L.J. [delivering the judgment of the court]: We agree with the judgment of MACNAGHTEN, J., The appellant company is an investment company within the meaning of the Finance Act, 1936, and subsequent income tax legislation. For the assessment year 1938-39 Mrs. Murray was assessed to sur-tax in respect of the income of the appellant company pursuant to the Finance Act, 1922, s. 21 and the Finance Act, 1939, s. 15 (7). She was throughout that assessment year in complete control of the company; and no argument has been addressed to us in respect of that year. She continued in complete control of the company until Dec. 8, 1939. On that day the company passed a special resolution under which that control was taken from her, and passed to other persons who were trustees for her children.

It was contended for her, both below and before us, that the statutory jurisdiction of the commissioners to direct that the company's income is to be deemed to be the income of the members for the purpose of their individual liability to sur-tax is subject to a condition precedent to the effect that neither "direction" nor "apportionment to members" of the income of the company can be effectively made so as to bind any member, unless that member occupies that position on the last day of the year under consideration. The appellants argue that the sole subject-matter of a statutory "direction" to a company is the company's income for the period ending on that date. Under the 1922 Act the material period was the company's accounting year or such other period as might at any particular time have been adopted by the company; but in 1937 the year of assessment was, in the case of "investment" companies, substituted as the basic period; see the Finance Act, 1937, s. 14 (2) (d). In the present case the company had, shortly before Dec. 8, 1939, changed its final accounting date to April 5, so that its period had become coincident with the year of assessment.

Counsel for appellant took us through a large number of sections of different Finance Acts in order to establish his proposition that the pecuniary subject-matter of a direction is always the result of a completed financial year, but even if this proposition be established, it by no means follows that the commissioners are thereby precluded from "apportioning between the members" in such a way as to make the apportionment amongst the members for the time being on the register during the whole of the period. The original enactment is contained in the Finance Act, 1922, s. 21 (1), and the material words there are "the amount thereof shall be apportioned amongst the members." What more general enabling words could have been devised? If there were any ambiguity in them—which in our opinion there is not, for generality is not the same thing as ambiguity—the opening preamble or recital to the section shows that the object of the legislation was to get sur-tax out of the members of a private company who by creating it would escape sur-tax but for the section under consideration. Rule 4 (b) of the first schedule to the 1922 Act provides that the commissioners may require the company to furnish them with the names of all members and their respective interests throughout the period in question; and that return must necessarily cover transfers during the period. Rule 8 of the same schedule requires the apportionment to be made in accordance with the respective interests of the members; not, be it observed, the members on the register at the expiration of the period. We fail to see any reason for the view that members could escape by selling their shares before the end of the year. As counsel for the Crown said, it would have been so easy for Parliament to say that the liability was to be on "members on the last day of the year" if that had been, or could have been its intention. He put two crucial instances to demonstrate the absurdity of such a construction: (i) The case of a transfer by law. If there were two successive tenants for life A. and B. during the year; would A.'s executors escape all charge and B. have to bear the whole? (ii)

The case of one small controlling group of shareholders, A., succeeded by another, B., to whom it transfers all its shares towards the end of the year, having already received a large interim dividend.

A There are two further reasons in favour of the Crown's interpretation. The Finance Act, 1927, s. 31 (2), expressly authorised deduction from the newly added sur-tax charge of the amount, if any, already distributed to the member and, therefore, already *ex hypothesi* included in his sur-tax return. It is incredible that Parliament, when making that addition to the language there used, should have thought it was only necessary to protect members on the register on the last day of the year. The second reason is that the Finance Act, 1938, s. 15 (2) (c) gives the commissioners complete discretion in apportionment; and that discretion has to be exercised, in the case of investment companies, with regard to various people who are not shareholders at all, but, for example loan creditors (Finance Act, 1936), and anybody "who is . . . or is likely to be able" to secure B any part of the income or assets of the company. These provisions seem to us wholly inconsistent with any such arbitrary limitation as that put forward on behalf of the appellant company.

Appeals dismissed with costs.

Solicitors: *Markby, Stewart & Wadesons* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

C [Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. TERENCE BYRON, LTD.

D [KING'S BENCH DIVISION (Macnaghten, J.), July 14, 20, 1943.]

Revenue—Excess profits tax—Capital—Theatre destroyed by enemy action—Whether theatre remained "capital employed in the business"—Finance (No. 2) Act, 1939 (c. 109), ss. 13 (3), 14 (2), Sched. VII, Pt. II, para. 1 (1).

E The respondent company carried on the business of theatre proprietors. On May 7, 1941, one of the company's theatres was totally destroyed by enemy action, and it was agreed that the War Damage Commission would in all probability make a value payment in respect of that property. The Crown contended that, for the purposes of excess profits tax, as from the date of destruction, the cost of the theatre was no longer "capital employed in the business," within the meaning of the Finance (No. 2) Act, 1939, s. 13 (3), and that the cost of the theatre should be excluded from the computation of the capital of the business:—

F HELD: notwithstanding its destruction, the destroyed theatre remained "capital employed in the business" within the meaning of the section.

[EDITORIAL NOTE. The statute speaks of capital "employed" in the business. Normally it would be impossible to speak of a theatre which has been destroyed as being employed in the business, but, having regard to what are by the terms of the statute itself described as capital employed in the business, it is held that this phrase must not be construed literally but must be taken to be equivalent to the capital of the business. In this sense, it is further held that the theatre, despite its destruction, is still part of the capital of the business.]

G FOR THE FINANCE (No. 2) ACT, 1939, s. 13 (3), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 1195, 1196.]

H APPEAL by the Crown against a decision of the General Commissioners for the Stockport Division who allowed the appeal of the respondent company from an assessment to excess profits tax under the Finance (No. 2) Act, 1939, Pt. III.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), and Reginald P. Hills for the appellants, the Inland Revenue Commissioners.

F. Heyworth Talbot for the respondent company.

MACNAGHTEN, J.: The respondents were incorporated under the Companies Act, 1929, on June 4, 1934, with the object (*inter alia*) of carrying on the business of theatre proprietors, and at all times since that date they have carried on that business. One of the theatres belonging to the respondents was a theatre in

Hull called the Alexandria Theatre; they bought it in April, 1937, at the total price of £12,280. On May 7, 1941, the Alexandria Theatre was destroyed by enemy action.

The Finance (No. 2) Act, 1939, s. 13 (3), provides that, in the case of a business commenced on or before July 1, 1936, the standard profits of the business for a full year are to be ascertained by reference to the profits of the standard period as thereafter defined, subject to the following proviso:

... Provided that if the average amount of the capital employed in the trade or business in the chargeable accounting period is greater or less than the average amount of the capital employed therein in the standard period, the standard profits for a full year shall, in relation to that chargeable accounting period, be increased, or, as the case may be, decreased, by the statutory percentage of the increase or decrease in the average amount of the capital employed in the trade or business.

The question in issue on this appeal is whether or not the average amount of the capital employed in the business of the respondents during the chargeable accounting period ending May 28, 1941, was by reason of the destruction of the Alexandria Theatre on May 7, 1941, less than the average amount of the capital employed therein during the standard period. The Finance (No. 2) Act, 1939, s. 14 (2), provides:

The average amount of the capital employed in a trade or business in the standard period or any chargeable accounting period shall be computed in accordance with Pt. II of Sched. VII to this Act.

Pt. II of that Schedule provides that the amount of the capital employed in a trade or business is to be taken, in the case of an asset acquired by purchase on or after the commencement of the trade or business, to be the price at which it was acquired.

The contention put forward by the Crown was that, as from the date of the destruction of the Alexandria Theatre its cost should be excluded from the computation of the capital of the business. The General Commissioners rejected this contention and stated their decision in these terms:

We, the Commissioners, found that on the evidence submitted the damaged theatre constituted an asset which must be included in the capital computation of the respondents for excess profits tax purposes as if such damage had not arisen.

Although whatever remains of the building cannot be used as a theatre, the ground on which the theatre stood still belongs to the respondents, and is an asset of their business, and apart from its site value this asset has the further value that the destruction of the building gives rise to a claim under the War Damage Act, 1941. The case states that it is expected that a "value payment" under sect. 3 of that Act of not less than £12,280 will in due course be allowed. The Attorney-General urged that, even if the bare site on which the theatre stood should be regarded as an asset of the business, it could not, after the destruction of the theatre, be regarded as an asset "employed in the business."

Sched. VII, Pt. II, para. 1 (1), of the Act divides the "capital employed in a trade or business" into three classes: (a) assets acquired by purchase on or after the commencement of the trade or business; (b) debts due to the person carrying on the trade or business; and (c) other assets acquired otherwise than by purchase. A debt due to a person carrying on a trade or business is no doubt an "asset" of the trade or business, but it cannot in ordinary parlance be described as "employed" in the trade or business before it has been paid. It seems, therefore, that the word "employed" as used in the Finance (No. 2) Act, 1939, s. 13 (3), in connection with the word "capital" is not used in a very strict sense, and that the expression "capital employed in a trade or business" has much the same meaning as "the capital of a trade or business," and must be so construed.

If the Alexandria Theatre had not been destroyed and during the whole of the chargeable accounting period the respondents had thought fit to keep it closed, would it have ceased for that period to be an asset "employed" in their business? If the proprietors of a manufacturing business carried on in two or more factories thought fit during the war, for some reason such as the shortage of raw materials or restriction of demand for their products, to close one of their factories, would that factory cease to be an asset "employed" in the business, or, if a branch of a bank or a multiple shop company be closed, does the closed branch or shop

cease to be capital "employed" in the business? It seems to me that the question must be answered in the negative in each of these cases. The supposed cases differ from the present case, since in those cases the asset in question remains intact during the chargeable accounting period, whereas in the present case the Alexandria Theatre was during that period destroyed by enemy action; but, if the standard profits suffer no reduction by reason of the fact that the person carrying on the trade or business does not choose to use a particular asset, it would seem unreasonable to reduce the standard profits because the asset has become unusable owing to enemy action. Moreover, in the present case, the respondents remain liable for all expenses in connection with their ownership of the destroyed theatre, such as fencing and watching, and such expenses would, of course, in the assessment of the profits of the business for income tax purposes, be allowed as expenses of the business, and, if any income were received from letting the site as a parking place or as a place for static water, the receipts from such sources would be included in the income of the business. In these circumstances, I think that it may fairly be said that the respondents do in fact "employ" this asset in their business notwithstanding the destruction of the theatre. In my opinion, therefore, the General Commissioners were right in deciding that the site of the Alexandria Theatre must be included for the purposes of the excess profits tax assessment as part of the capital employed in the business.

I am disposed to think that counsel for the respondents is right in his contention that, since this asset must be included as part of the "capital employed in the business," it must be taken for that purpose as of the value of £12,280 under para. 1 (1) of Pt. II of Sched. VII to the Act; but, if in consequence of the destruction of the theatre, the site is to be regarded as an asset acquired "otherwise than by purchase," namely, an asset acquired by the destruction of the theatre, then the decision of the General Commissioners as to its value is a decision on a question of fact and no appeal can be brought against it. The fact that the respondents have a claim under the War Damage Act, 1941, affords ample evidence to support their decision as to its value.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Gregory, Rowcliffe & Co.* (for the respondents).

[*Reported by R. L. ZIAR, Esq., Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS v. ASH BROTHERS AND HEATON, LTD.

[KING'S BENCH DIVISION (Macnaghten, J.), **July 19, 20, 1943.**]

Revenue—Excess profits tax—Director-controlled company—Whether directors' remuneration may be deducted in chargeable accounting period and not in standard period—Finance (No. 2) Act, 1939 (c. 109), Sched. VII, Pt. I, para. 10 (1), (2).

For the purposes of excess profits tax, the Finance (No. 2) Act, 1939, Sched. VII, Pt. I, para. 10 (1), as amended by the Finance Act, 1940, s. 33 (5), provides that in the case of a company limited by shares the directors whereof have a controlling interest, no deduction in respect of directors' remuneration shall be made in the computation of the profits of the company. Para. 10 (2) provides that "directors' remuneration" does not include the remuneration of any director who (a) is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity and (b) is not the beneficial owner of or able to control more than 5 per cent. of the ordinary share capital of the company. The respondent company was a company limited by shares the directors whereof had a controlling interest and F. was a director who was required to devote substantially the whole of his time to the service of the company in a managerial capacity. In the standard period F. was the beneficial owner of more than 5 per cent. of the ordinary share capital of the company and, accordingly, no deduction was made in respect of his remuneration in com-

puting the profits for that period. Subsequently, however, F. sold these shares and in the chargeable accounting period held no shares of the company. The company claimed that in computing the profits for the chargeable accounting period F.'s remuneration should be deducted. The Crown contended that F.'s remuneration should be deducted in both periods or not deducted in either:—

HELD: the company was entitled to include F.'s remuneration in computing the profits in the standard period and to deduct the remuneration in computing the profits in the chargeable accounting period. A

[EDITORIAL NOTE.] In making a comparison it is really essential that like should be compared with like and the result in this case cannot be viewed as a happy one. However, it is clear that the duty of the court is to construe the legislation and not to amend it and the only possible construction is adopted, though, as stated, the result is not a happy one.

FOR THE FINANCE (No. 2) ACT, 1939, Sched. VII, Pt. I, para. 10 (1), (2), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 1220, 1221.] B

APPEAL by the Crown against a decision of the Special Commissioners reducing an assessment to excess profits tax made on the respondent company. The facts are fully set out in the judgment.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), J. H. Stamp and Reginald P. Hills for the appellants. C

Frederick Grant, K.C., for the respondent company.

MACNAGHTEN, J.: This is an appeal by the Crown against an assessment for the purposes of the excess profits tax on the respondents, Ash Bros. & Heaton, Ltd., for the chargeable accounting period July 1, 1939, to June 30, 1940.

It is provided by the Finance (No. 2) Act, 1939, s. 14 (1), that for the purposes of the excess profits tax the profits of a trade or business in the standard period and in any chargeable accounting period shall be computed separately and shall be so computed on income tax principles as adapted in accordance with the provisions of Pt. I of Sched. VII to that Act. According to income tax principles the remuneration paid to the directors of a trading company is treated as a business expense and is deducted from its income in order to ascertain the full balance of the profits or gains to be assessed to the income tax. However, the Finance (No. 2) Act, 1939, Sched. VII, Pt. I, para. 10 (1), as amended by the Finance Act, 1940, s. 33 (5), provides that in the case of a company whose directors have a controlling interest therein no deduction shall be made in respect of "directors' remuneration"; but it then goes on to restrict the meaning of the expression "directors' remuneration" by providing that it does not include the remuneration of a director who (i) is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity, and (ii) is not the beneficial owner of or able to control more than 5 per cent. of the ordinary share capital of the company. The effect of this paragraph is, therefore, that in the case of a director-controlled company limited by shares no deduction is to be made in respect of the remuneration of any of the directors of the company unless he is a director who (i) is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity, or (ii) is not the beneficial owner of or able to control more than 5 per cent. of the ordinary share capital of the company. D E F G

At all material times the respondents, who are registered under the Companies Act, 1929, as a company limited by shares, were a director-controlled company within the meaning of the Finance (No. 2) Act, 1939, Sched. VII, Pt. I, para. 10 (1), and the ordinary share capital was £15,700 divided into 3,140 shares of £5 each.

In both the standard period and the chargeable accounting period W. H. Fletcher was one of the directors of the company. He was required to devote substantially the whole of his time to the service of the company in a managerial capacity. In the standard period he was the beneficial owner of 440 ordinary shares, or more than 5 per cent. of the ordinary share capital. Accordingly in the computation of the profits of the company in the standard period no deduction was made in respect of his remuneration, which amounted to £720 per annum. In the chargeable accounting period Fletcher owned none of the ordinary shares of the company: he had sold his 440 shares on April 4, 1939. Accord-

ingly the Special Commissioners have held that for the purpose of computing the profits of the company in the chargeable accounting period the remuneration of Fletcher, which was then £760 per annum, ought to be deducted. The result is that while the profits in the standard period are increased by the amount of Fletcher's remuneration, the profits in the chargeable accounting period are diminished by the amount of his remuneration, and the Revenue is thereby at a disadvantage. Against the decision of the Special Commissioners the Crown enters this appeal.

The Solicitor-General contended that since the excess profits tax is the amount whereby the profits in a chargeable accounting period exceed the standard profits, the remuneration paid to Fletcher ought to be treated in the same way in both the standard period and the chargeable accounting period; it ought to be deducted in both periods or not deducted in either. It was necessary to do this, as the Solicitor-General said, in order to compare like with like.

However, in my opinion, the provisions of Sched. VII, Pt. I, para. 10 (1) are too plain to admit of any such argument. Those provisions plainly require that in computing the profits for the standard period no deduction is to be made in respect of Fletcher's remuneration. After Fletcher had sold all his shares the provisions of that paragraph ceased to have any application to his remuneration, and, therefore, in accordance with income tax principles in computing the profits of the company in the chargeable accounting period his remuneration must be deducted.

The appeal will, therefore, be dismissed with costs.

I ought to add that it is not suggested that Fletcher got rid of his shares with a view to bringing about this result. No such suggestion could indeed be made, since he sold his shares on April 4, 1939, 5 months before the war with Germany began and 6 months before the Finance (No. 2) Act, 1939, received the Royal Assent.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Allen & Overy* (for the respondent company).

[*Reported by R. L. ZIAR, Esq., Barrister-at-Law.*]

J. BIBBY & SONS, LTD. v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Macnaghten, J.), **July 21, 22, 23, 28, 1943.**]

Revenue—Excess profits tax—Controlling interest in company—Directors holding shares as trustees of settlement—Directors with contingent beneficial interest in shares—Finance (No. 2) Act, 1939 (c. 109), s. 13 (3), (9).

For the purposes of excess profits tax, where the average amount of the capital employed in the business in any chargeable accounting period is greater than the average amount of capital employed therein in the standard period and the directors have a "controlling interest" in a company within the meaning of the Finance (No. 2) Act, 1939, s. 13 (9), the standard profits may be increased by 10 per cent., but only by 8 per cent. where they have no such interest. The directors of the appellant company contended that they had a controlling interest on the ground that they were entitled to include among the shares held by them certain shares vested in three of them as trustees of a marriage settlement. They not only held these shares as trustees but had a contingent beneficial interest in them on the death of the present beneficiary without issue. The present beneficiary, who was married in 1916, had no issue but her husband was still living:—

HELD: as trustees the directors had no interest in the shares and as contingent beneficiaries they had no control over the company and, therefore, they had no controlling interest in the company within the meaning of the Finance (No. 2) Act, 1939, s. 13 (9).

[EDITORIAL NOTE.] The facts here are probably fairly common among private companies, since many of the directors will be the holders of shares as trustees of settle-

ments. It will be seen that for the purpose of ascertaining whether they have a controlling interest in the company shares held as trustees cannot be included, and this is so where they also have a contingent beneficial interest in the shares.

FOR THE FINANCE (No. 2) ACT, 1939, s. 13 (9), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1197.]

Case referred to :

- (1) *British American Tobacco Co. v. Inland Revenue Comrs.*, [1943] A.C. 335 ; [1943] 1 All E.R. 13 ; Digest Supp.

APPEAL by the taxpayer from a decision of the Special Commissioners confirming an additional assessment to excess profits tax for the chargeable accounting period Apr.-Dec., 1939. The facts are fully stated in the judgment.

J. Millard Tucker, K.C., and *J. S. Scrimgeour* for the appellants.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), *J. H. Stamp* and *Reginald P. Hills* for the Inland Revenue Commissioners.

MACNAGHTEN, J.: The question at issue on this appeal is whether the directors of the company have "a controlling interest therein" within the meaning of the Finance (No. 2) Act, 1939, s. 13 (9). If the directors have such an interest, the company is entitled, under sect. 13 (3) and (9) of the Act, to an increase in its "standard profits" of an amount equal to 10 per cent. on the increased capital employed in the chargeable accounting period as compared with the capital employed in the standard period. If, on the other hand, the directors have no such interest in the company, the increase in the standard profits would be 8 per cent. instead of 10 per cent. It is, therefore, to the advantage of the company to establish that the directors have a controlling interest in it.

The capital of the company was £1,250,000, divided into 750,000 5 per cent. cumulative preference shares and 500,000 ordinary shares of £1 each. All the shares have been issued, and they are fully paid. The holders of the preference shares have no right of voting at any general meeting of the company; the registered holders of the ordinary shares alone have that right. Upon a show of hands, every holder of ordinary shares present in person at the meeting has one vote; but upon a poll he has one vote for every ordinary share held by him.

There are eight directors of the company, who are all members of the Bibby family. Between them they hold in their own right 209,332 ordinary shares, which is less than 50 per cent. of the ordinary share capital. Three of the directors, John Pye Bibby, James Edward Bibby and Henry Percy Bibby, are the trustees of the marriage settlement of their sister, Mrs. Sharples; and, as such trustees, they are the registered joint holders of 57,500 ordinary shares. Those shares and the 209,332 shares which the directors hold in their own right, added together, are more than 50 per cent. of the ordinary share capital; and that would give them a "controlling interest" in the company.

The question, therefore, arises: have the three directors, who are the joint holders of the 57,500 ordinary shares, an interest in the company by reason of those shares? A bare trustee of a share in the capital of a company, it is plain, has no interest in the share but, under the provisions of Mrs. Sharples' marriage settlement, the trust fund will become divisible among her brothers, the trustees, in the event of her death without issue. The trustees have, therefore, a contingent interest in the trust fund and in the 57,500 ordinary shares of the company, which form part of it. Mrs. Sharples married her husband in 1916 and there is as yet no issue of the marriage.

Counsel for the appellants submits that the three trustees, having this contingent interest in the shares held by them on the trusts of the settlement, have "an interest in the company," within the meaning of that expression as used in the Finance (No. 2) Act, 1939, s. 13 (9). The word "interest" as used in that section is a word of wide meaning; but it is qualified by the word "controlling." The interest in the company must be a "controlling" interest; and that, it seems to me, means an interest which gives control. The interest may be direct or it may be indirect, as in *British American Tobacco Co. v. Inland Revenue Comrs.* (1); but it is necessary that the directors between them should, by reason of their interest in the company, have control over it. As contingent beneficiaries under the settlement, the three directors have a contingent interest in 57,500 shares; but that contingent interest gives them no

control of the company at all. The answer to the argument for the appellants is, I think, this: as trustees they have no interest in the shares; and as beneficiaries they have no "control" over the company; and, therefore, in order to ascertain whether the directors of the company have a "controlling interest" therein, the shares held by them as trustees must be excluded. That was the decision of the Special Commissioners; and I think it was right. The appeal must be dismissed with costs.

A *Appeal dismissed with costs.*

Solicitors: *Layton & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[Reported by R. L. ZIAR, Esq., Barrister-at-Law.]

B WESTON v. HEARN (INSPECTOR OF TAXES).
CARMOUCHE v. HEARN (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Macnaghten, J.), July 23, 1943.]

Income Tax—Bonuses paid to employees after 25 years' service—Whether gifts or remuneration—Income Tax Act, 1918 (c. 40), Sched. E, r. 1.

C After 25 years' service in the same company, the appellants were given bonuses by the company. The question in issue was whether the bonuses were personal gifts or emoluments for services rendered and subject to income tax:—

HELD: the bonuses were given for past services and were subject to tax.

[EDITORIAL NOTE. The wording of Sched. E, r. 1, is very wide and seems apt to include every receipt by an employee from his employers. Remuneration as such might possibly be restricted to such payments as an employer was under an obligation to make and to exclude gratuitous payments made upon exceptional occasions. The words of the rule, however, are clearly much wider than remuneration and, however illogical it may be to treat such gifts made on isolated occasions as income payments, it seems clear that they are within the words of the rule.]

AS TO VOLUNTARY PAYMENTS TO HOLDER OF OFFICE, see HALSBURY, Hailsham Edn., Vol. 17, pp. 213-216, paras. 435, 436; and FOR CASES, see DIGEST, Vol. 28, pp. 85-88, Nos. 490-507.]

E Cases referred to:

* (1) *Reed v. Seymour*, [1926] 1 K.B. 588; *reversd.* [1927] 1 K.B. 90; *restored sub nom. Seymour v. Reed*, [1927] A.C. 554; DIGEST, Supp., 96 L.J.K.B. 839; 137 L.T. 312; 11 Tax Cas. 625.

* (2) *Cowan v. Seymour*, [1920] 1 K.B. 500; 28 Digest 85, 490; 89 L.J.K.B. 459; 122 L.T. 465; 7 Tax Cas. 372.

F Two APPEALS by taxpayers against decisions of the Commissioners on Public Offices or Employments of Profit in the City of London confirming assessments to income tax made upon each of the appellants under the Income Tax Act, 1918, Sched. E. Both appeals raised the same point and were dealt with in the same judgment. The facts are fully stated in the judgment.

Frederick Grant, K.C., for the appellants.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), and *Reginald P. Hills* for the respondent.

G MACNAGHTEN, J.: These are appeals against decisions of the Commissioners on Public Offices or Employments of Profit in the City of London confirming assessments to income tax made upon each of the appellants under the Income Tax Act, 1918, Sched. E, for the year ending Apr. 5, 1942. The assessment in the case of the appellant Weston was £1,037; in the case of Carmouche it was £331. Both the appellants are in the employment of the well-known bankers, Lazard Bros. & Co. During the year ended Apr. 5, 1941, each of them completed 25 years' service in that employment and Lazard Bros. & Co. then presented to Weston £250 and to Carmouche 67 national savings certificates, which cost £50 5s. Weston's assessment of £1,037 includes the £250 so received by him and Carmouche's assessment of £331 includes £50 in respect of the 67 national savings certificates received by her. These appeals are against the inclusion of those sums in their assessments.

H By the Income Tax Act, 1918, Rules applicable to Sched. E, r. 1, it is provided that:

Tax under this Schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this Schedule, or to whom any annuity, pension, or stipend, as described in this Schedule, is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever, therefrom for the year of assessment.

The question at issue in this appeal is whether these sums, £250 and £50, form part of the profits received by the appellants from their employment.

Mr. Tyser, the managing director of Lazard Bros. & Co., gave evidence before the commissioners; and I think it must be taken that the commissioners accepted his evidence as correct. In the case of Weston, he said that the payment of £250 was:

... voted at a meeting of the managing directors; that it was included as an expense in arriving at the profits of the company; that the company had often voted similar payments; and such payments were looked upon and intended as gifts.

In the case of Carmouche, Tyser said:

... that the company made a practice of giving its employees a payment on completion of 25 years' service with the company.

In her case also the £50 5s., the cost of the 67 national savings certificates, was included as a business expense in the company's accounts.

Counsel for the appellants contended that the sums in question were gifts of a personal nature and in no way part of the emoluments of the appellants. The phrase "personal gift" comes, it seems, from what was said by ROWLATT, J., in *Reed v. Seymour* (1). At p. 593 ROWLATT, J., referred to observations made by YOUNGER, L.J., in *Cowan v. Seymour* (2), about gifts of this description, and then said:

But is it in the nature of a personal gift, or is it remuneration?

Using the words "personal gift" in contradistinction to the word "remuneration." If it is remuneration for the services of the employee, then it is taxable; if it is not remuneration for his services, it is not taxable. Therefore, to say it was intended as a "personal gift" is merely to say it was not intended to be remuneration. But if the payment is in fact remuneration for services rendered, the employer cannot relieve the employee from the obligation to pay income tax by saying: "I do not intend it to be remuneration."

The commissioners dismissed the appeals; they held that the sums in question were in fact remuneration for services rendered. They certainly were gifts in the sense that Lazard Bros. & Co. were under no obligation to pay the £250 to Weston or to give the national savings certificates to Carmouche. They were gratuities by way of bonus after 25 years' continuous service; and I cannot see any ground for reversing the decision of the commissioners.

The appeals fail and must be dismissed with costs.

Appeals dismissed with costs.

Solicitors: *Linklaters & Paines* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by R. L. ZIAR, Esq., Barrister-at-Law.*]

STANLEY v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Macnaghten, J.), **July 26, 28, 1943.**]

Income Tax—Sur-tax—Infant tenant for life—Vested life interest—Accumulation of income during minority—Whether to be treated as income of infant—Trustee Act, 1925 (c. 19), s. 31 (2).

Upon the death of his father on Aug. 22, 1931, the appellant, who was at that time an infant, became entitled to a vested life interest in certain estates. Between Aug. 22, 1931, and Aug. 23, 1936, when the appellant came of age, the trustees accumulated, in accordance with the Trustee Act, 1925, s. 31 (2), so much of the income as was not expended on the maintenance of the appellant. Additional assessments to sur-tax were made upon the appellant in respect of the income of the settled estates arising during his infancy. For the appellant it

was contended that the effect of the Trustee Act, 1925, s. 31 (2), was that, during the minority of an infant with a vested interest, he was not to be regarded as entitled to the income of the property but merely as the person who was entitled to the income in the event of his attaining 21 years of age :—

HELD : during his minority and, unless and until he died under the age of 21, the income of the settled estates was the income of the appellant as tenant for life, and was subject to tax.

[EDITORIAL NOTE. Where an infant is entitled to a life interest, the trustees often apply some part of the income for his maintenance and education and accumulate the surplus income. Before 1926, where the life interest was a vested one and the infant died before attaining his majority, the accumulations passed to his next of kin. The Trustee Act, 1925, s. 31 (2), however, altered the law in this respect and the accumulations in such a case would become an accretion to the capital of the property. In this case the infant attained full age and the accumulations were paid over to him. It was argued that the alteration of the law in 1925 had the effect in such circumstances of changing a vested life interest into a contingent life interest. This argument is rejected, and it is held that when the accumulations are transferred to the life tenant on attaining full age he receives them as his income and they are subject to income tax as such.

AS TO INFANT'S VESTED INTEREST ACCUMULATED DURING MINORITY, see HALSBURY, Halsham Edn., Vol. 17, pp. 272, 273, para. 544 ; and FOR CASES, see DIGEST, Supp., Income Tax, No. 691a.]

APPEAL by the taxpayer by way of case stated from a decision of the Special Commissioners confirming additional assessments to sur-tax.

J. S. Scrimgeour for the appellant

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), J. H. Stamp and Reginald P. Hills for the respondents.

MACNAGHTEN, J. : This is an appeal by the Hon. Lyulph Henry Victor Owen Stanley against four additional assessments to sur-tax for the years ended Apr. 5, 1934, 1935, 1936 and 1937, in the sums of £3,500, £4,000, £4,000, and £2,750 respectively made upon him under the Income Tax Acts. The appellant is the second son of the fifth Baron Stanley of Alderley, who died on Aug. 22, 1931. On the death of his father the appellant became tenant for life of large estates situate in the counties of Anglesey and Flint. He took a vested life interest in those estates. At that date, Aug. 22, 1931, the appellant was under age. He attained his majority on Aug. 23, 1936. During his infancy the income of the estates was received by his trustees ; and so much of the income as was not expended upon his maintenance was accumulated by them. Upon attaining his majority the appellant became entitled, subject to the Trustee Act, 1925, s. 31 (2), which came into force on Jan. 1, 1926, to the accumulations of the income absolutely. The four additional assessments to sur-tax, which are the subject of this appeal, were made on the footing that during the minority of the appellant the income of the settled estates belonged to him and must be treated as his income for the purposes of income tax and sur-tax. This would undoubtedly have been so before the Trustee Act, 1925, came into force. If the appellant had died during his minority the accumulations of income would have passed to his next of kin under an intestacy, but the Trustee Act, 1925, effected a change of the law in that respect. By sect. 31 (1), power is given to trustees :

Where any property is held by trustees in trust for any person or any interest whatsoever, whether vested or contingent . . .

to apply the income for his maintenance and benefit. Subsect. (2) provides :

During the infancy of any such person . . . the trustees shall accumulate all the residue of [the] income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorised investments and shall hold those accumulations [in the event of the infant not attaining the age of 21 years] . . . as an accretion to the capital of the property from which the accumulations arose, and as one fund with such capital for all purposes, and so that, if such property is settled land, such accumulations shall be held upon the same trusts as if the same were capital money arising therefrom.

Counsel for the appellant contended that the effect of these provisions is that the vested interest of a minor is assimilated to the contingent interest of a minor,

and, therefore, during the minority of an infant with a vested interest, he is no longer to be regarded as entitled to the income of the property, but he is to be regarded as a person who is only entitled to the income of the property in the event of his attaining the age of 21.

For the Crown it was argued that the statute does not purport to make any change in the law; that the tenant for life of settled estates who is under age remains, notwithstanding the Trustee Act, 1925, s. 31, the owner of the estates, and the income of the property belongs to him. All that the Act has done is to provide that, in the case of an infant with a vested interest in the property dying under age, the accumulations of the income should go as an accretion to the capital of the trust, instead of going, as they did before Jan. 1, 1926, to the next of kin of the infant under an intestacy.

In my opinion, the contention of the Crown is correct. I think the appellant during his minority was entitled, as tenant for life of the settled estates, to the income of those estates. Although, if he had died before attaining his majority, the accumulations would have been added to the capital of the trust, nevertheless, they were, during his minority, unless and until he died under the age of 21, still his property, and, therefore, could properly be treated as his income for the purposes of the Income Tax Acts.

The appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Maples, Teesdale & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[Reported by R. L. ZIAR, ESQ., Barrister-at-Law.]

HERING v. HERING AND WILSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pilcher, J.), July 28, 1943.]

Divorce—Maintenance—Order for maintenance of children of the marriage—Order made against guilty wife—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 193 (1).

Under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 193 (1), upon the application of the husband in a divorce suit, a guilty wife who is possessed of a separate estate may, in an appropriate case, be ordered to pay maintenance for the benefit of the children of the marriage.

[**EDITORIAL NOTE.** It is said that there is no record of any such order having been made against a guilty wife. The words of the subsection are very wide and in no way prohibit an order against a wife and similar provisions in special cases provide expressly for such a payment by a wife. It is, therefore, held that such an order can, in appropriate circumstances, be made against a guilty wife.

AS TO ORDERS FOR MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, p. 755, para. 1190; and FOR CASES, see DIGEST, Vol. 27, pp. 536, 537, Nos. 5820-5827.]

APPLICATION to vary registrar's report on maintenance. The facts are fully set out in the judgment.

W. A. L. Raeburn for the applicant, the husband.

M. Morgan Gibbon for the wife.

PILCHER, J.: This is an appeal from a case which came before the registrar on an application by the husband, the successful petitioner in a divorce proceeding, that his wife should be ordered to pay maintenance in respect of the three children of the marriage. The registrar ordered that the wife should pay £125 per annum, less tax, by equal monthly instalments, towards the maintenance of the children. The registrar drew attention to the fact that, so far as he was aware (and, I fancy, so far as a number of practitioners in this court are aware), no order had ever been made under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 193, against a wife, in respect of the maintenance of her children, save when such order had been made by consent.

The appeal in this case is by the husband, who contends that the sum of £125 per annum, less tax, which the wife has been ordered to pay, is insufficient, and counsel for the husband suggests that a more appropriate sum would be £250. I gather that counsel for the wife does not actually oppose an order that the wife shall pay the sum of £125 per annum, and does not desire to argue, one

way or the other, whether or not it is competent to the registrar or the court to make an order against a guilty wife for the maintenance of her children under sect. 193. The fact that counsel does not desire to argue the point to which the registrar calls attention does not absolve me, of course, from giving it careful consideration.

The words of sect. 193 (1), which are very wide, are as follows :

A such provision as appears just with respect to the . . . maintenance . . . of the children . . .

of the marriage which is the subject of the proceedings. Orders under the section are, of course, made almost daily against husbands, and it is remarkable that no order has apparently ever been made against a guilty wife.

B The words of the section are, as I have pointed out, very wide, and, where the innocent husband is destitute and the guilty wife is possessed of means, it is, in my view, just that the wife should contribute towards the maintenance of her children. Sect. 191 (1) provides in terms that the court may order a guilty wife to make such settlement as may appear reasonable for the benefit of her innocent husband or the children of the marriage. Sect. 191 (2) also provides in terms that, when the husband petitions for restitution of conjugal rights and the wife is in receipt of profits of trade or earnings, she may be ordered to make periodical
C payments for the benefit of the children of the marriage. Sect. 193 (3) (introduced by the Matrimonial Causes Act, 1937, s. 10 (4)), provides that an innocent wife who petitions on the ground of her husband's insanity may be ordered to make secured payments for the benefit of the children of the marriage during their minority.

D In this state of affairs, whilst it may be surprising that there is no record of a wife having been ordered to pay maintenance under sect. 193 (1), the surrounding sections of the Act to which I have referred certainly do not suggest that the words of sect. 193 (1) should be given a narrow interpretation—indeed, they rather point to the conclusion that the legislature intended that a guilty wife who is possessed of separate estate should, in an appropriate case, be ordered to pay maintenance for the benefit of the children of the marriage and I accordingly hold that the registrar was right in ordering the respondent to pay maintenance in the present case. Having carefully gone into the figures I am, moreover
E of opinion that the sum of £125 per annum which the registrar has ordered the wife to pay is, in all the circumstances, a just and proper amount. I accordingly confirm the registrar's report.

Registrar's report confirmed. No order as to costs.

Solicitors : *Swann, Hardman & Co.* (for the husband applicant) ; *Lawrance, Messer & Co.* (for the wife).

F [*Reported by D. ARMSTEAD FAIRWEATHER, ESQ., Barrister-at-Law.*]

SUN LIFE ASSURANCE CO. OF CANADA v. JERVIS.

[COURT OF APPEAL (Scott, Luxmoore and Goddard, L.JJ.), **July 5, 6, 7, 29, 1943.**]

G *Insurance—Life insurance—Formation of contract—Illustration stating terms of insurance issued with proposal form—Policy subsequently issued in different terms—Rectification of policy.*

H The defendant insurance company sent to the plaintiff an application form for a with-profits endowment insurance together with a document entitled "Illustration" designed to show the plaintiff the amount payable under the policy on maturity. This Illustration was stated to be an illustration for the plaintiff and the figures were filled in by the agent of the company being the figures then appropriate to the suggested insurance. At the head were the words "Assets, £100,470,967. Surplus, £11,186,067 (at December, 1928). Income of £65 a Year for Life from Age 60 or a Cash Payment of £750." The document also contained the following : "Should you die during the 12 years, the company guarantee to pay the sum assured of £500 together with all dividends allotted to the policy prior to date of death, providing they have not previously been withdrawn

... Cash dividends are allotted to the Policy each year on an increasing scale, and may be applied either to reduce the deposit for the following year or to purchase additions to the sum assured . . . In addition to the annual dividends mentioned above the amount payable should death occur after the tenth year will be further increased by a special dividend based upon the number of years the policy has been in force . . . Should you live until the end of the 12 years, the company will pay you in cash the sum assured of £500, the dividends shown above which, if not previously withdrawn, will amount to annual dividends £150, special maturity dividend £100 making a total cash payment of £750 as against the total of your net annual deposits," i.e., premiums, "of £499 giving you a profit on the policy of £251." There was added in small print: "The examples given are based on the assumption that the 1929 dividend scale is maintained throughout the life of the policy." The wording of the application form was such that it could be completed only by a person who had read this Illustration. The policy subsequently issued was in terms less favourable to the assured. The plaintiff contended that the Illustration and application amounted to a contract to pay the sums stated in the Illustration, but the defendants contended that the Illustration was merely a representation which formed no part of the contract between the parties and that the whole contract was contained in the policy. They also contended that the word "dividends" implied a benefit which was not available until a dividend was declared and that the Illustration itself stated that the payments were dependent upon the profits being such that dividends could be maintained at the rate prevailing when the Illustration was prepared. In fact, profits fell off very considerably and a much lower dividend was declared during the years the policy was running:—

HELD [LUXMOORE, L.J., *dissenting*]: (i) the application form applied for the particular insurance set out in the Illustration and upon the acceptance by the company of the application, these documents formed the contract between the parties.

(ii) the assured was entitled to assume that the dividends were payable out of the surplus and were not necessarily payable only out of profits made during the currency of the policy.

(iii) there was a definite promise to pay the special maturity dividend of £100 irrespective of what profits were made.

(iv) the policy should be rectified to give effect to the contract contained in the Illustration and the application form.

[EDITORIAL NOTE.] Generally speaking, documents issued by insurers prior to the execution of the policy, unless incorporated by reference, form no part of the contract. Documents for which the insurers are responsible, however, may be taken into consideration, in cases of ambiguity, as indicating the real contract made between the parties. The salient feature of the present case appears to be that the Illustration was specially drawn up by an agent of the insurers to show the particular assured what benefits he would receive under the insurance, and, having regard to the wording of the document, the majority of the Court of Appeal have held that this document contains the real terms of the contract and, so far as the policy is inconsistent therewith, it must be rectified to conform with those terms. LUXMOORE, L.J., in a dissenting judgment, has come to the conclusion that the Illustration occupies a position no different from any other prospectus issued by the insurers and could not have formed part of the contract unless incorporated by express reference. He is also of opinion that, in so far as the illustration uses the word "guarantee," that word is not used with reference to the special maturity dividend. A great part of the argument in the case relied upon the proposition that dividends are payable only out of profits, but, as pointed out by GODDARD, L.J., in the case of an insurance policy, dividends, so called, might be paid out of a fund specially set aside to meet them and it is not necessarily implied that they must be payable only out of profits.

AS TO INCORPORATION OF DOCUMENTS, see HALSBURY, *Hailsham Edn.*, Vol. 18, p. 426, para. 612; and FOR CASES, see DIGEST, Vol. 29, pp. 344, 345, Nos. 2779, 2780.]

Cases referred to:

* (1) *British Equitable Assurance Co., Ltd. v. Bailey*, [1906] A.C. 35; 17 Digest 342, 1537; 75 L.J.Ch. 73; 94 L.T. 1.

(2) *Henry v. Great Northern Ry. Co.* (1857), 1 De G. & J. 606; 10 Digest 1156, 8191; 4 K. & J. 1; 27 L.J.Ch. 1; 30 L.T.O.S. 141.

APPEAL by the insurance company and cross-appeal by the plaintiff from a judgment of ATKINSON, J., delivered on Dec. 11, 1942, in an action on a contract of life insurance between the plaintiff, a customs clerk at Grimsby, and the defendant company, completed as a contract by a letter of acceptance from the company dated Nov. 5, 1929. The contract was for a £500 endowment policy (with profits) payable at latest on the expiration of 12 years from Nov. 2, 1929, the date when the plaintiff signed the application form, and forwarded the first year's premium. The plaintiff survived the 12 year period for which the policy was issued and on July 30, 1942, issued a writ claiming £250 in addition to the £500, the nominal amount of the policy. The £250 so claimed was composed of two items : the first was £150 as payable in respect of annual dividends ; and the second was £100 as payable in respect of special maturity dividend. The policy was executed in Montreal on Dec. 2, 1929. Its terms differed, although the plaintiff did not realise it, from the terms of the antecedent contract.

- B** The contention for the company was that the additional amount payable on maturity was only £79 16s. for annual dividends and that no payment was due in respect of special maturity dividend. ATKINSON, J., accepted the company's view that £79 16s. was payable in respect of the annual dividends, and also held that £55 was payable in respect of the special maturity dividend and gave judgment accordingly. He also ordered rectification of the policy in conformity with his judgment. The other relevant facts are stated in the judgments.

- C** The Illustration issued by the company was in the following terms :—

SUN LIFE ASSURANCE COMPANY OF CANADA

Government Supervised. Assets—£100,470,967 (At December, 1928). Surplus—£11,186,067 (At December, 1928).

INCOME OF £65 A YEAR FOR LIFE FROM AGE 60, OR A CASH PAYMENT OF £750 0. 0.

- D** Should you desire a larger or smaller Income or Cash Payment, the Deposit would be in exact proportion to that undernoted.

ASSURANCE—Should you die during the 12 years, the Company guarantee :—To pay the Sum Assured of £500 0 0
Together with all Dividends allotted to the Policy prior to date of death, providing they have not previously been withdrawn.

- E** ACCIDENT BENEFIT—Should you die by Accident before reaching age 60, and within 90 days of the Accident, the Company guarantee to pay, if the policy be then in force :—
Double the Sum Assured, viz. : £1,000 0 0
Together with Dividends. Additional Deposit required for this Benefit 14s. 0d. per annum.

DISABILITY BENEFIT—Should you become Totally and Permanently Disabled prior to age 60, or the maturity of the Policy, the Company guarantee :—

- F** 1. To pay you an income of £60 per annum in monthly instalments of £5 each.
2. To make all Deposits falling due during Disablement.
3. To pay the full sum Assured and Dividends at death, or at the end of the years, without any deduction. Additional Deposit required for this Benefit £1 18s. 0d. per annum.

DEPOSIT—Annual Deposit for 12 years £46 5 6
Less Income Tax abatement at 2s. in the £ £4 12 6

- G** Net Annual Deposit £41 13 0

Deposits may be made half-yearly or quarterly with the option of reverting to yearly deposits at any future date.

PROFITS—Cash Dividends are allotted to the Policy each year on an increasing scale, and may be applied either to reduce the Deposit for the following year, or to purchase Additions to the Sum Assured.

- H** The following table shows the Dividends under our present scale :—

If used to Reduce the Deposit, Annual Reduction				If used to Purchase Additions Total Additions			
1st Year	..	..	£7 6 6				
5th "	..	..	£11 3 6	At end of 6 Years	..	£57 0 0	
10th "	..	..	£17 0 3	" "	11 "	£146 0 0	
15th "	..	..	£17 16 9	" "	16 "	£250 0 0	
20th "	..	..	- - -	" "	21 "	- - -	
25th "	..	..	- - -	" "	26 "	- - -	

SPECIAL MATURITY DIVIDEND—In addition to the annual dividends mentioned above the amount payable should death occur after the tenth year will be further increased by a special dividend based upon the number of years the policy has been in force. This dividend is also payable at the end of the agreed investment period (providing not less than ten years) and will increase the total payable by the amount shown in the next paragraph.

Date 28th October, 1929. Figures supplied by T. M. Ward.

E. and O.E.

INVESTMENT —Should you live until the end of the 12 years, the Company will Pay you in Cash the Sum Assured of		£500	0	0	A
The dividends shown above, which, if not previously drawn will amount to :—					
Annual Dividends		£150	0	0	
Special Maturity Dividend		£100	0	0	
Making a Total Cash Payment of		£750	0	0	
As against the Total of your Net Annual Deposits		£499	0	0	
Giving you a Profit on the Policy of		£251	0	0	B

OPTIONS AT MATURITY

At age 60 instead of taking the Cash Payment of £750 shown under "Investment," you may select one of the following options, which are calculated on our present rates.

1ST OPTION—An income for Life of	£65	0	0	C
2ND OPTION—Withdraw in Cash the sum of	£362	0	0	
And for the Balance, secure a With Dividend Policy, payable at death and requiring no further Deposits, for	£500	0	0	
3RD OPTION—A With Dividend Policy, payable at death and requiring no further Deposits, for	£1,050	0	0	

Options 2 and 3 are issued subject to satisfactory evidence of good health, but this evidence is not required in the case of Option No. 2 if the selection is made two years prior to the maturity of the Policy. The examples given are based on the assumption that the 1929 Dividend Scale is maintained throughout the life of the Policy.

GUARANTEES AND PRIVILEGES INCLUDED IN THE POLICY (INCREASED BY ANNUAL DIVIDENDS)

Each Policy contains a complete table of the "Guaranteed Values" which are available at any time after three Annual Deposits have been made. This table shows at a glance exactly what the Policy is worth to you should you desire to raise money, or be unable to continue making the Annual Deposits.

Example—The following Summary of the Options available at the 7th year does not include, and would be considerably increased by, the Annual Dividends allotted to the Policy.

If unable to continue the Deposits, the Company will automatically advance them as they fall due to the extent of	£230	0	0	E
If you desired to cancel the Policy, you could surrender it for a Cash Payment of	£230	0	0	

If you wished to raise money, we would give you an immediate loan of 95 per cent. of the Cash Value, viz.

If you desired to cease making any further Deposits, you could take a fully Paid-up Policy, payable at the expiry of the original term of years, or at previous death, for	£270	0	0	F
The Dividends at the 7th year would increase this Policy to	£360	0	0	

As against the total of your Net Annual Deposits of	£290	0	0	
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NOTE—These Guaranteed Values are an absolute safeguard against loss, and are one of the most important features of any Life Assurance Policy. If fuller details are required, we shall be pleased to furnish on request a copy of the values included in the Policy, giving the options available at any year throughout the duration of the contract.

D. N. Pritt, K.C., G. O. Slade, K.C., and A. L. Gordon for the appellants.
C. L. Henderson, K.C., for the respondent.

SCOTT, L.J. : There are two main issues in this case: (i) whether there was a contract of insurance made by the documents passing between the parties before the issue of the policy, under which the plaintiff was entitled to have a policy conferring rights more beneficial to him than those provided in the policy sent to him in December, 1929, and (ii) whether the interpretation of that antecedent contract submitted on behalf of the plaintiff was correct. If both questions are to be answered in his favour, it is not disputed that he is entitled to rectification of the policy so as to make it conform with the contract—subject, however, to this qualification, that the cross-appeal to us is only on the question of the special maturity dividend upon which the trial judge gave judgment for only

£55. There is no appeal in respect of the annual dividends. On the question of special maturity dividend the company appeals on the ground that nothing is payable on that head, and the plaintiff cross-appeals on the ground that the whole £100 is payable.

A The facts are shortly these. In Oct., 1929, Ward, the agent of the company at Nottingham, forwarded to the plaintiff by post two documents. One was the Illustration. The other was a printed form of application for assurance to be signed by the plaintiff. Each document was a printed form issued by the company and each had blanks left to be filled in in writing or type. The blanks in the Illustration were in every case left for figures to be inserted; and, when so filled in, it was obviously intended to be used for explaining to a person contemplating life assurance the kind and value of the advantages which the company was prepared to offer him if he insured with it. When received by B the plaintiff, all the blanks for figures had been completely filled in by the agent, Ward. The application form had also been completely filled in by him except for the spaces left for the applicant's signature, and his own as witness. The plaintiff, then at Grimsby, signed the application, leaving the space for the witness blank, and sent the document to Ward at Nottingham. When Ward received the form at Nottingham, he signed it as witness. The plaintiff kept the Illustration.

C For the purpose of this judgment the whole of the Illustration is relevant; but it is unnecessary to quote it all. The company contends that it contained only matter of representation, and was in no sense an offer by the company containing promises, whether absolute or conditional, intended to become the terms of a contract between the parties. In my opinion, for several reasons, it is impossible so to treat it. The company cannot, in my opinion, escape D liability on the footing of its attractive inducements being "mere commendation which does not oblige." The language is the language of promise throughout the document. Read with the application form the terms in the Illustration constituted an offer of a contract conditional on the offeree executing and posting the application form, and paying the premium, with the further proviso that the bargain was not to be treated as closed until the company had posted their acceptance and receipt. When that was done, in my view, a completed contract would come into existence.

E For reasons which I will shortly state, I am satisfied that the agent had authority from the company to complete the Illustration by filling into all blank spaces the figures which were needed in order to make it intelligible, or even to make it serve the company's purpose of inducing the plaintiff to sign the application form, and pay the first premium. The Illustration begins from the very start, under the head of "Assurance," just as if it were a letter written F by the company to the potential assured:

Should you die during the 12 years, the company guarantee to pay the sum assured of £500 together with all dividends allotted to the policy prior to date of death, providing they have not been previously withdrawn. The "Accident Benefit" and "Disability Benefit" clauses equally begin: "Should you die," and: "should you become totally and permanently disabled," and in each case the company says that it "guarantees to pay." Under G the head of "Deposit" (the Canadian word for premium), the proposed assured is given an option of paying annual premiums half-yearly or quarterly. Under the heading of "Profits" he is informed that cash dividends are allotted to the policy each year on an increasing scale, and a scale of figures is appended showing resultant increases, whether used by the assured to reduce his premiums or to purchase additions to the assured sum.

H The word "guarantee" does not appear in the part dealing with the special maturity dividend, but there is what I think is an absolute promise equivalent to a guarantee; for it says that, in addition to the annual dividends mentioned in the previous paragraph about profits, the amount payable by the company on death (if it occurs after the 10 years), or at the end of the agreed investment period, will be further increased by a special dividend "based on the number of years the policy has been in force"; and, in the event of the special maturity dividend only becoming payable at the end of the agreed investment period, it says that that increase will be equal to the amounts shown in the next paragraph. The next paragraph is headed "Investment" (and the word itself is

significant) and again is addressed personally to the potential assured. Down to that point the document is, as I think, indubitably expressed in the language of contract, *i.e.*, in terms of offer capable of acceptance. The same comment applies to the next paragraph entitled "Options at Maturity" also in large red printed letters. Under that clause is a note of three and a half lines of small print which I read as applicable to this one clause, and not generally to the whole document, even though the phrase in it, "1929 dividend scale," has reference to the scale which is called "our present scale" in the paragraph headed "Profits." The last paragraph is headed "Guarantees and Privileges included in the Policy" and is an exemplification and elucidation of some of the various alternative rights, benefits or advantages offered to the assured, with figures of the varying values attached. It is followed by a note in small print that these guaranteed values are an absolute safeguard against loss and the company offers, on request, to furnish a copy of the values included in the policy giving the options available at any year during the duration of the contract.

The application form (presumably received by the plaintiff in the same envelope as the Illustration), assumes that the applicant already knows what his policy will contain; it is incomprehensible to the applicant, unless he reads it as applying to the Illustration already in his hands. Two of the questions and answers in para. 4 of the signed application form illustrate what I mean:

(b) Kind of policy and dividend plan—12 year endowment. Annual dividend: D.I.A.B.: (c) Is the total disability applied for?—Yes, with waiver of premiums and monthly income.

The first seven words of the answer to question 4 (c), *viz.*, "with waiver of premiums and monthly income" refer to the third clause of the Illustration, *viz.*, "Assurance": but the letters "D.I.A.B." which belong to 4 (b) (but by a mistake of the agent have been extended into the line belonging to question 4 (c)) really refer to the second clause, *viz.*, "Accident Benefit"; question 4 (c) has nothing to do with the letters "D.I.A.B."; it refers only to the third clause in the Illustration, *viz.*, "Disability Benefits." By the words "with waiver of premium" the applicant elects for term No. 2 of that clause, *viz.*, for the company "to make all deposits [*i.e.*, to pay all premiums] . . . during disablement"; and by the words "monthly income" he elects to have his disability benefit paid according to the offer in term No. 1.

The surrounding circumstances all point to the interpretation of the Illustration as an offer by the company to the applicant through their agent. All figures throughout the Illustration, and all entries in ink in the application form (other than the signature of the life to be assured) were inserted by Ward personally; and it was he who forwarded the documents to the plaintiff. This information for the purposes of the application form had been obtained from the plaintiff's son. The plaintiff duly posted his application form to the company with a cheque for the total of the three premiums quoted in the Illustration (which added together made up the £48 17s. 6d. of the application form). The company replied on Nov. 5, accepting the plaintiff as a first class life, and saying that a policy would in due course be issued in accordance with the plaintiff's application; and, either that day or shortly after, it forwarded a separate receipt for the premium.

The assured was called as a witness and said in effect that he did not, either when he received the policy or subsequently, realise that it gave him less than he understood from the Illustration he was to get. The essential relief asked for in the points of claim accordingly was rectification of the policy so as to make it conform to the agreement contained in the previous documents. There was another alternative put forward on the footing of there having been two contracts—the policy and the earlier collateral agreement; but we intimated that that presentation of the case did not appeal to us. The real issues in the case were: (i) Was a contract made, incorporating the Illustration, to be followed in due course by a formal policy? (ii) Upon the true interpretation of that contract, did the company make an absolute promise to pay £150 and £100 at maturity in addition to the £500? The trial judge thought not as to the £150 and only awarded the assured the £79 16s. which the company was prepared to admit: and, since from that order there is no cross-appeal before us, we can give no

decision upon the interpretation of that provision in the Illustration : but it must not be assumed that I agree with the trial judge's conclusion upon it. On the clause about the special maturity dividend he accepted the submissions of the plaintiff up to a point, viz., that the Illustration was one of the documents forming the contract ; and that, on its true construction, the company had undertaken absolutely to make some payment ; but, on some grounds which I do not follow, he only gave the plaintiff £55 instead of the £100 claimed.

A On the issue whether there was a preliminary contract, the legal position, as I see it, is simple. The Illustration and application form arrived together from the company's agent. On intrinsic and extrinsic evidence alike I am satisfied that they were intended by the company to be read together. The Illustration afforded the sole description of the kind of policy into which the company was inviting the plaintiff to enter, and the application form was only intelligible if it was to be read as an application for a policy embodying the applicant's selection of the terms offered by the Illustration. This inference of intention appears to me too clear to need argument in detail. The only *lacunae* left by the company in the printed Illustration, when transmitted to the agent for him to use, were those which required figures to be inserted—either of money or of time—and these were duly filled in by the agent before he put it to its intended use. It is obvious that the agent was intended by the company to do that filling in : for the printed form with no figures inserted would be a useless document for attracting business ; and, indeed, the printed form itself contained a note at the bottom of the first page : “ Date . . . figures supplied by . . . E. & O.E.”, from which the inference is irresistible that the company had actually instructed their agent to do all the filling in. If the agent was not expressly so authorised, he was held out as having ostensible authority.

D On the second issue the argument for the company, that the Illustration, if a contractual document, ought not to be construed as conveying any absolute promise to pay either the £150 or even the £100, was based on these contentions : (a) that the company could not in law give absolute undertakings to pay dividends out of profits in future years irrespective of whether in each of those years they earned profits or not ; and that, therefore, words of promise must be construed as words of representation only ; (b) that the language used indicated that, before allotting any dividend to the policy, there would have to be an antecedent declaration by the company's board of a dividend ; (c) that the word “ dividend ” as used in the policy was unambiguous, and meant, and could only mean, a share of a formal dividend distribution decided on each year by the board of the company—the share being proportionate to the assured's policy holding in the company. To these arguments the language of the Illustration seems to me in itself to afford sufficient answers : (a) (i) the words and phrases used are words of promise : “ will ” or its equivalent in periphrasis ; (ii) the language is addressed to “ you ” as the promisee ; (b) those promises are time after time expressed unconditionally ; e.g., (i) in the initial caption, the potential assured is told that the figures of “ Income of £65 ” and “ Cash payment of £750 ”, receivable by him, may be made by him greater or smaller in strict mathematical ratio by increasing or reducing the deposit ; (ii) by the word “ guarantee ” in the clauses opposite each of the first three marginal headings ; (iii) by the heavy leaded type of the first line of the clause opposite the marginal heading “ Profits,” which foretells a yearly increase on a certain scale, irrespective of any contingency, and by the figures thereunder showing the rate of increase on the company's scale of 1929 ; (iv) by the whole of the clause opposite “ Special Maturity Dividend ”—particularly when carried into figures under the marginal note headed “ Investment ”—which the company takes great care to describe as a certainty of hard cash independent of any problematical future declaration of dividends, not only under “ Investment ” but also under “ Options at Maturity ” and “ Guarantees and Privileges,” all these titles being printed in large red capitals.

The chief argument for the company was one which might at first sight appeal strongly to a company lawyer—viz., that it is illegal to pay dividends except out of profits ; and that, therefore, as the company cannot lightly be charged with an intention to commit such an illegality, the word “ dividend ” is sufficient of itself to show that the company was never intending to contract in absolute

terms. This is no doubt a powerful argument, but of little force if the company thought it was in such a strong financial position as to make absolute commitments a reasonably safe risk. That they did so think may not unfairly be assumed; they had in the boom period which (as we all know, did not begin to break till the October when this policy was being negotiated) accumulated a huge reserve by the vast appreciation of their investments; and might well then have been taking a roseeate view of their future and have been anxious to push hard for new business. The Illustration contains on its title page "Established 1865: Assets £100,470,967; Surplus £11,186,067; at December 1928"; and those figures are again repeated at the top of the first page just above the caption. Incidentally, this great "surplus" takes the sting out of a particular argument on this point put forward by the company, based upon the declaration of the assured at the bottom of the application form. That argument was that the policy though apparently differing in its terms from the Illustration could not be construed as really inconsistent with it because it included these words:

I declare . . . that I agree that . . . the methods which may be adopted by the company for distribution of surplus to said policy are hereby accepted.

It was urged by counsel for the company that the method of allotting dividends to the various outstanding policies (which resulted in this plaintiff only getting £79 16s. under the head of "Annual Dividends") was covered by this declaration. I disagree. The knowledge of the applicant that the existing "surplus" of the company was over £11,000,000 was enough to entitle him to assume that the company's promises of definite payments, absolute in expression, were not conditional or intended by them to be contingent on any method of distribution. Indeed, the whole of the company's arguments involved an assumption of the plaintiff possessing a knowledge of life-assurance business and methods which cannot properly be attributed to the class of people with small knowledge of affairs to whom such a document as the Illustration was addressed. If the Illustration contains inconsistencies—and perhaps it does between the big print and the small print; or if the smaller print of the application contradicts the large print and especially the big red headings of the Illustration, I think these inconsistencies must yield to, and not govern, the plain quantified promises of the Illustration; the more so, as the quantification is not printed but written into the printed form by the company's agent, acting, as I think, with the company's authority. If, contrary to my opinion, there be any real ambiguity left as the result of inconsistencies between particular provisions in the Illustration, the principle of presumptive construction against the party who put the document forward must apply in favour of the plaintiff, thus leaving the policy as an instrument which must be rectified. I hold, therefore, that the company contracted to pay £100 as a special maturity dividend, and that the policy must be rectified accordingly—unless the plaintiff's right to rectification has been lost. That has not been suggested in argument, and on the facts could not be.

The judgment below must be varied by substituting the sum of £100 for that of £55 and increasing the whole judgment to £679 16s.

LUXMOORE, L.J.: I regret that I am unable to arrive at the same conclusion as my brethren. In order to explain the reasons for my disagreement it is necessary that I should state what, in my view, are the material facts, although in so doing I may repeat what has already been stated by SCOTT, L.J.

The plaintiff, by the indorsement on his writ, claimed first a declaration that, as against the surrender by him to the defendant company of a policy of assurance issued by the defendant company, he is entitled to payment of £750 and interest at the rate of 4 per cent. per annum on that sum from Nov. 2, 1941, until payment or judgment whichever first occurs, and, second, if and so far as may be necessary, rectification of the policy to embody the terms of a warranty contained in two printed papers given by the defendant company to the plaintiff on or about Oct. 28, 1929.

The policy referred to states that the defendant company "hereby assures the life of the plaintiff" in the sum of £500 which shall be payable to the assured or his assigns on Nov. 2, 1941, or should the assured die before that date then to the executors, administrators or assigns of the assured in the manner and on the

conditions there mentioned. The consideration for the issue of the policy is stated to be the payment in advance of a premium of £48 17s. 6d., on Nov. 2, 1929, and of the payment :

... of a like amount yearly thereafter on Nov. 2 in every year during the continuance of this policy until 12 full years' premiums shall have been paid.

A It states that the privileges, options and mutual agreements set forth on the 2nd, 3rd and 4th pages thereof form part of the contract and are binding on both parties.

The policy was issued at Montreal on Dec. 2, 1929. In the left-hand bottom corner of the first page appear the words "Form No. 3127-9" and at the foot of the page the words "Endowment Assurance—Annual dividends—Total and Permanent Disability Provision." On the second page there is a group of provisions under the head "Dividend Provisions." These provide that the :

B ... policy shall participate in dividends at the expiration of each year from the date on which the first premium falls due, but no allotment of dividends shall be made unless the assured be alive at the end of each such year and this policy be then in force.

C The policy further states that the dividends allotted may be taken in accordance with any one of four stated options, the first being "As a bonus or paid-up addition to the sum assured." I need not refer to the other options because it is admitted the plaintiff never exercised any of them and the policy provides that, unless the assured elects otherwise, dividends shall be applied to the purchase of a paid-up addition to the sum assured. The policy gives the assured or those claiming through him alternative methods of settlement at death or at maturity of the endowment. It is sufficient to state that these provisions include an option to receive monthly instalments during a fixed period of 20 years or the life of "the beneficiary or the payee" whichever is the longer, and also an option to receive payment of the sum assured and the total value of the paid-up additions in one sum.

E The policy includes a series of provisions under the heading "Double Indemnity Accident Benefit" which provide for the payment to the assured of a sum equal and in addition to the sum assured (*i.e.*, £500) in the event of the death of the assured resulting during the continuance of the policy from bodily injury before attaining the age of 60. The consideration for this benefit is an extra annual premium of 14s., which it is stated is included in the annual premium of £48 17s. 6d. The provisions in relation to this benefit are contained in a separate sheet attached to and made part of the policy. In the left-hand bottom corner of this sheet appear the letters and figures following: D.I.A.B. 101-1. The policy also includes another series of provisions under the heading "Total and Permanent Disability Provision." These provisions become effective if the assured during the continuance in force of the policy becomes totally and permanently disabled by bodily injury or disease before attaining 60 and it is stated that the consideration for this provision is an extra annual premium of £1 18s. and that this extra premium is included in the annual premium of £48 17s. 6d.

F The plaintiff duly paid twelve annual premiums down to and including the premium which fell due on Nov. 2, 1940, and the policy matured on Nov. 2, 1941. G On paying to the defendant company the last premium the plaintiff inquired what would be (i) the approximate amount due as a lump sum, (ii) the sum that would be paid annually during lifetime, and (iii) if the money—lump sum—is left with the company until request what interest would be paid. In reply to this inquiry the general manager of the defendant company wrote to the plaintiff on Nov. 18, 1940, stating that at maturity the sum of £500 would become payable together with paid-up additions standing to the credit of the policy, and added :

H ... we are not yet able to advise you of the exact amount of these paid-up additions but assuming our present profits basis continues the sum due to you under this heading will be in the neighbourhood of £82 16s., thus making a total cash payment of £582 16s.

The other inquiries were answered by referring the plaintiff to the alternative options specified in the policy. On Oct. 4, 1941, the company's representative wrote to the plaintiff stating that the amount payable to him under the policy on Nov. 2, 1941, would be £579 16s., being £500 the sum assured and bonus

£79 16s. Attention was again directed to the various options set out in the policy. The plaintiff consulted his solicitor who wrote to the defendant company on Oct. 11, 1941, claiming payment of £750. There was further correspondence between the plaintiff, his solicitor and the company, to which it is immaterial to refer. The plaintiff issued his writ on July 30, 1942.

It is common ground that, under the policy as issued by the defendant company the sum to which the plaintiff is entitled is £579 16s. and no more. Consequently, unless he is entitled to have the policy rectified his claim must fail. The claim to rectification can only succeed if the plaintiff can satisfy the court that the policy does not give effect to the contract made between the parties and that the failure to give effect to that contract in the policy is due to mutual mistake.

It is, therefore, necessary to ascertain the circumstances in which the contract for insurance was entered into and what are the documents constituting the contract. The transaction started with the receipt by the plaintiff on or about Oct. 28, 1929, of a letter from an agent of the defendant company named Ward. This letter enclosed a document (hereinafter called the Illustration) which was produced at the trial and put in evidence by the plaintiff. At the trial the document was in two parts and it is undoubtedly what is referred to in the writ as "two papers." The two parts were marked respectively P. 1 and P. 2. The document is a printed form. Originally it had a number of blank spaces. These spaces had been filled in typescript by or at the direction of Ward before it was received by the plaintiff. On the outside of the part marked P. 1, appears the name of the defendant company, the date of its establishment, its assets and surplus as at December, 1928, and the printed words, "Illustration for " followed by the plaintiff's name in typescript as well as the printed word "age" followed by the figure 48 also in typescript. On the face of P. 1 the name of the company, its assets and surplus "at Dec. 1928," are repeated. The statement starts with the heading printed in red ink "Income of £65 a year for life from age 60 or a cash payment of £750." The figures in this heading are inserted in type. Then follow under a number of headings printed in red ink statements referring to the subject matter of the particular heading to which they respectively refer. Under the heading "Assurance" it is stated:

Should you die during the 12 years, the company guarantee to pay the sum assured of £500 together with all dividends allotted to the policy prior to date of death, providing they have not previously been withdrawn.

This is followed by statements referring to the headings: Accident Benefit, Disability Benefit and Deposit. Under each of the first two of these headings the company is stated to "guarantee" payments of the respective sums specifically mentioned under them. The next heading is "Profits." The statement with regard to it is as follows:

Cash dividends are allotted to the policy each year on an increasing scale and may be applied either to reduce the deposit for the following year, or to purchase additions to the sum assured. The following table shows the dividends under our present scale . . .

Then follows a table showing the value of the dividends at various times during the life of a policy if used (i) to reduce the deposit or (ii) to purchase additions to the sum assured. The figures in this table are in type and are admitted to be inaccurate. The next heading is "Special Maturity Dividend" and against this is the statement:

In addition to the annual dividends mentioned above the amount payable should death occur after the 10th year will be further increased by a special dividend based upon the number of years the policy has been in force. This dividend is also payable at the end of the agreed investment period (providing not less than 10 years) and will increase the total payable by the amount shown in the next paragraph.

The next paragraph is headed "Investment," and states:

Should you live until the end of the 12 years, the company will pay you in cash the sum assured of £500 the dividends shown above which if not previously drawn will amount to: Annual dividends, £150. Special maturity dividend, £100. Making a total cash payment of £750. As against the total of your net annual deposits, £499. Giving you a profit on the policy of £251.

The document proceeds by stating the various options offered and the guarantees and privileges included in the policy increased by annual dividends. Under the heading "Options at Maturity" appears in small type the sentence:

The examples given are based on the assumption that the 1929 dividend scale is maintained throughout the life of the policy.

Either at the same time as the plaintiff received the Illustration or by a subsequent post he received an application form. The application form had before its receipt been filled in by Ward and all the plaintiff did was to append his name to it in the appropriate place and return it. On Nov. 5, 1929, the plaintiff received a letter from the London office of the defendant company stating that the plaintiff had been accepted as a first class life and that a policy would in due course be issued in accordance with the application. In due course the plaintiff paid the £48 17s. 6d. in respect of the first premium and the policy to which I have already referred was issued. The Illustration and the application form were sent to the plaintiff by Ward as the result of some conversation Ward had with the plaintiff's nephew, but the plaintiff had not, at that time at any rate, met Ward and he had no conversation either with Ward or any other agent of the company before the policy was issued. Consequently, the question what constituted the contract between the plaintiff and the defendant company rests entirely on the written documents.

The plaintiff originally rested his case on the contention that the Illustration constituted a warranty or a collateral agreement that the policy issued to the plaintiff would entitle him to receive at maturity £750. ATKINSON, J., rejected this contention and I think rightly. Subsequently the plaintiff based his claim on the contention that the contract between himself and the company was contained in the three documents, viz., the Illustration, the application and the letter of acceptance of Nov. 5, 1929. ATKINSON, J., accepted this view, but pointed out that, on this basis, there was on the true construction of the contract no guarantee that the annual dividends would amount to £150 if the whole of the Illustration was read carefully, but he held that there was a guarantee that the plaintiff would receive what ATKINSON, J., referred to as a Special Maturity Benefit. The evidence showed that the figure of £100 given in the Illustration in respect of the Special Maturity Dividend was incorrect and should at the date of the Illustration have been £55 and he held, though I fail to appreciate the reason, that, on the true construction of the contract, this sum was agreed to be paid by the defendant company at maturity. He accordingly directed that the policy should be rectified or treated as rectified so as to provide for payment of this sum on maturity and he gave judgment for the plaintiff for the £579 16s. admitted to be due on the policy and £55 making the total sum of £634 16s. with interest at 4 per cent. from one month after the date when the policy matured. The defendant company has appealed from this judgment and claims that the judgment should be varied by entering judgment for the plaintiff for £579 16s. only. The plaintiff has entered a cross-appeal and asks for judgment for £100 in addition to the £579 16s. admitted to be due. He has not appealed in respect of the £150 claimed for annual dividends.

The result of both appeals depend on the answers to be given to two questions : (i) What are the documents which constitute the contract of assurance, and (ii) What is the true construction of the contract so ascertained.

It is, I think, admitted that, unless the Illustration forms part of the contract the defendant company's appeal must succeed and the cross-appeal must fail, for apart from the Illustration there is no express reference in the proposal form or the letter of acceptance to the £750, or to the fact that the annual dividends or the special maturity dividend will at maturity be respectively £150 and £100. There is in fact no express reference to the Illustration in the proposal or acceptance, but it is said that the Illustration is incorporated because there is an indirect reference to it in the answers to be found to the questions in para. 4 of the application form. The paragraph in its completed form reads as follows :

(4) (a) Sum to be assured—£500. (b) Kind of policy and dividend plan—12 year endowment, annual dividend. (c) Is the total disability applied for—Yes. With waiver of premium and monthly income, D.I.A.B.

The letters "D.I.A.B." it is agreed mean Double Indemnity Assurance Benefit. I am unable to read the proposal form as incorporating the Illustration. As I have already said there is no express incorporation of the Illustration. The sum to be assured is stated to be £500. The fact that the policy is to be a

12-year endowment policy with annual dividends does not require the incorporation of the Illustration. It merely states that the insurance is to be of a class which obviously was one of the classes effected by the company and would plainly be understood by the company without any reference to the Illustration of whose existence there is no evidence to show the defendant company was aware. The same consideration applies with equal force to the words "With waiver of premium and monthly income D.I.A.B." in the answer to the question, "Is the total disability applied for?" This, too, was obviously one of the classes of insurance effected by the defendant company as witness the fact that the provisions in the policy in relation thereto are on a form marked D.I.A.B. 101-1. To incorporate the Illustration would, I think, require an express reference thereto and an appropriate clause providing for its inclusion. In my judgment the Illustration occupies no different position from any prospectus issued by the defendant company. It must, however, be remembered that the action is not to rescind the contract on the ground of misrepresentation whether innocent or fraudulent. In this respect the facts of this case are very similar to those to be found in *British Equitable Assurance Co., Ltd. v. Baily* (1), where the House of Lords overruled the decision of the Court of Appeal which had upheld the original judgment of KEKEWICH, J., on the ground that a prospectus shown to the plaintiff before he signed his proposal form but not expressly mentioned in that form, formed part of the contract for insurance. LORD MACNAGHTEN, at p. 38, said he was:

... at a loss to understand how the Court of Appeal came to the conclusion that the statements in the prospectus constituted a collateral contract or are to be treated as incorporated in the contract of insurance.

LORD ROBERTSON, at p. 40, after stating what he considered constituted the contract in that case, said:

But the Court of Appeal and the learned judge have felt themselves entitled to decide the case not on the documents but on the prospectus which was shown to the respondent before he made his proposal. The theory of KEKEWICH, J., was that there was a collateral contract while the learned Lords Justices justify the introduction of the prospectus on the somewhat singular ground that inasmuch as Table A, which is referred to in the proposal, is to be found in the prospectus, therefore, you are entitled to read the rest of the prospectus relating to mutual policies as part of the contract. I am unable to agree in this. We are not here in an action of damages or of rescission of contract and I do not feel entitled, when the respondent in the proposal refers to Table A, to hold him as incorporating all the rest or part of the rest of the print in which the table is to be found.

In my judgment, the Illustration forms no part of the contract which has to be construed. If I am wrong in this view and the contract is contained in the Illustration, the application and the letter of Nov. 5, 1929, then the Illustration and the application must be construed together. The Illustration guarantees certain payments expressly, *i.e.*, the £500 and the £1,000 and certain figures under the heading "Guarantees and Privileges included in the Policy," but there is no guarantee of the amount of the annual dividend or of the Special Maturity Dividend. Indeed, ATKINSON, J., has so held in cogent language in the case of the annual dividends.

The application contains an important declaration at the foot. It states:

I agree that this declaration with the answers given by me in the personal declaration made in lieu of medical examination . . . shall be the basis of the assurance that the methods which may be adopted by the company for distribution of surplus to the said policy are hereby accepted.

The absence of the word "guarantee" in the paragraphs relating to annual dividends and special maturity dividend coupled with the statement that the table in the Illustration shows the dividends "under our present scale" and the further statement that the examples given are based on the assumption that the 1929 dividend scale is maintained throughout the life of the policy are all directed to the fact that the dividends whether annual or special on maturity depend on their declaration by the company—indeed, the word dividend in its natural meaning when applied to a subject-matter like a policy of insurance implies that it is to be declared out of and is dependent on profits. As KNIGHT BRUCE, L.J., said in *Henry v. Great Northern Railway* (2), at p. 642:

... the word dividend carries no spell with it. Applicable to various subjects, it is not intelligible without knowing the matter to which it is meant as referring . . . The word as used in the places in which we have now to deal with it means, I apprehend, share of profits.

The OXFORD DICTIONARY defines the word as meaning :

- A (ii) a sum of money to be divided among a number of persons especially the total sum payable as interest on a loan or as the profit of a joint stock company divided periodically among the holders usually reckoned at a certain rate per cent., also a sum divided among the creditors of an insolvent estate. (iii) a portion or share of anything divided especially a share of anything divided between a number of persons that falls to each to receive or pay.

B The meaning of the word dividend, the absence of any guarantee in relation to dividend and the several references to the present scale of dividend as well as the reference and acceptance in the declaration to the company's methods of distribution of surplus compel me to the conclusion that, even if the Illustration is included in the contract, the contract on its true construction does not include any provision under which the plaintiff is entitled to have the policy issued to him rectified by the inclusion therein of a provision guaranteeing either that the annual dividends at maturity will amount to £150 or that the plaintiff will be entitled to receive a special dividend of £100 on maturity.

- C For these reasons I am of opinion that the appeal of the defendant company ought to succeed and the cross-appeal of the plaintiff should fail.

D GODDARD, L.J. : The first and principal question which has to be determined in this case is what was the agreement for insurance which ought to have been embodied in the policy. Fortunately, we are not concerned with any oral promises or negotiations, for there never was an interview between the plaintiff and any representative of the defendants, and the matter depends wholly on the documents. In my opinion the contract is to be found in the Illustration, the application form and the letter of acceptance dated Nov. 5, 1929. There was also a receipt from the company for the first premium, but I do not think it affects in any way the question we have to decide. The defendants contend that the Illustration is not a contractual document but is, to use the expression of counsel for the company, a mere "puff." In my opinion, it goes far beyond

E a "puff"; it is most material, and not only would the application form, which admittedly is part of the contract, be unintelligible without it, but, I think, the latter clearly refers to it and is intended to do so. It was sent by the defendants' Nottingham office with the application form. It is intended to give the plaintiff detailed information as to the particular assurance which the defendants were willing to grant him if he would apply, and if they, after seeing his application, approve him as a life. It will be noticed that the application form which

F was subsequently bound up with the policy, asks for the information which the defendants require to enable them to decide whether they will accept the plaintiff without a medical examination. The Illustration is a document, which it is not disputed, emanates from the company itself; it is drawn so that its agents or managers can fill in figures which will give prospective applicants precise information as to the amount and nature of the assurance which can be obtained for the payment of a definite premium, also stated in the form. One

G of the assurances offered is accident benefit and another, disability benefit, for both of which additional premiums are required. A person who received the application form would not know to what questions 4 (b) and (c) referred without seeing the Illustration. By sending him the Illustration with the figures filled in, I think it is clear that the defendants are saying : "This is the insurance we are willing to grant to you in return for a premium of £46 5s. 6d., with certain

H extra benefits for additional premium if you require them, provided that you fill in the application form and we are satisfied with the information that you give us." By filling in the form the plaintiff applied for the particular insurance set out in the Illustration, and by their letter of Nov. 5 the defendants notified their satisfaction and agreed to insure him. The Illustration must, therefore, be regarded as a contractual document. Before I consider its terms, it will be convenient here to refer to *British Equitable Assurance Co. v. Baily* (1), which counsel for the company contended was an authority which debarred us from holding that this document formed part of the contract, as, he said, the House

of Lords there laid down that the statements in a prospectus did not constitute a collateral contract, and were not to be treated as incorporated in a contract of insurance. In that case the plaintiff had agreed in his proposal to conform to and abide by the deed of settlement, byelaws, rules and regulations of the company, and he sought to prevent them from altering their rules so as to enable them to provide a reserve fund out of part of their profits. The prospectus, on the faith of which he had insured, had stated that the entire profits were divided among the policyholders without any deduction for a reserve fund, and the actual decision was that this did not amount to an agreement collateral or otherwise by the company that they would never alter their rules with regard to their method of dealing with profits. LORD MACNAGHTEN said that he could not understand the conclusion that the statements in the prospectus constituted a collateral contract, or were to be treated as incorporated in the contract as limiting the powers of the company in the full and free exercise of which the plaintiff bound himself to acquiesce. LORD LINDLEY pointed out that they were not considering, as we have to, a claim for rectification, because the plaintiff here alleges that there was a complete agreement and that the policy is so drawn as not to embody it. I think the present action is materially different from that cited. The Illustration is sent to the plaintiff for the purpose of enabling him to apply for the particular insurance which it describes and of which it gives the details, telling him that, if he desires a larger or smaller income or cash payment, the deposit he has to make will be in exact proportion to that under-noted. It is not the case of a contract being thereby formed collateral to the main contract; it is that the Illustration is part of the contract itself. Thus it becomes necessary to construe the contract. The contest is now confined entirely to the clause dealing with the special maturity dividend. ATKINSON, J., has held that this clause was part of the contract, but has limited the dividend to £55 and not to £100, the amount given in the Illustration. From this the defendants appeal and the plaintiff cross-appeals and asks that the amount should be increased to £100. He has not cross-appealed against that part of the judgment which only awarded him profits to the extent of £79 16s. I wish he had, though I appreciate the considerations which weighed with his advisers in not so doing.

The heading of the Illustration would not only convey to the ordinary man, but I am satisfied was intended to convey that, if he insured on the terms set out, he would have the choice, after the age of 60, of £65 a year for life or a cash payment of £750. As his actual payments, apart from his rebate on income tax, would only have amounted to £555 6s., that surely was an attractive offer. The actuary of the company in London makes it clear in his evidence how wrong in their view that is. He will, according to him, get neither the one nor the other. If he had died during the 12 years' currency of the policy, he would have £500; and to that extent would have got what was promised, but what he was to get at maturity depended entirely on what profits the company had made. A person familiar with insurance or one accustomed to documents of this sort might have understood that there was a catch somewhere, but a person in the position of the plaintiff, and many in a better, would, I think, understand and believe that the document meant what I am sure the company wanted him to believe, and what, in my opinion, it says, namely, that, if he insured for 12 years and was alive at the end he would have an income of £65 for the rest of his life or a lump sum of £750. Then take the heading "Assurance" on the Illustration:

Should you die during the 12 years the company guarantee to pay the sum of £500 together with all dividends allotted to the policy prior to date providing they have not been previously withdrawn.

Compare this with the heading on the Illustration, "Investment" (in itself a significant word as contrasted with assurance):

Should you live until the end of 12 years the company will pay you in cash the sum assured of £500 [and] the dividends shown above which if not previously drawn will amount to annual dividends, £150; special maturity dividend, £100, making a total cash payment of £750 as against the total of your net annual deposits [that is payments less tax rebate] of £499, giving you a profit on the policy of £251.

A more misleading statement it is difficult to imagine if the contention of the company is right. A skilled person, no doubt, might appreciate that the annual dividends shown above are dividends "under our present scale" and, if he did,

would see the red light at once. A clerk in an office which was not an insurance office, or anyone in a similar walk of life, would, when he saw that these figures were typed into a printed form so that they were actually set out for his information, assume that, when the company said they would pay these sums, they meant it, especially when they set out the sums in detail, totalled them and showed his profits. It surely would be more honest, though doubtless less attractive, to say, not that the dividends "if not previously drawn will amount to," but that "the dividends, if the present rate of profit is maintained, may amount to" if that was what the company meant. However, for the point with which this appeal is concerned it is necessary to examine the paragraph dealing with the special maturity dividend. I need not read it again. As ATKINSON, J., pointed out, the paragraph says nothing whatever about the profits either under the present scale or at all. It does say that the amount will be further increased by a special maturity dividend based on the time the policy has been in force.

Then the next paragraph says that, if the assured lives for 12 years, it will be £100. It seems to me that this is as clear a promise as can well be imagined to pay this £100 to the assured if he lives for 12 years. The contention of the defendants centres entirely round the word "dividend." That, they say, must mean that it can only be paid out of something to be divided, and that something must be profits. Why, then, not say so, and why insert the figure of £100 and say that the company will pay it and show it as part of the total cash payment which will give a profit of £251? But other things than profit are capable of division and why may not the meaning be that the company have made provision, by setting aside some fund or otherwise, to enable them to fulfil the promise that they make? If this man is told, as I think he was, that at the end of 12 years he will get, if he lives, a special dividend of £100, it does not lie in the mouth of the promisor to say, "Well, but I have not made any profits, so I have not anything to divide." To show that the amount of dividends promised in this Illustration does not always depend on the rate of the profit over the period, I may refer to the last part which deals with guarantees and privileges included in the policy and which are stated to be increased by annual dividends. The use of the word "guarantee" shows that this, at any rate, is a promise, just as much as the guarantee to pay £500 if death occurs during the 12 years. At the end of the seventh year the assured, instead of continuing to pay premiums, can take a paid-up policy payable at the expiry of the original term, that is, after 12 years, for £250. Then it goes on: "The dividends at the seventh year would increase this policy to £360 as against your net annual deposits of £290." Coming in the portion of the Illustration which deals with guarantees, could there be any question that it is a promise to give a policy for £270 plus £90? Just as the total of deposits, £290, is a sum certain, so is the £360, yet on the argument of the defendants and the evidence of the actuary, there is no guarantee of profits, and all that is promised is £270 plus whatever dividends there may be. In my opinion, ATKINSON, J., was right in holding that the special maturity dividend was promised apart from any consideration as to the amount of profits, but I do not agree that this dividend is limited to £55. It seems to me that it is £100 or nothing. The reason why £55 was given was that the defendants' witness said that was the highest amount the policy ought to have borne, had the maturity dividend been continued and that the figure of £100 was a mistake. No explanation was given as to by whom or why the figure of £100 was inserted, but whoever did it must have had ostensible authority to fill in figures. I am not going to assume that it was the agent Ward who typed these figures. He filled in the application form and did so in writing. It is more probable that the typing was done in the district office at Nottingham by or under the direction of the manager, but this is quite immaterial. I do not think it is necessary to inquire out of what funds this dividend could be paid. At the end of 1928 the company had a very large surplus on a valuation of their assets which they advertised in their Illustration. Within three years that surplus had disappeared. The plaintiff might well have thought, had he applied his mind to the question, that it was out of that 11 millions that the special maturity dividend would be paid, but, if the company contracted to pay this dividend, that is enough to entitle the plaintiff to judgment, and he is not concerned with the fund out of which it was to be paid. I have read and entirely agree with the judgment of SCOTT, L.J. As a con-

sequence the plaintiff is entitled to have the policy rectified so as to provide for payment to him of this special maturity dividend of £100 in accordance with the agreement which had been concluded. It must be assumed that both parties intended that agreement to be embodied in the policy, and, if that document fails to give effect to it, rectification may be decreed.

Appeal dismissed with costs. Cross-appeal allowed with costs. Order of ATKINSON, J., varied. Leave to appeal to the House of Lords.

Solicitors: *Freshfields, Leese & Munns* (for the appellants); *Maude & Tunnicliffe*, agents for *James Young, Grimsby* (for the respondent). A

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

Re MAYO, MAYO v. MAYO.

[CHANCERY DIVISION (Simonds, J.), July 6, 1943.] B

Trusts—Trustees—Statutory trust for sale with power to postpone—Refusal of trustees to concur in sale—How discretion of court to order sale exercised—Law of Property Act, 1925 (c. 20), s. 30.

Settled property, was held upon the statutory trust for sale arising under the Settled Land Act, 1925, s. 36. Two of the trustees of the settlement refused to concur with the third in a sale of the property, and a summons was taken out by the third trustee for an order under the Law of Property Act, 1925, s. 30, to direct his co-trustees to join in the sale:— C

HELD: the judicial discretion under the Law of Property Act, 1925, s. 30, must be exercised in favour of the statutory trust for sale and a sale must be ordered unless there is *mala fides* or the trustees unanimously agree to exercise their power to postpone the sale.

[EDITORIAL NOTE. Where property is vested in trustees upon trust for sale, all the trustees must concur in a sale. Where one or more refuse to concur, an application to the court becomes essential. In the case of an express trust for sale with power to postpone it has long been settled that it is the duty of the court to order a sale, unless the trustees unanimously agree to postponement. The only question here is whether the same rule is applicable where the trust for sale is imposed by statute and it is held that the rule is the same.] D

AS TO THE NECESSITY OF CONCURRENCE OF ALL TRUSTEES, see HALSBURY, Halsbury Edn., Vol. 33, pp. 224, 225, para. 405; and for CASES, see DIGEST, Vol. 43, pp. 870, 871, Nos. 3151-3158.] E

Cases referred to:—

* (1) *Re Roth, Goldberger v. Roth* (1896), 74 L.T. 50; 43 Digest 871, 3156.

* (2) *Re Hilton, Gibbs v. Hale-Hinton*, [1909] 2 Ch. 548; 43 Digest 936, 3743; 79 L.J.Ch. 7; 101 L.T. 229.

SUMMONS by a trustee for an order under the Law of Property Act, 1925, s. 30, to direct the co-trustees to concur with him in effecting a statutory trust for sale arising under the Settled Land Act, 1925, s. 36. A testator by his will appointed his son, his daughter and another person to be his executors and the trustees for the purposes of the Settled Land Act, 1925. He devised his real estate to his trustees upon trust for his wife for life and after her death upon trust for his two children, the son's share for life and the daughter's share for her absolutely; after the death of the son his share was to be held in trust for the daughter absolutely. On the death of the widow the son wished to sell the property, but the daughter opposed the sale. The son took out a summons for an order under the Law of Property Act, 1925, s. 30, to direct his co-trustees to concur in the exercise of the statutory trust for sale. F

W. G. H. Cook for the applicant trustee.

J. Pennycuik for the respondent trustees. G

SIMONDS, J.: The result of the residuary devise, having regard to the provisions of the Settled Land Act, 1925, s. 36, was that the property was held on trust for sale, but superadded to that trust there was a statutory power of postponement. The property was not sold, in spite of the demand of the testator's son, who is both a trustee and tenant for life of one-half of the residuary estate. In these circumstances, being unable to obtain the concurrence of his co-trustees, he applies to the court under the Law of Property Act, 1925, s. 30, which provides as follows: H

If the trustees for sale refuse to sell or to exercise any of the powers conferred by either of the last two sections, or any requisite consent cannot be obtained, any person interested may apply to the court for a vesting or other order . . . directing the trustees for sale to give effect thereto, and the court may make such order as it thinks fit.

It appears to me that the judicial discretion set out in the section must be exercised in the same way as the discretion which is exercisable by the court in the case of an instrument containing an express trust for sale. The trust for sale will prevail unless all three trustees agree in exercising the power to postpone. That principle is established by *Re Roth* (1), and *Re Hilton* (2).

There is no suggestion of *mala fides* on the part of the applicant who claims that the sale shall not be postponed. If that was established, the position would be different. In fact I think that in the present case the son is reasonable in asking for the property to be sold. It has been urged that the same considerations should influence the court as those by which it would have been influenced before 1925 on applications under the Partition Acts. I do not think the analogy is in any way of assistance. Here there is an express trust for sale imposed by statute with a power to postpone the sale. I cannot exercise the discretion in any other way than I should have exercised it if there had been an express trust for sale with a power of postponement in the will. I must direct the respondent trustees to concur with the plaintiff trustee in taking all necessary steps for the sale of the property.

Declaration accordingly.

Solicitors: *Wright & Bull*, agents for *Franklin & Jones*, Gloucester (for the applicant); *Blyth, Dutton, Hartley & Blyth*, agents for *M. F. Carter*, Newnham (for the respondents).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

SUTCH v. BURNS.

[KING'S BENCH DIVISION (Atkinson, J.), July 26, 1943.]

Insurance—Motor insurance—Compulsory third-party insurance—Extent of cover—Negligence of permitted driver for which owners of vehicle not liable—Road Traffic Act, 1930 (c. 43), ss. 35, 36.

The defendant, a Lloyd's underwriter, issued an insurance policy against third-party liability in respect of the user of a motor vehicle. The plaintiff's husband was killed as the result of an accident in which the insured vehicle was concerned. The plaintiff sued the owners and the driver of the vehicle in negligence and obtained judgment against the driver but not against the owners. It was then discovered that the policy in terms covered only the liability of the owners. The policy was issued as one complying with the requirements of the Road Traffic Act, 1930, but the defendant contended the Act only required a policy to cover a liability of the driver where the circumstances were such that a liability was also created in the owners of the vehicle, that is, where the owners are liable for the negligence of the driver :—

HELD: in order to comply with the Act, the policy must cover any liability arising out of a permitted user of the vehicle. The indemnity under such a policy must, therefore, extend to damages recovered against the driver of the vehicle which are not also recoverable against the owner.

[EDITORIAL NOTE. Generally speaking motor car policies in practice extend to cover the liability of the permitted driver of the vehicle, but the question had not been raised before whether the Act specifically required this to be so. It is held that such policies must cover the liability of the driver whether or not the circumstances are such that the owners of the vehicle are also liable—in the ordinary case, whether or not the negligence was in the course of the driver's employment.

AS TO INSURANCE OF MOTOR VEHICLES AGAINST THIRD-PARTY RISKS, see HALSBURY *Hailsham Edn.*, Vol. 18, pp. 561, 562, para. 909; and FOR CASES, see DIGEST, Supp., Insurance, Nos. 3217u-3217yy.]

ACTION to recover damages for injury caused by a road accident from the insurers of the responsible driver's employer.

Montague L. Berryman for the plaintiff.

Humfrey H. Edmunds and *F. Bertram Reese* for the defendant.

ATKINSON, J. : This is an action against an underwriting member of Lloyds who defends this action on behalf of himself and the other co-underwriters. On Mar. 1, 1937, the defendant and others issued a policy of insurance to Convoys, Ltd., which was intended to indemnify them against third-party risks. Convoys, Ltd., had some vehicles of considerable size, somewhat bigger than an ordinary lorry, and these were hauled by a separate petrol motor vehicle. On Nov. 12, 1937, during the currency of that policy, Convoys, Ltd., were to deliver some big rolls of paper at the premises of Mono Containers, Ltd., who had separate premises on each side of the road, opposite one another. The vehicle was driven by a man named Welling. He drove into the premises on the south side of the road and there discharged the rolls which he had brought. He was then asked by the foreman of Mono Containers, Ltd., if he would load up some other rolls which they wanted taken across the road to the other branch of their works. Welling agreed. The rolls were loaded on to this lorry and Welling proceeded out into the road. He turned to the left because about 20 yards in that direction the road became very wide and would enable him to turn. He was proceeding to turn round, apparently rather hastily, when some of these rolls were dislodged and knocked the plaintiff's husband off the lorry and killed him. The deceased was in the employment of Mono Containers, Ltd., and he and seven others had jumped on to the lorry to go with the goods.

The deceased's wife brought an action for damages against Convoys, Ltd., and the driver Welling. The action was tried by WROTTESELEY, J., and he awarded damages amounting to £1,625 and £25 funeral expenses against Welling, but he found in favour of the other defendants, Convoys, Ltd. Welling had no means with which to satisfy this judgment and the plaintiff claimed against the underwriters, supposing that Convoys, Ltd., would have a policy which complied with the Road Traffic Act, 1930, s. 35, and that Welling would be covered by the policy, and, therefore, that she would have a right, under sect. 10 of the 1934 Act, to recover directly from the insurance company. It was discovered that, under this policy indemnification for third-party liability was limited to the assured, that is, Convoys, Ltd. In that position the insurers and Convoys, Ltd., found themselves faced with a difficulty because it seems clear that the defendant had agreed with Convoys, Ltd., to give them a policy which complied with sect. 35 (1) of the 1930 Act, and that he had not done so; and, not having done so, Convoys, Ltd., were guilty of an offence under sect. 35 (2) and were liable to penalties. The defendant, not wanting to be faced with a claim for damages from Convoys, Ltd., for not having given them the policy which he had undertaken to give, concedes that, if he has not given a policy which complies with sect. 35, it is to be treated as a policy which does comply with that section and everybody's rights are to be dealt with on that basis. This action is, therefore, to be treated as based not on the pleadings, but on the pleadings coupled with this admission and this concession, if it be a concession.

The argument adduced for the defendant is that it would have made no difference whatever if he had given a policy which complied in terms with that section, because, even so, the liability to indemnify under the policy only arises if the circumstances are such as to create a liability in the policyholder.

The words of the Road Traffic Act, 1930, s. 35 (1) are :

Subject to the provisions of this part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this part of this Act.

The defendant argues that, even if he had given a policy which in terms covered the person who was to be permitted to use the vehicle, it would only cover him if he were driving under circumstances which made his employers liable.

The object of this section was to protect the public by ensuring that they would get paid any compensation to which they were entitled; and to that end, sect. 36 (4) provides :

Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.

In other words, it creates a contract between the insurers and third persons who are permitted to drive the vehicle upon which a claim can be based.

If the defendant's argument is correct, the relevant part of sect. 35 really means nothing. What is the point of insisting upon the insurance of third persons in charge of a vehicle if the insurance is only to cover such persons when driving under such circumstances that the employers is liable? Employers are bound to be insured under this Act, and, therefore, even if the employers
A are insolvent, the injured person or his relatives are sure of their compensation. If the defendant is right in his contention, this provision amounts to nothing.

The plaintiff contends that, the policy must cover any person permitted to drive, and that there is no limitation on the use of the vehicle to be covered. If the section is to be interpreted as the defendant contends, it should refer to user by a permitted driver only so long as that user is in precise accord with the authority given by the employers. There is no such limitation at all in the
B section.

Sect. 36 (1) provides that :

In order to comply with the requirements of this part of this Act, a policy of insurance must be a policy which . . . insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on the road . . .

When it says "insures such person, persons or classes of persons as may be specified in the policy," that means that it must insure Welling. The language is perfectly simple : it must insure against any liability incurred in respect of the death of any person caused by or arising out of the use of the vehicle on a road.

Further, sect. 36 says :

. . . provided that such a policy shall not be required to cover . . . (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon [the lorry].

It is conceded here that the deceased man was on the vehicle by reason of or in pursuance of a contract of employment with Mono Containers, Ltd.

I find myself wholly unable to accept the restricted interpretation which is contended for. It seems to me that the meaning of the section is beyond doubt. A man who chooses to give a third person permission to use his vehicle on a road must accept *vis-a-vis* persons injured or the relatives of those killed the obligation to see that that man is insured against all claims arising out of user on a road. A policy which purported to insure the employers or Welling to a less extent than that would be one which did not comply with the Act. Therefore, the plaintiff is entitled to succeed against the defendant. This policy, if it had complied with that section, would have covered Welling, against whom a judgment has been obtained which has not been satisfied, and the plaintiff is therefore entitled to recover against the insurer. There must be judgment for the amount claimed with costs.

Judgment for the plaintiff with costs.

Solicitors : Gisborne & Co. (for the plaintiff) ; Barlow, Lyde & Gilbert (for the defendant).

[Reported by R. BOSWELL, ESQ., Barrister-at-Law.]

Re POLLOCK deceased, PUGSLEY AND OTHERS v. POLLOCK AND OTHERS.

[CHANCERY DIVISION (Bennett, J.), July 30, 1943.]

Wills—Legacies—Interest—Legacy to be paid immediately after testator's death—Legacy to trustees on trust for son contingently—Dates from which legacies carry interest.

A testator bequeathed the following pecuniary legacies: (i) a legacy of £1,000 to his wife to be paid immediately after his death; (ii) a legacy of £10,000 to his trustees upon trust for his son if he should attain the age

of 25 years absolutely, but, if he should die under that age, then that sum was to fall into the residuary estate. It was asked what interest, if any, the legacies carried:-

HELD: (i) the legacy to the widow carried interest from the date of the testator's death.

(ii) since the second legacy was a contingent legacy given to the trustees and not to the son, interest should be credited to it from the expiration of one year from the testator's death and such interest or the income produced by the investment of the capital of the legacy should, if the contingency happened, be paid to the son, and in the meantime the son was entitled to be maintained out of such interest or income if maintenance was required. In such a case the rate of interest is 4 per cent.

[EDITORIAL NOTE]. The questions dealt with here are purely questions of administration and, though small matters in themselves, often give rise to some practical difficulty. The rules relating to interest are technical. The general rule is based upon the idea that executors require one year in which to get in the estate and where necessary convert it into money. The necessity for this getting in and conversion has led to the rule that legacies do not carry any interest until the expiration of one year from the testator's death. Thus a vested legacy does not carry interest until the expiration of this one year and this same rule has been held to apply to legacies directed to be paid as soon as possible after the testator's death. It seems, however, that there is an exception in the case of a legacy ordered to be paid immediately on the testator's death and such a legacy carries interest from the date of the death. A contingent pecuniary legacy does not as a rule carry interest until the happening of the contingency, but such a legacy given to an infant child of the testator or to a person to whom the testator stands *in loco parentis* carries interest from the testator's death if there is no provision for maintenance. Here a distinction is drawn between a legacy given directly to the infant child of the testator and one given to trustees in trust for such a child. In the latter case the legacy does not carry interest until the expiration of one year from the testator's death.

AS TO INTEREST ON LEGACIES, see HALSBURY, Hailsham, Edn., Vol. 14, pp. 354-356, paras. 662-664; and FOR CASES, see DIGEST, Vol. 23, pp. 406-411, Nos. 4765-4812.]

Cases referred to:

* (1) *Re Riddell, Trustee v. Riddell*, 155 L.T. 247.

* (2) *Re Medlock, Ruffle v. Medlock* (1886), 55 L.J.Ch. 738; 44 Digest 786, 6436; 54 L.T. 828.

SUMMONS by the executors of the deceased to ascertain the dates from which certain pecuniary legacies carried interest. The facts are fully set out in the judgment.

Wilfrid M. Hunt for the applicant executors and trustees.

H. Wynn-Parry, K.C., and *W. F. Waite* for the testator's widow.

H. B. Vaisey, K.C., and *D. H. Cohen* for the testator's son.

F. C. Watmough for certain other legatees.

BENNETT, J.: The first question is whether a legacy of £1,000 which the testator bequeathed to his widow carries interest from the testator's death or only from the expiration of 1 year after his death.

The legacy is in the following terms:

I give the following legacies all free of duty namely: (i) To my said wife the sum of £1,000 to be paid to her immediately after my death for her immediate requirements.

In dealing with questions of administration, it seems to me to be of the utmost importance that there should be certainty as to what the rule of this court is. When the matter was first argued, it was thought that there was no express authority dealing with the point raised by this question. There were cases in which legacies had been given to be paid "as soon as possible" after a person's decease, and in those cases it is clear that the legacies do not carry interest until the expiration of a year from the death of the testator. There are other cases in which a legacy has been given, to be paid at a fixed date before the expiration of a year, and in those cases it seems to be settled that a legacy given in those terms carries interest from the fixed date.

Since the matter was last before the court, the industry of counsel has discovered a decision of FARWELL, J., *Re Riddell* (1) which precisely covers the point. There the legacy was in these terms:

I bequeath to the said Annie Molison Baroness Riddell free of death duties the sum of £100,000. I direct that such legacy shall be paid immediately after my death and that the same shall be paid in priority to all other legacies and annuities bequeathed by my will and treated as a first charge on my estate.

Upon the question being raised whether that legacy carried interest from the death of the testator, FARWELL, J., said, at p. 247 :

A The question is whether the legacy of £100,000 carries interest from the death or from a year after the death. Generally speaking, a legacy carries interest from one year after the death, but there are exceptions, as in the case where the testator was the father of, or stood *in loco parentis* to, the legatee. In this case there is an express direction that the legacy shall be paid immediately after the death. It is plain, in my judgment, that these words do entitle the widow to immediate payment and, that being so, she is entitled to interest as from the date of the death.

B I shall follow that decision—a decision of a judge of great experience, particularly in regard to matters concerned with the administration of an estate by this court. I accordingly decide on this question that this legacy carries interest from the testator's death.

The other question relates to a legacy given by the testator in cl. 4 (2) of his will. He says :

C I give the following legacies all free of duty namely : . . . (2) To my trustees the sum of £10,000 upon trust for my said son John Alexander Russell Pollock if he shall attain the age of 25 years absolutely but if he shall die under that age then I direct that the same shall fall into and form part of my residuary estate.

D By cl. 1 of his will the testator had appointed his wife, his brother, and Pugsley (whom he called his trustees) to be the executors and trustees of his will ; and by a codicil, his brother having died, he substitutes for him the National Provincial Bank, Ltd., as his executor and trustee to act jointly with his wife and Pugsley.

The question is whether the legacy given in the terms which I have read :

. . . carries interest until paid or set aside from the death of the testator, or from 1 year after such death or only as from the date when the second defendant attains 25 and whether such interest should be at the rate of 4 or 5 per cent. per annum or at some and what other rate.

E As Mr. Watmough says, the rules with regard to the payment of interest upon pecuniary legacies are technical. In the ordinary case of a pecuniary legacy without any direction as to payment of interest upon it, the legacy being vested, it carries interest at the expiration of one year from the death of the testator. A contingent pecuniary legacy carries no interest, but to that rule there is an exception, the exception being that in the case of a contingent pecuniary legacy, either to a child of the testator or to somebody to whom the testator stands *in loco parentis*, such a legacy, if there is no other provision in the will for maintenance, is one which carries with it interest from the death of the testator.

F The terms of this legacy are such as not to bring it within that class of legacy, the third class of which I have spoken—a legacy to an infant to whom the testator stands *in loco parentis* or who is a child of the testator, upon a contingency. This legacy is not such a legacy. It is a legacy to the trustees of the testator's will, the testator recognising, apparently, just as the testator did in *Re Medlock* (2) that the persons whom he had appointed to be executors and trustees of his will might have to act in two distinct capacities—in one capacity as executors and the other as trustees ; and the legacy with which we are concerned, is given to the trustees of his will in that capacity.

G In those circumstances the case does not fall within one of the exceptions to the general rule. It is not a legacy given upon a contingency to a child of the testator or to somebody to whom the testator stands *in loco parentis*. It cannot, therefore, upon that principle or upon that technical rule carry interest.

H Is there any other technical rule or principle upon which the legacy can carry interest from the date of the testator's death ? I know of none, and no case has been cited to me which supports the argument that a legacy in the form in which this legacy has been given carries interest from the testator's death. In form the legacy is given in terms which are substantially the same as the legacy which the court had to consider in *Re Medlock* (2), a legacy to trustees, and in

such a case, unless there is some provision in the testator's will which indicates that the ordinary rule is to be departed from, such a legacy carries interest at the expiration of one year from the testator's death, and that is regarded as part of the income produced by the legacy, whether or not the legacy is paid at the expiration of one year from the testator's death. Any interest which is payable upon it under the general rule, and any income produced by the investment made by the legacy, follows the principle, and, if the contingency happens, the income or the interest, as the case may be, goes to the person to whom in that event the capital of the legacy goes, and, in the meantime, the interest may be utilised for the maintenance of the legatee if the legatee in the interval requires to be maintained.

The answer to the question, I think, must be that the legacy in question carried interest from one year after the death of the testator, and is at the rate of 4 per cent.

Declaration accordingly.

Solicitors : *Lake & Son*, agents for *Hole & Pugsley*, Tiverton (for all parties).
[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

ASHWORTH v J. McQUIRK & CO. LTD.

[COURT OF APPEAL (Lord Greene, M.R., Goddard and du Parcq, L.J.J.),
Sept. 29, 1943.]

Factories—Regulations—Breach—Dock—Signaller to be employed—Continuity of duty—Docks Regulations, 1934 (S.R. & O., 1934, No. 279), reg. 43.

The plaintiff was employed by the respondents, and at the material time was engaged in unloading a cargo by a fall at a hatchway. Whilst so doing he was struck and injured by the movement of a sling of which he had been given no warning. A signaller, whose duty it was to signal to the craneman to hoist the sling, was employed by the defendants and was present at the job at the commencement of the work, but the evidence did not establish that the signaller or a deputy was present at the time of the accident. The plaintiff sued the defendants, basing his claim on an alleged breach of the Docks Regulations, 1934, reg. 43. The defendants contended that the duty imposed upon them by the regulation was fulfilled by their having provided a signaller for each job whether or not he was performing his duties at any particular time :—

HELD : on the true construction of the regulation the duty imposed upon the employer was not discharged by the employment of a signaller, but required that they should keep a signaller on the job and, if the signaller was not there, the duty was not performed.

[**EDITORIAL NOTE.** The extent of the duties of employers under the Factories Act, 1937, and the regulations made under that Act have often been the subject of decision. Here the regulation required that a signaller should be employed and the decision is that the duty is not fulfilled by merely employing a signaller, but that the employer is liable if the signaller or a deputy is not on duty when his presence is required. The duty is to provide continuous protection to the workmen at all times when protection is needed and, in the circumstances of the present case, at all times while work needing the help of a signaller is going on, it is the duty of the employer to see that a signaller is on the job.

AS TO REGULATIONS CONCERNING DOCKS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 619-621, para. 1174 ; and FOR CASES, see DIGEST, Vol. 24, pp. 918, 919. Nos. 127-138.]

Cases referred to :

- (1) *Potts or Riddell v. Reid*, [1943] A.C. 1 ; [1942] 2 All E.R. 161 ; Digest Supp.
(2) *Thomas v. Bolton (T.) & Sons, Ltd.* (1928), 139 L.T. 397 ; Digest Supp.

APPEAL by the plaintiff from a decision of the Presiding Judge of the Liverpool Court of Passage, dated Mar. 17, 1943. The plaintiff was employed by the respondents, and at the material time was engaged in unloading a cargo by a fall at a hatchway. Whilst so doing he was struck and injured by the movement of a sling of which he had been given no warning. A signaller, whose duty it was to signal to the craneman to hoist the sling, was employed by the defendants and was present at the job at the commencement of the work, but the evidence

did not establish that the signaller or a deputy was present at the time of the accident. The plaintiff sued the defendants, basing his claim upon an alleged breach of the Docks Regulations, 1934, reg. 43.

E. Wooll, K.C., and *A. D. Pappworth* for the appellant.

H. I. Nelson for the respondent company.

A *Wooll, K.C.*: The judge came to the conclusion that the respondents had fulfilled their duty by making provision for a signaller and that, if the signaller was absent for a short time during the operations, the regulation had, nevertheless, been complied with. That, in my submission, is a wrong construction of the regulation. The obligation imposed by the regulation is a continuous one. [Counsel referred to *Potts or Riddell v. Reid* (1).]

B *Nelson*: If the signaller had to leave his post, there was provision for a deputy to take his place. It is putting too high a construction upon the regulation to interpret it as meaning that the signaller must be present for every load. The judgment means no more than that the onus of proof has not been discharged.

Wooll, K.C., in reply, referred to *Thomas v. Bolton (T. & Sons), Ltd.* (2).

LORD GREENE, M.R.: By the Docks Regulations, 1934, reg. 43, it is provided that:

C When cargo is being loaded or unloaded by a fall at a hatchway, a signaller shall be employed, and where more than one fall is being worked at a hatchway, a separate signaller shall be employed to attend to each fall.

D In the present case the Presiding Judge found that the defendants did on the day in question and for the purposes of the process, which was an unloading process as described in the regulation, employ a man or men whose duty was to signal to the craneman to hoist the sling. He also found that before any work began the ship and shore gangs were complete in number. By that I understand him to mean that, not merely had the defendants employed a man to perform this duty, but that the man was actually present at the job with the rest of the gang before the work began. Those findings of fact are not in any way criticised, nor, indeed, could they be, but the Presiding Judge, basing himself on those findings, held that, on the facts as so found, no breach of the regulation had been committed. He construed the regulation as meaning that **E** the duty imposed by it would be discharged provided a man was under a contract of employment to do the work indicated in the regulation, whether or not at any given moment he was present on the job. In the present case, there was a further issue of fact, about which I shall say a word in a moment, as to whether or not the man who was employed as a signaller was or was not present at the time of the accident.

F The Presiding Judge's construction of the regulation appears to me, with great respect, to be much too narrow. I do not read the words "shall be employed" as meaning merely that the duty of the employer is discharged as soon as he has engaged a man to do that work. I read those words as meaning that the signaller is to be actually at work on that particular job specified in the regulation at the time when the act of loading or unloading is taking place. Nice questions were raised in argument as to what the position might be if a signaller was present and gave the wrong signal through carelessness or inattention or committed some act of that kind. Any case of that character can be dealt with when it arises. We are not here concerned with the case of a man who was actually engaged in that work, but was doing it inefficiently; **G** we are dealing with the case of a man who, on one view of the facts, was not there at all, but had absented himself from the post of duty at the relevant time.

H In my opinion, the obligation which is imposed upon the employer by this regulation cannot be satisfied unless for each act of loading there is present on the job a signaller, which means, of course, a duly qualified signaller and a properly instructed signaller. The conception of a continuous and absolute obligation on employers under safety regulations enacted under statute is very common and familiar. It is familiar in the case of the fencing of machinery, and where a precaution which the statute requires to be taken is one involving a human as distinct from a mechanical factor, I cannot myself see why a narrow construction should be put upon the regulation so as to absolve the employer from all liability provided he has contracted with somebody to do the work,

It seems to me to be very much more consonant with the purpose of regulations of this kind that the duty imposed upon the employer should not merely be to enter into a contract with a man to do the work, but that he should be under the duty of keeping that man there doing that work, and that, if the man is not there, the obligation is not performed. It seems to me, therefore, that the words "shall be employed" in this regulation must not be regarded as being satisfied by the mere existence of a contract of employment, but that the word "employed" is used there rather in the sense of the man being actually engaged in the operation than being employed contractually to carry it out. That, in my opinion, is the true construction of this regulation, and accordingly I must respectfully disagree with the view which the Presiding Judge took. A

Another point is raised and it is this. It is said with truth that, the plaintiff's case being based on breach of statutory duty, it was for the plaintiff to establish affirmatively that a breach of the regulation had been committed, and, therefore, that it was for him to satisfy the Presiding Judge that a signaller was not engaged in the function of signalling at the time of the accident. The Presiding Judge said in his judgment that he was not satisfied that the rail man or a deputy was present when the sling in question came over. I may say that the rail man was the person whose duty it was to act as signaller, and no question was raised as to that practice. It is said that what the Presiding Judge meant was something of this kind: "It is not necessary for me to decide one way or the other whether the rail man or a deputy was present, I am not satisfied that he was and I am not satisfied that he was not. It is not necessary for me to decide that because on the construction of the regulation which I favour, and on the fact that I find that a rail man was under contract to perform the work, the liability of the defendants is not established." That, in effect, it is said, was what he meant. In my view, the Presiding Judge's mind was working in a different way. I do not think that he was thinking when he used these words of the question of burden of proof, and I cannot bring myself to think that, in using the phraseology that he did he was in some sort of error as to the side on which the burden of proof of breach of statutory duty lay. I read these words, when he says he is not satisfied that the rail man or a deputy was present, as meaning that the presence of the rail man or a deputy had not been proved, and in the context it is equivalent to saying that on the evidence it is not established that a rail man was present. That being so, it seems to me that what the Presiding Judge really meant was this: there was no rail man present so far as the evidence assists me, but that does not matter because a rail man was in fact under contract to do the work, and his absence at the moment is, therefore, immaterial on the true construction of the regulation. That seems to me to be the true view as to what the Presiding Judge meant, and I am confirmed in forming that opinion when I look at the evidence which is really, as it seems to me, all one way. It is true that a foreman gave some evidence, which does not strike one as being very satisfactory, as to the presence of the rail man at the crucial moment, but certainly the weight of the evidence and the probabilities are strongly in favour of the plaintiff's case. If the rail man was present, he must have entirely failed in his duty to give a signal or the craneman must have committed a breach of duty in disregarding the signal if it were given, and the probabilities are that the reason why the plaintiff was hit by the sling which was wrongly brought down upon him was that there was no rail man there. That seems to me to be the probability. Therefore, the view that I take as to what the Presiding Judge means is one which I must confess seems to me to be completely in accordance with the weight of the evidence which was before him. That being so, the position is that the regulation was not complied with, and that really disposes of the whole point in the case except the question of damages. B C D E F G

In my opinion, the appeal on the question of liability ought to be allowed. H

GODDARD, L.J. : I agree. I think obviously on the evidence the Presiding Judge must have intended to find that there was no signaller present at the time of the accident and that, therefore, at that time the work of unloading was being carried on in the absence of a signaller. That being so, it seems to me that reg. 43 must be construed as a protection for the plaintiff. If we gave the construction to it which I think the Presiding Judge gave, it really would afford no protection at all. I agree with LORD GREENE, M.R., that it is not necessary

to decide here and now what would have happened if a signaller had been appointed and he had negligently given a wrong signal, or had negligently omitted to give the signal that he ought to have done when he was there present for the purpose of giving the signal. That does not arise in this case. In this case work was allowed to continue when no signaller was present. Therefore, I think, giving a reasonable construction to this regulation which would afford a protection to the workman, we ought to hold that there was a breach of the regulation for which the employers were responsible.

DU PARCQ, L.J. : I agree with what has been said by LORD GREENE, M.R., and GODDARD, L.J., and I am sure it will not be thought that I am in any way disrespectful to the Presiding Judge if I add no words of my own to what they have said.

Appeal allowed with costs, the damages to be £400.

Solicitors : J. H. Milner & Son, agents for Silverman & Livermore, Liverpool (for the appellant) ; Smiles & Co., agents for H. G. C. Day & Co., Liverpool (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

HARRISON v. LIVERPOOL CORPORATION.

[COURT OF APPEAL (Lord Greene, M.R., Goddard and du Parcq, L.JJ.),
Sept. 30, 1943.]

Practice—Medical reports—Order for agreed medical reports—One report only may be filed.

Practice—Payment into court—Admission of liability—Judgment should not be for less than the amount paid in.

When it is ordered that medical reports shall be agreed between the parties, if possible, it means a report in which the doctors have come to an agreement on matters of medical fact and of medical opinion as therein stated. The order is not complied with by putting in two differing and inconsistent reports. The proper form of order, however, should refer to a medical report and not reports, except in cases where different types of injury are dealt with by different sets of specialists.

When a sum is paid into court with an admission of liability, judgment should not be given for a smaller sum, because liability is admitted up to the amount paid in.

[EDITORIAL NOTE.] In order to reduce the expense of calling medical evidence, a practice has been evolved of obtaining an interlocutory order that medical reports shall be agreed between the parties. It is here pointed out that by this is meant that, if the doctors are agreed as to the medical facts and the matters of medical opinion arising upon those facts, then the proper course is for an agreed report by the doctors to be drawn up and signed by them. The order should speak of an agreed report, and not reports in the plural as seems to have been done in the past. There may, however, be complicated cases where more than one report is necessitated by the fact that different injuries to the same person have had to be treated by different specialists. In such a case each set of specialists should sign an agreed report.

AS TO ORDERS ON SUMMONS FOR DIRECTIONS, see HALSBURY, Halsham Edn., Vol. 26, pp. 51, 52, para. 83 ; and FOR CASES, see DIGEST, Practice, Nos. 1800-1816.

AS TO PAYMENT INTO COURT, see HALSBURY, Halsham Edn., Vol. 26, pp. 62-64, paras. 100-107 ; and FOR CASES, see DIGEST, Practice, pp. 479-484, Nos. 1591-1637. See also YEARLY PRACTICE OF THE SUPREME COURT, pp. 369-377.]

Case referred to :

(1) Davies v. Rustproof Metal Window Co., Ltd., [1943] 1 K.B. 299 ; [1943] 1 All E.R. 248 ; Digest Supp.

APPEAL of the plaintiff from a judgment of STABLE, J., at Liverpool Assizes, dated Apr. 19, 1943. So far as material to the matters here reported, the facts sufficiently appear from the judgment of LORD GREENE, M.R.

Phineas Quass for the appellant.

G. J. Lynskey, K.C., and A. D. Pappworth for the respondents.

LORD GREENE, M.R. : This case came before STABLE, J., and comes before us upon very unsatisfactory materials. In the course of the interlocutory proceedings an order was made, in what appears now to be the common form in such cases, that medical reports be agreed between the parties if possible, and that, failing agreement, the medical evidence be limited to two witnesses on each side. It is to be observed that the order refers to medical reports in the plural, and it appears to be commonly interpreted, at any rate it has been interpreted in this case, as meaning really no more than that the document shall be accepted as the doctor's evidence. A

What was done was this. Each side put in a report by its doctor, and the plaintiff, having received the report of the defendant's doctor, submitted to another examination by another doctor and his report was put in, and the solicitors for the parties purported to agree those three reports, which were then put before the court as medical reports agreed pursuant to the order. When those reports are examined in relation to the facts of this case, two comments at once leap to the mind. One is that there are important gaps in the sum of the information to be collected from them, but what is more important, I think, is that the reports appear to be, in particulars of some importance, inconsistent with one another. B

It must be understood that orders of this kind are made for the purpose, not of hindering the administration of justice, but of assisting it. If a judge is confronted with two or more medical reports which are inconsistent with one another and the doctors are not called, he is immediately placed in the position of having to select, if it be material, between the two views and the two statements. The whole object of this type of order is to ensure that matters of medical fact, and matters of medical opinion shall, if possible, be agreed by the medical men. That is the object and, as I understand it, the sole object of orders of this kind, and, indeed, no order could achieve anything more. The practice was certainly never intended to admit of inconsistent and differing medical points of view being put before the judge and described as agreed medical reports. They are nothing of the kind. You cannot have an agreement on two inconsistent statements of fact, and the phrase "agreed medical report" means, and means only, a report where the facts stated are agreed as true medical facts, or other facts as the case may be, and the medical opinions expressed are accepted as correct. In the normal case in pursuance of an order of this kind, the doctors on the two sides would meet and embody their views in a document which they may both sign. That is very convenient, and it would save a great deal of trouble and expense in many cases; but it is not to be understood that orders of this kind are to be made as matters of course. It would depend very much on the nature of the case and the nature of the injuries, and whether it will save trouble and expense in the long run by dispensing with the doctors at the hearing. On an interlocutory application some discretion must be exercised by the Master who is making the order as to whether it will be a saving of expense to make this type of order, but it must not be taken that that is all that is necessary. The case may be one where the report of the first doctor is accepted by the other doctor. If, on the other hand, there are likely to be points of controversy, then, if the agreement is to be completed, they can only solve them by coming to an agreement, and, if they cannot come to an agreement, there can never be an agreed report. That is the object of this procedure. C
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In future these orders should refer not to medical reports, but to a medical report. That, of course, does not mean that where, for instance, there are two types of injury, each of which is dealt with by, let me say, specialists, there should not be two agreed medical reports, one by one pair of specialists, and the other by another pair of specialists, each dealing with its own province. What I mean by saying "medical report" is, where doctors are dealing with the same symptoms and one diagnosis, that should be embodied in one medical report. The practice of making orders allowing a number of such reports, each dealing with the same subject-matter, must cease, and the matter must be dealt with in the way I have indicated. H

In this case, in the first place, the matter was left in considerable confusion. One gap in the evidence which STABLE, J., considered to be of importance was the question of treatment; he was very much impressed by the fact that no

treatment had been ordered for this plaintiff, such as electrical treatment or massage, which he appears to have thought would have been the proper treatment in a serious case. With the greatest respect to STABLE, J., he was not entitled, in my opinion, to draw any such inference from some assumed medical practice which he may have come across in other cases; he was not entitled to assume, in the absence of evidence, that any such treatment would have been suitable on the facts of the present case. He did not use the fact that no treatment

- A was given as a reason for cutting down the damages, save in this sense, that the fact that no treatment was given was apparently regarded by him as a matter of evidence which negatived, or tended to negative, the seriousness of the injury. If the doctors had been in court, it may very well be that they would unanimously have said that, in this class of sprain, whether it was serious or was not serious, treatment of that kind was not of any use, or would not have been of any use. I do not know, nor did STABLE, J. know; nevertheless,
- B he drew upon some store of medical knowledge of his own, and his judgment was obviously influenced to a very great degree in assessing the seriousness of this injury by that medical view of his own. When the medical evidence is examined, I can find there evidence, even in the mouth of the defendants' doctor, of a permanent, physical affection which is a matter of some seriousness. It is perfectly true that the defendants' doctor says that the plaintiff does not suffer from disability. There, again, what he means by that exactly is not too
- C clear; I think, judging by the rest of his statement he must have in his mind merely the question of ability to earn her wages, and, of course, there is no dispute that she could, at the date when she was examined by this doctor, have earned her usual wages in spite of the fact that she was suffering from a more or less permanent injury, and in the workmen's compensation sense was not suffering from disability. If that is what the doctor meant and, in my
- D opinion, it must have been what he meant, it is irrelevant. If he meant that she was a physically perfect human being, that is quite inconsistent with the evidence of her own doctor, because he says that she complained at the time she saw him that the ankle was still a little painful, and that the foot was apt to turn inwards when she was walking. He does not suggest for a moment that that complaint of hers was ill-founded or imaginary. He says:

- E There was no deformity or swelling, movement was very good and painless except she complained of some pain when the foot was turned inwards at the ankle. . . In my opinion, she is not now suffering any disability as a result of the accident.

If that means the usual workmen's compensation disability, it is not disputed; if it means she was not suffering any physical disability, it is untrue. Then, when you look at the evidence of the other two doctors, one of them an orthopaedic surgeon, it appears on his evidence that she has a tendency to swelling,

- F but these symptoms are not severe:

She should always wear flat heeled shoes in future, and I have also suggested that she should have an outside crooking and elongation of the heel of the shoe to minimise the strain on the damaged ligament.

- He then goes on to say that she may be more liable to further strains of the ankle, and to say that a person in that position is not suffering from disability in the sense of physical disability is quite untrue. This young woman has to wear special shoes for the rest of her life, and is obviously suffering from some disability that might seriously prevent her earning wages in other types of work if she wished to engage in them. Her panel doctor, who had attended to her from the beginning, refers to her condition at the time and the shock that she suffered as being aggravated by the fact that she was three months pregnant at the time. He says:

- H The ankle is showing a definite weakness and will probably not recover for another three months. The ankle will most likely remain permanently weak.

She herself in her own evidence said she could not go back to work for certainly three months, quite apart from this pregnancy, and that this accident had prevented her working.

That being the state of the evidence, the trial judge has awarded her a sum of £45 10s., which is just about the three months' wages that she was claiming. He obviously took the view that she could have gone back to work very much

earlier, but that view was based on the unjustifiable assumption that if her injuries were so serious she should have been given some massage, or something of that kind. In this case, I think the judge has taken into account matters which he ought not to have taken into account and has not really dealt with these three medical reports in the way in which they ought to have been dealt with. Giving the best consideration to the matter that I can, I am of opinion that the proper sum to compensate this plaintiff is £150.

There is one further matter to which I should refer. As the result of an amended defence and an amended payment into court, the defendants paid into court the sum of £50 with an admission of liability. Nevertheless, STABLE, J., declined to give judgment for £50, and gave judgment only for £45 10s., the result of that, of course, being very important in respect of costs. In my opinion, STABLE, J., ought to have followed what was said in this court in *Davies v. Rustproof Metal Window Co., Ltd.* (1), where GODDARD, L.J., reading the judgment of the court, said, at p. 300 ([1943] 1 All E.R., at p. 249):

... if money is paid in with an admission of liability, it follows that liability is admitted up to the amount paid in and judgment cannot be given for less, which is not the case where it is paid in with a denial of liability.

The trial judge here erred in refusing to give judgment for the £50, which he ought to have done, and, in my opinion, the proper figure is £150.

GODDARD, L.J.: I agree, and I do not think I can usefully add anything to what LORD GREENE, M.R., has said.

DU PARCQ, L.J.: I also agree.

Appeal allowed with costs. Upon a review of the facts the court varied the judgment of the court below from £45 10s. to £150.

Solicitors: *J. H. Milner & Son*, agents for *Silverman & Livermore*, Liverpool (for the appellant); *Cree & Son*, agents for *W. H. Baines*, Town Clerk, Liverpool (for the respondent corporation).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

BUDD v. ANDERSON, MORRISON AND WILLIAMSON

[KING'S BENCH DIVISION (Asquith J.), June 11, 1943.]

Emergency Legislation—Imprisonment under defence regulation—Member of a proscribed association—Inaccurate copy of order served on detainee—Legality of detention—Defence (General) Regulations, reg. 18B (1), (1A), (4).

The plaintiff, a member of a proscribed society, was detained with 25 other persons on June 15, 1940, under an order made on June 11, 1940, by the Home Secretary in pursuance of the Defence (General) Regulations, reg. 18B (1A). As a matter of Home Office practice a copy of the order was served on the plaintiff, but this inaccurately stated that the reason for his arrest was that he was a person of hostile associations, whereas the true reason, as stated in the original order, was that he was a member of a proscribed association. The plaintiff was not in fact misled by the error nor was he thereby prejudiced by a deprivation of his rights under the Defence (General) Regulations, 18B (4). In May, 1941, the plaintiff brought *habeas corpus* proceedings in the Divisional Court and was released by order of that court on May 27, 1941. The plaintiff brought an action for false imprisonment against the Home Secretaries holding office during the period he was detained and against the official responsible for the issue of the inaccurate copy of the order, claiming that his detention was illegal and he relied in part on the action of the Divisional Court in releasing him. It was conceded that the order of June 11, 1940, was valid:—

HELD: the order directing the plaintiff's detention was valid and a mistake in the copy of it could not deprive the order of its validity where the plaintiff was not prejudiced by the error. The detention was, therefore, legal and the action failed.

[EDITORIAL NOTE. The person detained was by an error wrongly informed as to the reason of his detention and for this reason the Divisional Court held that the order detaining him was invalid and ordered his release. *Prima facie* that would entitle the person detained to bring an action for false imprisonment, but it is held that the decision of the Divisional Court is inconsistent with the later decision of the House of Lords in *Greene v. Home Secretary* (4), and that, upon the true view of the law, the order of detention was valid despite the fact that a misleading document was given to the person detained and that, therefore, no right of action for damage vested in the person detained.

AS TO DETENTION UNDER EMERGENCY LEGISLATION, see HALSBURY, Hailsham Edn., Vol. 6, p. 533, para. 622; and FOR CASES, see DIGEST, Vol. 11, p. 552, Nos. 538-543.]

Cases referred to :

- (1) *Stuart v. Anderson and Morrison*, [1941] 2 All E.R. 665; Digest Supp.
- (2) *R. v. Brixton Prison (Governor), Ex parte Pitt-Rivers*, [1942] 1 All E.R. 207; Digest Supp.
- * (3) *Liversidge v. Anderson*, [1942] A.C. 206; [1941] 3 All E.R. 338; Digest Supp.
- * (4) *Greene v. Secretary of State for Home Affairs*, [1942] A.C. 284; [1941] 3 All E.R. 388; Digest Supp.

ACTION for damages for false imprisonment on the ground that a detention made in pursuance of the Defence (General) Regulations, reg. 18B was illegal.

The facts are fully set out in the judgment.

J. Scott Henderson and Harold Brown for the plaintiff.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.) and Valentine Holmes for the defendants.

ASQUITH, J. : This is an action for damages for false imprisonment, brought in the following circumstances. On June 15, 1940, the plaintiff was detained under the Defence (General) Regulations, reg. 18B, first in Brixton prison and later at various internment camps near York and Liverpool. In May, 1941, the plaintiff brought *habeas corpus* proceedings in the Divisional Court, and on May 27, 1941, that court made an order for his release.

As a matter of history, although its bearing upon the issues that I have to determine is very remote, he was re-arrested about a week or 10 days later, and only released from this second term of detention about a fortnight before the present case was heard, and in respect of his second detention he again brought *habeas corpus* proceedings, which, however, in this case failed both in the Divisional Court and on appeal.

The present action is brought in respect of his first period of detention. The plaintiff claims that this detention was illegal, and he relies, in part at any rate, on the action of the Divisional Court in releasing him in May, 1941, in support of his contention. Sir John Anderson, the first defendant, is sued as having caused the original detention. Mr. Herbert Morrison, who succeeded Sir John Anderson as Home Secretary, is sued as having continued it. The basis of the liability of the alleged third defendant is a matter to which I will come in a moment.

The plaintiff is a man with a respectable record of public service. He joined the Army in 1914, when only 16 years of age, and was wounded in the Battle of Loos in 1916 and discharged from the Army ultimately with a 70 per cent. disability pension. He served after the war in the auxiliary division of the Royal Irish Constabulary, and between 1930 and 1936 he was a member of the West Sussex County Council, and, I think, of the Worthing Town Council, and also a special constable. On Aug. 4, 1939, he reported as a captain in the Royal Engineers, in which he served until the day of his arrest. In 1933 he had joined the British Union of Fascists, and he became area organiser for Sussex and Hampshire. In 1936 he was assistant national inspector on behalf of the union for the Midlands and North Wales, and I rather think that when he was elected to the various local government bodies to which I have referred he stood on a Blackshirt platform. After 1936 his services as an organiser were dispensed with by the British Union of Fascists, but he continued for some time afterwards to subscribe to the union, and remained until his arrest, and remains today, so he says, in sympathy with the aims of the union, which he claims are purely patriotic.

The circumstances of his arrest were these. On June 11, 1940, just before the fall of Paris, the then Home Secretary, the first defendant, made an order under reg. 18B ordering the detention of 25 persons, one of whom was the plaintiff. According to the decisions of the courts as they stand today, this was a perfectly valid order. It was criticised in the Divisional Court in the proceedings in May, 1941, on a number of grounds by HUMPHREYS, J. It was criticised on three grounds in particular, first, that 25 persons were dealt with *en bloc*, hence the Home Secretary could not have given individual attention to each case; secondly, that the order failed to recite that the Home Secretary thought it necessary to exercise control over the plaintiff, and thirdly, that the Secretary of State had no reasonable grounds for detaining him, by which HUMPHREYS, J., meant no objectively reasonable grounds for detaining him. These objections have since been disposed of respectively by the decisions of the courts in *Stuart v. Anderson and Morrison* (1), *R. v. Brixton Prison (Governor)*, *Ex parte Pitt-Rivers* (2), and *Liversidge v. Anderson* (3). So clear is this that counsel for the plaintiff was forced to concede that the Home Secretary's order of June 11 was a valid order. I will refer to this order, in order to distinguish it from another document of the same date, as document 1.

Reg. 18B contains no express provision that any copy or notice of the order of detention or any extract from it should be served on the intended detainee at the time of his arrest. Whether such a provision should be implied is a question that I will come to later, but, however that may be, in practice the Home Office would make a copy or summary of the order in triplicate. One copy would be served on the detainee, a second would be sent to the governor of the prison to which he was committed, and a third would be handed to the police officer effecting the arrest, with directions to this last to return it to the Home Office in due course, indorsed with a statement by such officer that he had carried out the instructions. This document in triplicate, as employed in the present case, I will refer to as document 2. In the present case, by an unfortunate and unexplained error, document 2 did not accurately reproduce the terms or effect of document 1. The third defendant drafted document 2 and put it into circulation by handing it to the detective inspector who effected the arrest, and that is the basis of his alleged liability. That document runs as follows:

Whereas I have reasonable cause to believe the persons mentioned in the schedule to this order to be persons of hostile associations and that by reason thereof it is necessary to exercise control over them: Now, therefore, I in pursuance of the power conferred on me by the Defence (General) Regulations, reg. 18B (1A), hereby make the following order: I direct that the persons mentioned in the schedule to this order be detained.

Then follow the names of the 25 persons including the plaintiff. The second sentence of document 2 is accurate. The real ground of the plaintiff's detention was, in fact, membership of what may be called a proscribed association, namely, the British Union of Fascists, and this ground, membership of a proscribed association, is the ground that is dealt with, as stated in document 2, in reg. 18B (1A). The first paragraph of document 2, the exordium, is taken, not from reg. 18B (1A), but from reg. 18B (1). Reg. 18B (1) does not relate to membership of proscribed associations or organisations, but to other possible grounds of detention, including hostile associations, and hostile associations were the actual ground specified in what I have called the exordium in question. In the result a detainee served, as the plaintiff was, with a notice in this form, might, if he had a copy of reg. 18B at hand, realise that he was detained as a member of a suspect organisation. He might also reasonably suppose that another ground for his detention was that specified in the exordium, that is to say, hostile associations. Such was not the actual ground referred to or relied on in the order of the Home Secretary, document 1.

On a possible view of the law it might be material to decide whether the plaintiff was, in fact, misled, and I, therefore, record that the evidence in my view established that he was not misled into supposing that his membership, or ex-membership, of the British Union of Fascists had nothing to do with his

arrest. He may or might have supposed that he was arrested on two charges (a) hostile associations, and (b) membership of the British Union of Fascists; but I am quite satisfied that he supposed (b) to be a ground, not necessarily the only ground but a ground, of his detention. He had ample reason for making that assumption. He had ample reason for thinking that in the early months of 1940 the Government were, if I may borrow an expressive but homely phrase from the Attorney-General, "after" the British Union of Fascists; that they regarded that body with disfavour and suspicion. He knew this partly because A a lecturer—clearly an officially inspired person—had lectured to his unit, I think, in Jan., 1940, about the alleged subversive and disloyal character of the Union. Again, a letter at about that same time, early in 1940, had been sent to the plaintiff's commanding officer, one part of which letter had come to the plaintiff's notice, in the same vein and of the same tenor; and within two days of B his arrest we find him writing a letter dated June 17, 1940, to the chairman of the advisory committee appointed under reg. 18B, containing, amongst other passages, the following two sentences:

I have not been to Germany during the present regime, I have never written a letter to Germany, and I do not know any Germans, either in this country or abroad. I joined the British Union when it first came into being as an organiser, I am not a propagandist, I have never spoken in public, and, further, I have done nothing for the party for about 3 years.

C The first of those two sentences repudiates the "hostile associations" imputed in what I have called the exordium of document 2 (I would add in passing that there is no reason for doubting the truth of the plaintiff's denial under this head). The second paragraph is clearly an appropriate rejoinder to a charge of being a member of a proscribed association, and would not have been D phrased as it was if the plaintiff had not believed that, in all probability, one of the grounds for his detention was that membership. In his evidence he candidly admitted that he surmised this.

On July 26, 1940, the advisory committee appointed under reg. 18B informed the plaintiff, quite clearly, in writing, that he was detained because he had been a member of the British Union of Fascists, in pursuance of the committee's duty under para. (5) of the regulation. The committee, after hearing arguments E and objections from the plaintiff, rejected them, and a number of similar representations by the plaintiff to successive secretaries of State for Home Affairs were equally infructuous. That is, between July 25, 1940, and May 27, 1941.

On May 27, 1941, as I have indicated, *habeas corpus* proceedings brought by the plaintiff were heard by the Divisional Court, and he was released. It is F important to note the grounds upon which that court proceeded. HUMPHREYS, J., who gave the leading judgment, proceeded on the grounds which I have already referred to, grounds which, in my respectful opinion, whatever their validity at the time, seem to me now to be in conflict with later decisions, and in particular with the decision in *Liversidge v. Anderson* (3). The other two members of the court, SINGLETON and TUCKER, JJ., based their decisions solely on a different *ratio*. Both of them relied on para. (4) of the regulation, which runs as follows:

G It shall be the duty of the Secretary of State to secure that any person against whom an order is made under this regulation shall be afforded the earliest practicable opportunity of making to the Secretary of State representations in writing with respect thereto and that he shall be informed of his right, whether or not such representations are made, to make his objections to such an advisory committee as aforesaid.

It is only the first part of para. (4) which matters for the present purpose. SINGLETON and TUCKER, JJ., constituting the majority of the court, asked how H could it be said that the Secretary of State had complied with his duty under this paragraph, the duty to give the detainee the earliest practicable opportunity of making representations to the Home Secretary about his detention, if the detainee had been left in ignorance, or at least doubt, as to the precise grounds of that detention? They, therefore, held that the Secretary of State had not complied with his duty under para. (4). It seemed to them to follow that the plaintiff's detention was illegal, and that he should be released, and they, accordingly, discharged him from custody, HUMPHREYS, J., concurring for his own reasons.

I will assume in favour of the plaintiff that in this case a detention which is illegal to the extent of justifying his release on *habeas corpus* is also illegal for the purpose of enabling a civil action for false imprisonment to succeed. Where the facts on which the two courts have adjudicated are identical, the assumption would seem not unreasonable, although I would reserve the question whether it is valid in all circumstances. Making this assumption in favour of the plaintiff, two further propositions seem to be plain : first, that the decision of the Divisional Court is not *res judicata* for the purpose of the present proceedings for false imprisonment, if only because the parties are different. Apart from that, it is inherent in *habeas corpus* proceedings that they do not result in a *res judicata* decision, at least, if they fail. A number of successive applications can be made on the same facts. The second thing which appears to me to be plain is that the *ratio* upon which the majority of the Divisional Court proceeded is binding on me, unless that *ratio* is in conflict with the decisions of superior tribunals which are binding on the Divisional Court itself. It is on this last issue, as it appears to me, that the decision in the present case turns.

While, I hope, not lacking in zeal on behalf of the liberty of the subject, I cannot ignore the decisions of the House of Lords or question their supremely binding character. I have come to the conclusion, not without doubt and difficulty, that the combined effect or result of *Liversidge v. Anderson* (3) and *Greene v. Secretary of State for Home Affairs* (4) is inconsistent with the earlier decision of the Divisional Court, overrides the principles on which that decision proceeds, and compels me to decide the present case in favour of the defendants.

Liversidge v. Anderson (3), though in form a decision on particulars, is in substance, if I may quote from LORD MACMILLAN at p. 258 ([1941] 3 All E.R. at p. 370) a decision that

... the production by the Secretary of State of an order of detention by him *ex facie* regular and duly authenticated ... constitutes a peremptory defence to any action of false imprisonment and places on the plaintiff the burden of establishing that the order is unwarranted, defective or otherwise invalid.

In the present case it is conceded that the order, document 1, is neither unwarranted nor defective nor otherwise invalid. It may be objected that part of the passage which I have cited was in the nature of a *dictum*. It may be said that the issue before the House of Lords was whether the production of the order was conclusive as to the existence of reasonable grounds for detention, not whether it was conclusive for all purposes ; and it may further be objected that in *Liversidge v. Anderson* (3) there was no breach of any paragraph of reg. 18B. There was no question, for instance, of a defective copy of the order being served. I therefore turn for further guidance to the other leading House of Lords decision in this matter, *Greene v. Secretary of State for Home Affairs* (4). In that case also there was a valid order made by the Secretary of State and an accurate copy served on the detainee, but there was a breach of reg. 18B (5). Para. (5) provides, among other things, that :

... it shall be the duty of the chairman to inform the objector of the grounds on which the order had been made against him and to furnish him with such particulars as are in the opinion of the chairman sufficient to enable him to present his case.

The advisory committee in *Greene's* case (4) failed to comply with this paragraph, inasmuch as they misquoted the original order and misinformed the detainee as to the causes of his detention, but it was held that this mistake, although its result was that a paragraph of the regulation had been violated, did not invalidate the order of detention or divest the detention of the lawful character which it had originally possessed, and that that order constituted a complete answer to the appellant's demand for a writ of *habeas corpus*. There are two or three passages which I will venture to read from the judgment in that case. VISCOUNT MAUGHAM says, at p. 296 ([1941] 3 All E.R., at p. 395) :

The other point argued before your Lordships can I think be dealt with shortly. I agree with all the judges who have considered this case that the appellant has not shown that he was prejudiced by the error in the document sent to him by the advisory committee. I also agree with their view that a mistake in that document could not in any event invalidate the original detention or render its continuance invalid.

At p. 297 ([1941] 3 All E.R., at p. 396), LORD MACMILLAN said :

The result, in my opinion, is that the production of the Secretary of State's order, the authenticity and good faith of which is in no way impugned, constitutes a complete and peremptory answer to the appellant's application.

And later, at p. 298 ([1941] 3 All E.R., at p. 397), he said :

A The mistake, the occurrence of which your Lordships deplore, does not in any way affect the validity of the detention order which is the answer to the appellant's application. It affects the due observance of the procedure prescribed for the further consideration of the case of a person who is *ex hypothesi* under lawful detention. Consequently the mistake affords no ground for invalidating the detention order and does not help the appellant in his present application.

Finally, LORD ROMER at p. 309 ([1941] 3 All E.R., at p. 404) said :

B It only remains to deal with the mistake in the document emanating from the advisory committee in professed pursuance of the duty cast upon the chairman of the committee by para. (5) of the regulation. The mistake, of which no explanation has been given to your Lordships, was most regrettable. But it cannot affect the validity of the order that had been made by the Home Secretary nearly two months before. Had the appellant been prejudiced by the mistake the court might nevertheless have afforded him some relief. But the matter was carefully considered both by the Divisional Court and the Court of Appeal. They came to the conclusion that the appellant had not been in any way prejudiced by the mistake, and I am satisfied that their conclusion was right.

D In that connection I might mention that the judgment of GODDARD, L.J., in the Court of Appeal, which was accepted by the House of Lords and approved, suggested that, if one of these procedural paragraphs of reg. 18B were violated, the remedy might be by way of *mandamus*.

E The mistake in this case in what I have called document 2 was only relied on by the majority of the Divisional Court as depriving the detainee of his rights under para. (4), and I cannot believe that the House of Lords, having held that a detainee's deprivation of his rights under para. (5) did not invalidate his detention, would have held that a different result should have flowed from his deprivation of his rights under para. (4), especially where, the detainee was not prejudiced by that deprivation, and, if necessary, I find as a fact, that that was the case here. There is no reason to suppose that, if he had been given an earlier opportunity of making representations to the Home Secretary, those representations would have differed, either as regards their substance or their fate, from those which he repeatedly made somewhat later to the Secretary of State, or from those which he made to the advisory committee.

F The rights secured by para. (5) seem to me distinctly more valuable than those secured by para. (4), and for a breach of them, even if he had been damnified, a *mandamus* would, in my view, have been a sufficient remedy.

G A number of cases were cited to me, dealing with the position where a valid conviction is followed by an irregular commitment, but those cases, which are not easy to reconcile with each other, shed only a wavering and uncertain light on the point which I have to determine.

H I would only add two observations which apply if my reasoning is wrong. In the first place, I would add that the position of the jailer, or possibly of the third defendant, but certainly of the jailer, might in *habeas corpus* proceedings have been different in law from that of the Home Secretary. Under the technical rules of *habeas corpus* it might have been argued that document 2, the only document which could be produced by the jailer, would have been an insufficient return.

In an action against the Home Secretary, the Home Secretary might have produced document 1, which is on any possible view valid. The existence of this valid order is the basis of this judgment.

Secondly, I would add that, if the detention was in fact illegal, the plaintiff's damage would have been merely nominal. If a true copy of the order had been served on him, all subsequent events, so far as one can judge, would have

followed exactly the same course as they did. The only difference is that he would not in fact have been released for the short period between May 27, 1941, and the early part of June.

For those reasons, I give judgment for the defendants.

Judgment for the defendants with costs.

Solicitors: *Oswald Hickson, Collier & Co.*, agents for *Marsh and Ferriman*, Worthing (for the plaintiff); *Treasury Solicitor* (for the defendants).

[Reported by HUBERT B. FIGG, ESQ., Barrister-at-Law.]

Re PRATT'S SETTLEMENT TRUSTS. McCULLUM v. PHIPPS-HORNBLY AND OTHERS.

[CHANCERY DIVISION (Cohen, J.), June 25, 1943.]

Powers—Exercise—Appointment of absolute interest with gift over—Gift over infringing perpetuity rule—Whether whole appointment invalid.

By a marriage settlement the settlor settled her reversionary interest in certain properties in Westminster and the settlor and her husband were given power jointly to appoint in favour of all or such one or more of the children or issue of the said marriage. By a subsequent deed of appointment the settlor and her husband irrevocably appointed that, subject to their respective interests, the Westminster properties and the moneys to arise from the sale thereof should be held on trust for their eldest son A.P., with a proviso that, if A.P. should die without leaving issue living at his death, the property was to be held in trust for other children of the marriage. The son A.P. died in 1933 without leaving issue living at his death. It was agreed that the gift over infringed the rule against perpetuities and the question was whether the whole appointment was void on that account or merely the gift over:—

HELD: the appointment of the absolute interest to the eldest son was valid, but the gift over was void.

[EDITORIAL NOTE.] In this case the court has followed the decision in *Re Brown & Sibly's Contract* (1), holding that only the gift over which was too remote failed. The result of the failure of that gift is to make the prior interest an absolute one, since the defeasance placed upon it has gone. The only difficulty lies in the decision of the Exchequer Chamber in *Doe d. Blomfield v. Eyre* (3), which appears to suggest that the presence of a gift over shows an intention that the prior gift was not to be an absolute interest but was to be defeated on the happening of the stated event. This decision, however, is held not to apply where the gift over is void as infringing the rule against perpetuities.

AS TO APPOINTMENT WITH EXECUTORY GIFT OVER, see HALSBURY, Hailsham Edn., Vol. 25, p. 572, paras. 1020, 1021; and FOR CASES, see DIGEST, Vol. 37, pp. 495-497, Nos. 888-896.]

Cases referred to:

- * (1) *Re Brown and Sibly's Contract* (1876), 3 Ch.D. 156; 37 Digest 113, 449; 35 L.T. 305.
- (2) *Stuart v. Cockerell* (1870), 5 Ch. App. 713; 37 Digest 67, 96; 39 L.J.Ch. 729; 23 L.T. 442.
- * (3) *Doe d. Blomfield v. Eyre* (1848), 5 C.B. 713; 37 Digest 496, 889; 18 L.J.C.P. 284; 10 L.T.O.S. 525.
- (4) *Robinson v. Wood* (1858), 27 L.J.Ch. 726; 44 Digest 432, 2598; 31 L.T.O.S. 311.
- (5) *Wainwright v. Miller*, [1897] 2 Ch. 255; 37 Digest 93, 293; 66 L.J.Ch. 616; 76 L.T. 718.
- (6) *Bourne v. Keane*, [1919] A.C. 815; 8 Digest 250, 106; 89 L.J.Ch. 17; 121 L.T. 426; *reusq. S.C. sub nom. Re Egan, Keane v. Hoare*, [1918] 2 Ch. 350.

SUMMONS by a trustee of the settlor's marriage settlement to determine the effect of a power of appointment thereunder. The facts are fully stated in the judgment.

E. G. Eardley-Wilmot for the plaintiff, one of the trustees of the original marriage settlement.

Hon. C. R. R. Romer, K.C., and Raymond W. Jennings for the trustees of the marriage settlement of the settlor's eldest son.

H. B. Vaisey, K.C., and C. D. Myles for the personal representative of the settlor's third son.

Wilfrid M. Hunt for the personal representatives of the wife of the settlor's second son.

R. F. Roxburgh, K.C., and J. F. Bowyer for the settlor's daughter.

A COHEN, J. : On the occasion of the marriage of Catherine Greene to Dr. Spencer Pratt, Miss Greene, on Feb. 27, 1854, covenanted to settle her reversionary interest in certain property in Westminster by a deed of the same date a declaration of trust of the property. In that declaration of trust there was reserved to the wife a life interest, not restraining her from anticipation, and a protected life interest after her death in favour of the husband. Subject to these life interests the proceeds of sale were to be held upon trust for :

B . . . all or such one or more of the children or other issue of the said Catherine Elizabeth Greene by the said Spencer Pratt if more than one in such shares and charged with such sums for the benefit of some one or more of the said children or issue and generally in such manner as they during their joint lives should by deed with or without power of revocation and new appointment (such new appointment to be in favour of the child children or issue aforesaid) from time to time direct or appoint and in default of
C and until such appointment and subject thereto and so far as any such appointment should not extend upon trust for all the children of the said Catherine Elizabeth Greene by the said Spencer Pratt who should attain the age of 21 years or being daughters or a daughter marry in equal shares.

The wife, who was an infant at the time of the marriage, came of age and on Nov. 15, 1854, confirmed the assurance of the property to the trustees. Her interest was a reversionary interest, but it fell into possession on the death
D of her father on July 1, 1862. There were issue of this marriage three sons and one daughter, all of whom attained the age of 21 years.

On June 25, 1886, Dr. and Mrs. Pratt executed an irrevocable deed of appointment on the occasion of the intended marriage of their eldest son, Arthur Spencer Pratt. By this deed they exercised their power to revoke an earlier revocable appointment and irrevocably directed and appointed that, subject to their respective interests therein, the Westminster property and the moneys to arise
E from the sale thereof should be held on trust to raise thereout the portions for their younger children therein specified (I pause there to say that these have long since been raised and paid) and subject thereto in trust for the said Arthur Spencer Pratt, his heirs, executors, administrators and assigns (I pause there to observe that that would amount to an absolute appointment in favour of Arthur Spencer Pratt) ; but the appointment goes on :

F . . . but if the said Arthur Spencer Pratt should die without leaving issue who should be living at his death upon trust for the said Henry Montague Pratt his heirs executors administrators and assigns but if the said Henry Montague Pratt should also die without leaving issue who should be living at his death then upon trust for the said Ernest St. George Pratt his heirs executors administrators and assigns but if the said Ernest St. George Pratt should also die without leaving issue who should be living at his death upon trust for the said Edith Florence Pratt her heirs executors administrators and assigns.

G On the same date a marriage settlement was executed with a view to the intended marriage of Arthur Spencer Pratt to Emily Frances Phipps-Hornby. By that settlement Arthur Spencer Pratt conveyed and assigned to the trustees all his

. . . estate and interest in as well the moneys to arise from the sale of the Westminster property as in the Westminster property until the sale thereof and in the rents and profits thereof subject nevertheless to the estates or interests of the said Spencer Pratt and Mrs. Spencer Pratt respectively therein upon the trusts and with and subject to the
H powers and provisions thereby and therein declared and contained.

Such trusts were for

. . . the payment of the income of the trust premises to the said Arthur Spencer Pratt during his life with remainder to the said Emily Francis Phipps-Hornby during her life and after the death of the survivor of them upon trust as to both capital and income [subject to a special power of appointment to issue which was never exercised] for all the children or any the child of the said marriage who being sons or a son should attain the age of 21 years or being daughters or a daughter should attain that age or previously marry and if more than one in equal shares.

Now I turn to the family history. As I have said, there were 4 children of the said marriage: first, Arthur Spencer Pratt, who married Miss Phipps-Hornby on June 22, 1886; they have had only 1 child, a son, Geoffrey Cowper Spencer Pratt, who attained the age of 21 years on Sept. 16, 1914, and died intestate on Nov. 27, 1915. Letters of administration of his estate were granted to his father, Arthur Spencer Pratt, on May 29, 1916. Arthur Spencer Pratt died on June 16, 1933, and his personal representatives are the defendants Edith Florence Lofts and Sir Weldon Dalrymple-Champneys. His widow died on Dec. 22, 1941. There was a second son who married Mary Frances Pratt and had no children, and who died on Feb. 10, 1933, having by his will dated June, 1895, proved by her on Mar. 17, 1933, appointed her sole executor. She died on Apr. 17, 1939, having by her will, which was proved on June 6, 1939, appointed the defendants Barrow and McCarthy to be the executors thereof. The third son, Arthur St. George Pratt, was married once only to the defendant Mrs. McCarthy. He had a child who died an infant. He himself died on Nov. 24, 1918; his personal representative is the defendant, Mrs. McCarthy. The last child, Mrs. Lofts, is still alive. I should have added that Mrs. Spencer Pratt, the original settlor, died on Feb. 9, 1897, and that Dr. Pratt died on Mar. 9, 1901. The present trustees of the original settlement are the plaintiff and Sir Weldon Dalrymple-Champneys.

The Westminster property has been sold, and the trust fund is now represented by certain property known as Orford Hall and investments, of considerable value. Orford Hall is still vested in the trustees of the original settlement, but the investments were transferred to the trustees of the marriage settlement of Arthur Spencer Pratt shortly after his death. The present trustees of that settlement are the defendants Edward John Phipps-Hornby, Windham Mark Phipps-Hornby and George Lawrence Stewart. This transfer of the investments to the trustees of the marriage settlement was made (I may say in intelligent anticipation of the decision I am about to give) upon the footing that the irrevocable appointment was good in so far as it gave an absolute interest in the settled property to Arthur Spencer Pratt, but that the gift over on his death was bad as transgressing the rule against perpetuities and consequently failed together with any limitations subsequent thereto.

It is common ground between all the parties that this view is right in so far as it assumes that the gift over on his death, without leaving issue, was bad as transgressing the rule against perpetuity; but it is now suggested that the invalidity of the gift over may affect the whole appointment and accordingly the settled property passes as in default of appointment, or on the footing that the trusts in default of appointment declared by the original settlement are also affected so that it has become subject to a resulting trust in favour of the settlor, Catherine Pratt. The third alternative, namely, that there is a resulting trust in favour of the settlor, has been abandoned, and I think wisely abandoned, because, if it were to be upheld, the way of a settlor who regretted having settled his property, and desired to secure control of it, would be too easy.

Counsel for the trustees of the eldest son's marriage settlement, who supports the second contention, namely, that the absolute interest in the settled property of Arthur Spencer Pratt remains in force, relies, in support of his contention, on the decision in *Re Brown and Sibly's Contract* (1). The headnote in that case is in the following terms:

By marriage settlement, dated in 1821, real estate was conveyed to trustees to the use of the settlor, W.M., for life, and after his death to the use of all or any exclusively, of the children, grandchildren, or other issue of W.M. (to be born before the appointment was made), as he should by deed or will appoint, and in default, to the uses therein declared. By will, dated in 1867, W.M. appointed the estate to his son W.E.M. in fee, but in case he should have no child who should attain 21, then to the settlor's grandson, W.M.B. in fee: Held, that the executory gift over to W.M.B. was void for remoteness.

The headnote does not make it clear that the absolute gift remained in force, but that appears clearly from the judgment of MALINS, V.-C. He says, at p. 159:

The point I have to decide under this settlement is free from doubt. The law is settled, that where a person takes property by virtue of the execution of a special or limited power of appointment, he takes directly under the instrument creating the power. Consequently, when W. Metford made his will, it was the same as if the words he there used had formed part of the settlement, and as if the property had been con-

veyed by that settlement to trustees to the use of himself for life, with remainder to the use of his (unborn) son in fee, with a direction that in case his son should have no child who should attain 21, then that the estate should, after the son's death, go over to the settlor's grandson in fee. That is an attempt to make the property inalienable for a period which might extend to 21 years after the determination of the life of a person not in being at the date of the settlement. The law does not allow a man to tie up property for longer than a life or lives in being and 21 years; and this is clearly an attempt to do what is contrary to the law. I need not do more than refer to my decision in *Stuart v. Cockerell* (2), afterwards affirmed on appeal, which shows that the law is as I have stated it. My opinion, therefore, is that the appointment by the testator to his son in fee is good, and the attempt to give the estate over is void. It is precisely the same as if a man were to give property to his son for life, and after his decease to his son's children, as tenants in common in fee, with a proviso that if any of the children should die under 25 the property should go over. In that case the proviso carrying over the shares would be void. The gift to the son in fee is, therefore, good, and the executory devise over is void.

Now that is a direct decision in favour of the first two defendants and it would be my duty to follow it unless it has been overruled or there is another decision of equal authority to the contrary effect, in which event I should have to decide which decision to follow. Counsel for the settlor's daughter and the personal representatives for the third son argued that such a contrary decision is to be found in *Doe v. Eyre* (3). The facts and principle of the decision in that case are conveniently stated in JARMAN ON WILLS, Vol. 2, at p. 1409 :

. . . In *Doe d. Blomfield v. Eyre* (3), where M.S. having an exclusive power of appointing lands by will amongst her children, appointed them to her eldest son, J.B., in fee; but if J.B. and his brother both died before her husband, then she appointed the estate to her father-in-law (a stranger to the power) in fee. J.B. and his brother both died in their father's lifetime, and it was held, in the Exchequer Chamber, that although the father could not take [I pause there to say "not being an object of the appointment"] yet the son lost the estate. PARKE, B., delivered the judgment of the court, and after premising that the question was the same, whether it arose upon an ordinary devise or upon an appointment under a power, he said, "If a testator seised in fee were to devise a real estate to A.B. in fee, and to direct that, in the event of A.B. dying in the lifetime of J.S., the estate should go over to a charity, it surely was perfectly clear that if A.B. should die in the lifetime of J.S., he, or rather his heirs, would lose the estate. The testator could not give to the charity without taking away from the devisee. The testator, therefore, in such a case, by his will said, 'If A.B. dies in the lifetime of J.S., I do not mean that he or his heirs should any longer have the estate.' That which defeated the estate of J.B. was the death of himself and his brother in his father's lifetime, not the giving over the estate to strangers."

I need only read from the report of the case, in addition to the passage I have read, the concluding two sentences of the judgment of PARKE, B., there. In further elaboration of the passage I have read as extracted in JARMAN, PARKE, B., says, at p. 748 :

The reason why John's representatives cannot claim the property, is, that his mother expressly declared, that, in the event which happened, he should not have it. How she would have disposed of it, if she had known that she could not give it in the mode proposed by her will, can only be matter of conjecture. One thing quite certain, is, that she has not expressed any intention, that in the events which have happened, John should take; and, as he could only be entitled by virtue of an expressed intention in his favour, we think that he fails to establish any right.

In that case the gift over failed because it was in favour of a person not an object of the power.

That decision was followed with evident reluctance by KINDERSLEY, V.-C., in *Robinson v. Wood* (4), where the cause of the failure of the gift over was the operation of Statute of Mortmain. Counsel for the settlor's daughter says, and the argument is attractive, that there can be no difference between the cases where the gift over fails owing to the Statute of Mortmain and where it fails owing to the operation of the rule against perpetuities. Attractive as the argument is, I am unable to accept it. It seems to me to be inconsistent not only with the decision in *Doe v. Eyre* (3), but also other earlier decisions which relate to wills; but as stated by PARKE, B., there does not seem to be any difference in principle between the case of a devise and the case of an exercise of a power.

The cases to which I have referred are dealt with in a passage in JARMAN ON WILLS, Vol. 2, at p. 1431, where he says :

And the exception to the principle of *Doe v. Eyre* (3), namely, that it does not apply where the gift over is void for remoteness, exists in the case of personalty as well as realty; the result being that the prior gift remains absolute.

I think that the true reason for the exception is correctly given in JARMAN ON WILLS, Vol. 2, at p. 1410, where he says:

But to the rule thus laid down in *Doe v. Eyre* (3), the case of a gift over which is to defeat a prior devise in a too remote event forms an exception, since the law refuses permission to await that event for any purpose; so that the prior gift must, of necessity, remain absolute. A

I was referred to a number of other textbook writers who were, as counsel for the personal representatives of the third son said, reluctant to accept the decision in *Doe v. Eyre* (3) unless at any rate it was explained as it was explained in SUGDEN ON POWERS. I would only refer to one passage in SUGDEN ON POWERS, 8th Edn., where, in dealing with *Doe v. Eyre* (3), the learned author says, at p. 514:

In the course of the argument PARKE, B., asked for a reference to any case of a limitation to one and a conditional limitation over to a person who could not take, as a corporation, etc., to which it was answered from the bar that no doubt there were some such cases—of that class were the cases of perpetuity; whereupon ROLFE, B., said that can hardly apply; the first taker is clearly intended to take, and takes for ever unless the estate can go over to another. His observation therefore is confined to a case where the fee is first given and then there is a gift over void for perpetuity, in which case the fee remains in the first devisee and the gift over is simply void. But this has no bearing upon the principal question, for here the testatrix could by law declare her intention, that upon the happening of the contingency, the devise to her son should cease, whereas in the case put at the bar and answered by the learned baron, the testator could not by law defeat the first devise in the event which he provided for: the law forbade the devise over, and therefore the first devise remained unaffected by it. C

That passage seems to me to put on clear principles the exception to the rule in *Doe v. Eyre* (3), to which effect was given in the decision of MALINS, V.-C., in *Re Brown and Sibly's Contract* (1). D

Wainwright v. Miller (5) was relied on by counsel for the settlor's daughter. In my view, that case is irrelevant; the court decided that the particular gift was not void for remoteness. It would seem to me to have no bearing on the question as to the consequences which follow where a gift fails for remoteness. In my opinion, therefore, *Re Brown and Sibly's case* (1) is not inconsistent with the rule in *Doe v. Eyre* (3). E

There is one other observation I would make: the decision in *Re Brown and Sibly's Contract* (1) was given in 1876. It was a decision upon which the title to property depended. Now the sanctity of such a decision was recognised in *Bourne v. Keane* (6), where the court, in a certain case, refused to be hide-bound, if I may so put it, by the principle that they must leave unfettered a rule, however long it had existed, to which effect had been given over a series of years. I was referred only to a passage in LORD BUCKMASTER'S opinion, where he says, at p. 874:

From these authorities I collect the following principles as applicable to such a question. Firstly, the construction of a statute of doubtful meaning, once laid down and accepted for a long period of time, ought not to be altered unless your Lordships could say positively that it was wrong and productive of inconvenience; secondly, that decisions upon which title to property depends, or which by establishing principles of construction or otherwise form the basis of contracts, ought to receive the same protection... G

Re Brown and Sibly's Contract (1) was decided in 1876 and I have no doubt that it has been acted upon on many occasions; it has certainly been acted upon in the case before me, and, in those circumstances, even if I were inclined to think it was wrongly decided—whereas in fact I think it was correctly decided in principle—I should hesitate to say so after this lapse of years. H

I must, therefore, declare that the absolute appointment in favour of Arthur Spencer Pratt remains of full force and effect. I declare, of course, that the gift over is bad, and the appointment is good so far only as it is in the first instance an absolute disposition of the property to the said Arthur Spencer Pratt.

Declaration accordingly.

Solicitors: *Lee & Pembertons* (for the plaintiff and for the trustees of the marriage settlement of the settlor's eldest son); *Kenneth Wright & Johnson* (for the personal representative of the settlor's third son); *Ralph Bond & Rutherford* (for the personal representatives of the wife of the settlor's second son); *Blundell, Baker & Co.* (for the settlor's daughter).

[Reported by HUBERT B. FIGG, ESQ., Barrister-at-Law.]

A

Re LORD WESTBURY'S SETTLEMENT, WESTMACOTT AND ANOTHER v. BETHELL AND OTHERS.

[CHANCERY DIVISION (Cohen, J.), June 29, 1943.]

B *Settlement—Annuities—Deficiency of income—Whether arrears payable out of income of subsequent years or out of capital—Rate of income tax.*

By a settlement dated Sept. 23, 1925, the trustees of the settlement were directed to pay to the settlor's widow and daughter-in-law, during their lives, the clear sum of £500 per annum each out of the net income of the settled fund. From March, 1929, the income of the trust fund proved insufficient to meet the annuities in full, and at the date of the death of the settlor's widow in 1941, considerable sums under both annuities were in arrear. The trustees of the settlement asked whether the arrears should be paid out of income or out of capital. It was agreed that, if paid out of corpus, income tax would have to be deducted at the rate in force at the time the payment was made, in accordance with the provisions of the Income Tax Act, 1918, All Schedules Rules, r. 21, and, if paid out of income, tax would have to be deducted, in accordance with r. 19, at the rate in force at the date when the arrears accrued due:—

C

HELD: (i) the difficulty arising from the incidence of income tax did not warrant a departure from the general rule, and the arrears must be paid out of capital.

(ii) the payments made on account must be treated as made in the first instance in satisfaction of the payment due in the current year and any sum paid in excess of that due in the current year must be applied in payment of the arrears which first fell due.

D

[EDITORIAL NOTE. In the normal course an annuitant is entitled to have his annuity wholly paid each year. If the income is not sufficient, the deficiency must be made up out of capital. Here this had not been done and the rules regulating the deduction of income tax made it important to determine whether the arrears were payable out of income or capital. The point would not be of great importance in the past, but has become important now owing to the very considerable increases in the rate of income tax in recent years. It is held that since the annuitants were entitled to have any deficiency made up out of capital in each year, they are now entitled to be paid out of capital. The payments which have been made are to be appropriated to the annuity due by analogy with the rule in *Clayton's case* (2). If that rule were wholly applied no doubt the payments made would first be applied in reduction of arrears, but there is the overriding rule in the payments of the annuities that the current annuity has to be satisfied out of the current income and, therefore, only payments in excess of the current annuity can be applied in reduction of arrears. These, however, will be applied in paying off the arrears due in respect of the earliest period.]

E

F

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 28, pp. 202-204, 211, 212, paras. 369, 370, 380-382; and FOR CASES, see DIGEST, Vol. 39, pp. 143-148, Nos. 373-422, pp. 156-158, Nos. 490-502.]

Cases referred to:

G

(1) *Re Croxon, Ferrers v. Croxon*, [1915] 2 Ch. 290; 39 Digest 159, 517; 84 L.J.Ch. 845; 113 L.T. 1103.

(2) *Devaynes v. Noble, Clayton's Case* (1816), 1 Mer. 529, 572; 12 Digest 483, 3961.

SUMMONS by the trustees of the settlement for a declaration as to whether arrears of annuities should be paid out of income or corpus.

H. H. King for the plaintiffs, the trustees.

J. V. Nesbitt for the first defendant, the surviving annuitant.

A. P. Vanneck for the second and third defendants, parties contingently interested in corpus.

H

A. J. Belsham for the fourth defendant, party interested in income subject to the annuities.

J. H. Stamp for the Attorney-General.

COHEN, J. : This summons arises out of a settlement dated Sept. 23, 1925, made by Lord Westbury for the benefit of certain members of his family. Under cl. 4 of the settlement the trustees are directed out of the net income of the fund thereby created to pay to his widow and his daughter-in-law during their respective lives the clear sum of £500 per annum each. Then somewhat complicated trusts are declared upon which the fund is to be held subject to the payment of the annuities that I have mentioned, and under them, as modified by a supplemental trust deed of Nov. 17 of the same year, in the events which have happened the present Lord Westbury is now entitled to one-third part of the income of the fund remaining after providing for the annuities that I have mentioned, the remaining two-thirds being subject to a trust for accumulation. When that period expires, Lord Westbury will be entitled to the income of the fund, but there is no person in existence who is directly interested in the corpus.

The settlor died in 1930, and his widow died in 1941. The investments, the subject of the trusts of the settlement, were not what one might call the ordinary trustee securities, but they were of a more speculative nature, and as from and including the first half year ending March, 1929, the income of the fund proved insufficient to meet the annuities. It appeared from the evidence that at the date of the death of Lady Westbury, the testator's widow, there were, according to the calculation made, arrears of her annuity amounting to £2,008 16s. 9d., and there must, of course, have been at least an equal amount due to the daughter-in-law of the settlor, who is still alive, or there must at any rate now be a larger amount due to her. The gross income for the year ending Sept. 23, 1941, only amounted to £457 16s. 0d., so that at the date of the issue of this summons, notwithstanding the death of Lady Westbury, there was not enough income to pay the annuity to her daughter. In those circumstances the summons was issued, which asked first of all the question :

Whether upon the true construction of the above-mentioned settlement any parts of the said annuities, which the income of the trust fund during the year in respect of which the same accrued due was insufficient to pay, are payable : (a) out of the income of any subsequent year or years ; and (b) out of the capital of the trust fund.

That part of the summons came before FARWELL, J., on Mar. 10, 1942, and he declared that upon the true construction of the settlement as modified by the deed the two annuities were charged upon and payable out of the capital of the funds, subject to the trusts of the settlement as so modified. The rest of the summons, which in its then form raised the question whether, in making payments in respect of arrears of the said annuities which accrued due before the year in which such payments were made, the plaintiff or other of the trustees of the said settlement should deduct sums representing the amount of income tax thereon (i) at the standard rate in force at the time when such payments were actually made or (ii) at the rate or rates in force during the period during which such arrears were accruing due, was ordered to stand over.

In so far as the arrears may come out of corpus, it is not disputed that in accordance with the Income Tax Act, 1918, All Schedules Rules, r. 21, tax must be deducted at the standard rate in force at the time when the payment is made ; but counsel on behalf of the surviving annuitant says that he does not desire them to be paid out of corpus, and that he would prefer that they should be paid, as and when possible, out of income from the fund, with the result, satisfactory from his point of view, that, if he is right, although the fund out of which the arrears would be paid would have suffered tax at the rate of 10s. in the £, the trustees, on making payment to him, having regard to the terms of r. 19, would only be entitled to deduct tax at the rate in force at the time when the arrears which were being paid had accrued. That attitude is not supported either by the trustees or by any of the other persons interested in the trust fund who are before the court, and, in my opinion, the trustees are quite right in saying that the proper course for them to adopt is to satisfy the arrears out of corpus.

It is quite clear from *Re Croxon* (1), before EVE, J., that the proper course is to treat the annuity as payable annually on the anniversary of the death of the testator, and on each anniversary apply the income which is available in keeping down the annuity, and, if there is a deficiency, to make up such deficiency out of corpus, starting *de novo* with the next year, and without any right—which is a point that does not arise in this case—to resort to the future income to recoup the capital. If I were to accede to the argument of counsel for the surviving annuitant the only result would be that instead of keeping down the arrears I should pile them up, and in those circumstances I think I must certainly accept the suggestion of counsel for the trustees that it is the duty of the trustees to pay off these arrears out of capital. Whether or not it will exhaust the fund remains to be seen.

As to the question which arises as to what is to be done with regard to the payments on account which were made, two alternative suggestions were made. Counsel for the parties interested in corpus suggested, and counsel for the surviving annuitant I think accepted the argument, that a sort of analogy of the rule in *Clayton's case* (2) should be applied, and that I should direct that each payment should be treated as having been made in satisfaction of the earliest portion of the arrears.

On the other hand, counsel for the trustees, who in the absence of anybody directly interested in corpus was necessarily bound to argue the case, said, and I think said correctly, that having regard to the decision in *Re Croxon* (1), to which I have already referred, this would not be right. Had the rule been strictly complied with—I am not suggesting any dereliction of duty on the part of the trustees who appear to have consulted the beneficiaries throughout—but had the strict rule been complied with, as it is now known that it should have been applied in accordance with the order of Farwell, J., the arrears would in each year have been made good out of capital, and the income of the subsequent year would have been applied in paying the annuity of the then current year before any balance thereof could be available for wiping out the arrears.

I think that the nearest thing I can do for doing justice between the parties is to direct that the payments made to the annuitants on account should be treated as having been made in the first instance in satisfaction of the instalment falling due during the current year, and the surplus only should be treated as having been used in payment off of the arrears. In so far, however, as it is so applied, I think that the analogy to the rule of *Clayton's case* (2) should be applied, and it should be treated as having been applied in paying off the arrears, the instalment first falling due being paid off first.

Declaration accordingly. Costs of all parties to be paid out of the fund.

Solicitors: Tylee & Co. (for the plaintiffs, the trustees); Rooper & Whately (for the first, second, third and fourth defendants); Solicitor of Inland Revenue (for the Attorney-General).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

G ABERCROMBIE v. ABERCROMBIE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Henn Collins, J.), **July 15, 1943.**]

Divorce—Summary Jurisdiction—Separation order—Reconciliation—Husband's occupation preventing parties from residing together—Whether amounting to resumption of cohabitation—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (c. 51), s. 2 (2).

In 1940 the respondent obtained a separation order against her husband, the appellant, on the ground of his persistent cruelty. In 1943 the appellant wrote to the respondent with a view to reconciliation. The respondent, who was living with her mother at Blackpool, wrote to the appellant a number of affectionate letters either in reply to his letters or for the purpose of arranging meetings. As the respondent's mother was violently hostile to a reconciliation the correspondence and meetings were kept concealed from her. The appellant was a doctor engaged in various appointments

as a *locum tenens* and the first meeting took place at Preston and the second at Manchester. On both occasions sexual intercourse took place, but the parties did not spend the night together. On two subsequent occasions the parties stayed overnight at a friend's house and on one occasion spent a week-end together at a hotel in London. The question for the determination of the court was whether, in the circumstances, there had been a resumption of cohabitation :—

HELD : it is not essential in order to establish a resumption of cohabitation that the parties shall have lived together again in a new home. Where the special circumstances of the parties make the establishment of a new home impossible, there may be a resumption of cohabitation by a resumption of intercourse. In the present case, there had been a resumption of cohabitation.

[EDITORIAL NOTE.] It will be remembered that in the early days of divorce law desertion was described as a departure from an existing matrimonial home. This definition was later found to be impossible, because there are cases where married persons do not set up a matrimonial home in the ordinary sense. The most usual case is where one or both parties reside upon the premises where they are employed. In the same way, where parties have drifted apart, they may come together again in circumstances which make the establishment of a home impossible. When in such a case their conduct is such that they are leading the life of husband and wife so far as their special circumstances permit, then there has been a resumption of cohabitation sufficient to end a period of desertion. Each case of this nature naturally falls to be decided upon its own facts, and the point of the present decision is that in dealing with resumption of cohabitation, as in dealing with desertion, no hard and fast rule can be laid down which will govern all cases, but where there are special circumstances the question must be whether, so far as possible in the circumstances, married life has been resumed.

AS TO DISCHARGE OF ORDER BY RESUMPTION OF COHABITATION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 842, 843, para. 1344; and FOR CASES, see DIGEST, Vol. 27, pp. 565-568, Nos. 6237-6256.]

Cases referred to :

- (1) *Jones v. Jones*, [1924] P. 203; 27 Digest 565, 6241; 93 L.J.P. 94; 132 L.T. 63.
- * (2) *Rowell v. Rowell*, [1900] 1 Q.B. 9; 27 Digest 246, 2172; 69 L.J.Q.B. 55; 81 L.T. 429.
- * (3) *Mummery v. Mummery*, [1942] P. 107; [1942] 1 All E.R. 553; Digest Supp.; 111 L.J.P. 58; 166 L.T. 343.
- (4) *Pulford v. Pulford*, [1923] P. 18; 27 Digest 307, 2846; 92 L.J.P. 14; 128 L.T. 256.
- (5) *Bradshaw v. Bradshaw*, [1897] P. 24; 27 Digest 554, 6086; 66 L.J.P. 31; 75 L.T. 391.
- (6) *Fitzgerald v. Fitzgerald* (1869), L.R. 1 P. & D. 694; 27 Digest 307, 2845; 38 L.J.P. & M. 14; 19 L.T. 575.
- (7) *Mahoney v. M'Carthy*, [1892] P. 21; 27 Digest 566, 6247; 61 L.J.P. 41.

APPEAL by the husband from a decision of the Blackpool justices, dated May 18, 1943, refusing to discharge a separation order made in favour of the wife.

In 1940 the respondent obtained a separation order against her husband, the appellant, on the ground of his persistent cruelty. In 1943 the appellant wrote to the respondent with a view to reconciliation and on Feb. 27, 1943, the respondent, who was living with her mother at Blackpool, replied that she was prepared to meet him to discuss the matter. On Mar. 7, 11, 15, 23, 24 and 26 the respondent wrote to the appellant either in reply to his letters or for the purpose of arranging meetings, the letters becoming progressively more affectionate. The communications and meetings were concealed from the respondent's mother who was violently hostile to a reconciliation, and for this purpose some of the correspondence was conducted through and some of the meetings were arranged at an accommodation address, the house of a Mrs. R. The appellant, who was a doctor, was engaged in various appointments as a *locum tenens*. The first meeting, which occurred on Mar. 2, took place at Preston, the second meeting was at Manchester on Mar. 10, and the parties went to Swinton and looked over the house in which the appellant was at that time living. On both occasions sexual intercourse took place, but the parties did not spend the night together. On two subsequent occasions the parties stayed overnight at Mrs. R.'s house, and over one week-end in April stayed together at an hotel

in London. On the Sunday of this week-end they went to Eastleigh to see about a possible appointment for the appellant as a *locum tenens*, and on this occasion also the respondent inspected the house.

D. Armstead Fairweather for the appellant.

Victor O. Williams for the respondent.

A LORD MERRIMAN, P. : This is an appeal from the refusal of the Blackpool justices, on May 18, 1943, to discharge a separation order made on Sept. 17, 1940, in favour of the respondent wife on the ground of the appellant husband's persistent cruelty. The husband sought to have the order discharged on the ground that, since the making of the order, the parties had resumed cohabitation.

B It is, I think, important to bear in mind the statutory provisions governing this matter. By the Summary Jurisdiction (Married Women) Act, 1895, s. 7, the section which deals with the variation and discharge of orders, there is this provision :

If any married woman upon whose application an order shall have been made under this Act, or the Acts mentioned in the schedule hereto, or either of them, shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged.

C It is quite plain, on the face of that section, that the resumption of cohabitation and the act of adultery are put in the same category in this respect, that, before the order shall cease to have effect, it is necessary that there should be an adjudication upon evidence ; and that is made perfectly plain, so far as this particular question is concerned, by the decision in *Jones v. Jones* (1). However, in the year following that decision the law was changed, and sect. 7 of the Act of 1895 was amended in this respect by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (2), which reads as follows :

D Where a married woman with respect to whom an order has been made under the principal Act resumes cohabitation with her husband after living apart from him, or where she has before the date of the commencement of this Act so resumed cohabitation, and is at that date cohabitating with him, the order shall cease to have effect on the resumption of such cohabitation or at the commencement of this Act, as the case may be.

E That does not necessarily involve a judicial decision ; the order has *ipso facto* ceased to operate ; and the distinction is made the plainer by the fact that, for obvious reasons, the corresponding ground for discharge under sect. 7 of the Act of 1895 still remains, as it must remain, subject to proof and judicial decision. Strictly speaking, therefore, it may be said that this application to the justices was unnecessary, if the facts are established ; but I suppose that, somehow or another, if the matter is controversial, it must come to a decision.

F How that is to be done may be a matter for discussion in any given case ; but here the husband has chosen to make the application (which I conceive is open to him, though not obligatory) and it has been refused ; hence this appeal.

The question is, therefore, whether in this case the wife, after living apart from the husband, has resumed cohabitation with him ?

G LORD MERRIMAN, P., reviewed the evidence and continued : All questions in which a separation order is involved are matters of importance. Indeed, all matrimonial disputes are matters of importance, but at the head of the scale of importance is a decision which indirectly, if not directly, involves the right tomorrow to found a petition for dissolution of marriage. The justices' reasons for their decision are given as follows :

H The justices found that there had been overtures by the appellant for the parties to resume cohabitation and that the respondent was willing for this to take place, provided [and I shall come back to these words in a moment] she was satisfied that the appellant would conduct himself towards her in a normal manner and that there would be no further acts of cruelty by him. Where the evidence of the respondent differed from that of the appellant the justices accepted her evidence.

I think I may take it, from what counsel for the respondent has said, that the only real conflict which stands out is a conflict as to what happened at the hotel in London. About that there is a conflict, as the wife says she went home because of the husband's bad conduct, while he says she went back because her mother might come home earlier.

The justices found that there had been further acts of cruelty by the appellant towards the respondent in the Linbrook Hotel on the Monday morning. They also found that the appellant had distressed the respondent by his excitable conduct when he started shouting in the restaurant in London. They were of the opinion that although intercourse had taken place, there was no resumption of cohabitation and, therefore, dismissed the application.

It is necessary to consider the wording of these reasons very carefully. It is to be observed that there is no suggestion here—and I am bound to say I should have felt very doubtful about the validity of it if there had been—that the husband's overtures for the resumption of cohabitation were not perfectly genuine, and it is stated plainly that the wife was willing for this to take place, with this proviso, which needs careful consideration :

... provided she was satisfied that the appellant would conduct himself towards her in a normal manner and that there would be no further acts of cruelty by him.

That sentence is a little ambiguous. It may mean one of two things. It may mean that she did not make up her mind until she had satisfied herself that he would conduct himself in a normal manner in future ; in which case it is innocuous, and merely means that, at any rate, to take the latest date, by the time she decided to go to London with him she had so satisfied herself. However, I do not think that that is the meaning. I think the natural meaning of the words is that she was willing for a resumption of cohabitation to take place with the condition subsequent that, if the husband should not conduct himself properly and should be guilty of acts of cruelty, she would be at liberty and would be justified in parting from him.

I find some difficulty in seeing how it can properly be said that, if there is a resumption of cohabitation, the nature of what is done by way of resumption of cohabitation can be altered by a condition subsequent. In the course of the argument, after HENN COLLINS, J., had called attention to this aspect of the matter, I introduced, by way of illustration, a case which reduces such a conception to an absurdity. Whether one talks about resumption of cohabitation or condonation, any wife who has suffered an injury effects a reconciliation with the implied condition that there shall be no recurrence of the bad behaviour ; but that does not change the nature of the reconciliation. It does not change the nature of the physical act of intercourse, and it does not change the nature of a resumption of cohabitation, whichever aspect of the matter one chooses to look at ; and, if one could attach a condition subsequent in such a way as to change the nature of the thing done, one would get, as I say, this absurd position, that, where there is a complete reconciliation subject only to the condition subsequent, the parties might live together for 5 years, have 3 more children, and then, because some act of cruelty or adultery, or whatever it is, occurs which can be complained of by the wife, she is then entitled to say there never has been a resumption of cohabitation because the condition subsequent was operating the whole time. That seems to me to reduce the whole thing to an absurdity. Either they did or they did not resume cohabitation. If they did resume cohabitation, the fact that she would have a grievance if there was any recurrence of the previous misconduct, whatever it was, and would be entitled to regulate their arrangements from that moment forward upon the proper implications of such a recurrence, is one thing ; but to say that the nature of the thing done on the day, whenever it may be, that cohabitation is resumed can be changed *ex post facto* by something which happens later, seems to me to be a contradiction in terms, just as it would be ridiculous to say because there has been a recurrence of misconduct after an act of condonation, the condonation had not occurred at the time when it did occur. It has occurred but, owing to the breach of the condition on which it occurred, it is not possible for the offending party, after that breach, to rely on the condonation which had previously occurred. But that does not change the nature of what has happened.

I propose to approach this matter, and I feel entitled to approach this matter, on the basis that when this statement of reasons is investigated it is clear that there is an underlying fallacy in the reasons, which I am indebted to HENN COLLINS, J., for pointing out ; and, therefore, unencumbered by the justices' findings, by which I do not feel myself to be fully bound, I now proceed to consider for myself, on the known facts and taking them at their worst against

the husband, whether there has or has not been a resumption of cohabitation.

A It is quite clear that the mere fact that sexual intercourse has taken place is not decisive. That was plainly decided by the Court of Appeal in *Rowell v. Rowell* (2); and though I agree that the issue there was not precisely the same, I cannot myself see that there is any essential difference between deciding, on the one hand, whether parties are still "living separate" within the meaning of a deed of separation and the issue whether they have or have not resumed cohabitation within the meaning of a section of an Act of Parliament. At any rate, if there is a distinction, it is so fine that for the moment it escapes me, and for the purposes of this case, whatever importance it may have in other circumstances, it is negligible. To put the decision in *Rowell v. Rowell* (2) the other way, it was plainly decided that the resumption of cohabitation depends upon the intention of both parties; as to which the mere fact that one or more acts of sexual intercourse have taken place, though of great weight, is not absolutely conclusive.

B In another connection, I decided the same point in *Mummery v. Mummery* (3), to which we have been referred. There the issue was somewhat different. The question was whether there had been a resumption of cohabitation or condonation, as the case might be—the real issue was resumption of cohabitation—sufficient to interrupt a period of desertion about which there was, and could otherwise be, no controversy. In the circumstances of that case I held, rightly or wrongly, that the single act of intercourse, in the circumstances in which it occurred, was neither here nor there, and that the period of desertion was uninterrupted; but in the course of the judgment (if I may quote myself) I said one thing which I think it is not inappropriate to quote, because it alludes to earlier decisions to which I should like to make reference. I said this at p. 109 ([1942] 1 All E.R. at p. 555):

D LORD MERRIVALE said more than once that no judge has ever attempted to give a comprehensive definition of desertion and that probably no judge would ever succeed in doing so, but among the descriptions of desertion which he gave was one which has always appealed to me. He said that desertion was a withdrawal not from a place, but from a state of things: *Pulford v. Pulford* (4). Similarly, I doubt whether any judge could give a completely exhaustive definition of cohabitation, and certainly I am not going to attempt to do so, but at least a resumption of cohabitation must mean resuming a state of things, that is to say, setting up a matrimonial home together, and that involves a bilateral intention on the part of both spouses so to do.

The allusion to *Pulford v. Pulford* (4) makes it clear—and, if it is not clear already, I wish to say it now—that just as you can have an act of desertion where the parties are not living under the roof of a matrimonial home but are living in a state of affairs which amounts to having a matrimonial home, so equally, you can have a resumption of cohabitation without necessarily going under the same roof (at any rate at the moment), by resuming a state of affairs which can properly be called a matrimonial home; and I think that that principle is of great importance in this case. I was referring mainly and particularly to *Pulford v. Pulford* (4), but I had in mind also the very clear exposition of the same point which was given by SIR FRANCIS JEUNE, P., sitting in the Divisional Court, with GORELL BARNES, J., in *Bradshaw v. Bradshaw* (5), where referring, not for the first nor the last time, to the difficulties created by a very rigid phrase of LORD PENZANCE in *Fitzgerald v. Fitzgerald* (6). SIR FRANCIS JEUNE, P., said, at p. 26:

H It is true that there cannot be desertion of a wife by a husband unless the cohabitation is broken by some act of desertion. But cohabitation does not necessarily imply that a husband and wife are living together physically under the same roof; if that were so, there would be large classes of persons to whom the term could have no application: married domestic servants, for example, who cannot live day and night under the same roof, but yet may cohabit together in the wider sense of the term.

He then went on to point out that, of course, on the other side, if people were living separate by mutual consent, then it really would be true to say you could not get desertion until there had been a resumption of cohabitation; but it is implicit in the very contrast between the two things that, in the mind of SIR FRANCIS JEUNE, P., you could get whichever kind of resumption of cohabitation the circumstances of the case warranted.

The same thing is implicit again in an earlier decision of his in *Mahoney v. M'Carthy* (7), where he says—again talking about *Fitzgerald v. Fitzgerald* (6)—at p. 25 :

I cannot, however, agree that that is so [that is, that there must always be a resumption of cohabitation before there can be desertion], because though it may be perfectly true that if there has been a separation by consent, that is to say, an agreement to live separate, there cannot be desertion without a return to cohabitation, such a rule does not apply where the absence has not been in pursuance of an agreement to live separate but merely for a temporary reason and amounting only to a temporary separation. A

To my mind—and this is where I think these decisions are so important—precisely the same language applies *mutatis mutandis* to the resumption of cohabitation. We are dealing here with the case of a doctor who *ex concessis* had no settled abode. He was at the material time earning his living by taking local and temporary employment as a *locum tenens* wherever his services might be required ; and even in the short space of time with which we are concerned, less than three months, we know he was employed at Preston and Swinton, and apparently was in negotiation for yet another employment in the south of England. B

On the other hand, as her letters show beyond the slightest shadow of a doubt, the wife was concealing, through fear of her mother, the fact that she was becoming reconciled to her husband—or, as I think is the right way to put it, the fact was that she had become reconciled—but at every stage throughout these letters it is quite clear that her whole conduct, all these clandestine meetings and the rest of it, are prompted solely by her fear that her mother, who was violently opposed to any reconciliation, would discover what was going on. C

In those circumstances—and one must judge each case upon its merits—it seems to me to be impossible not to hold that, at the very latest when this couple went up to London for what I have called, and what nobody can doubt was intended to be, their second honeymoon, complete resumption of cohabitation is the only possible inference to be drawn from the facts. I should be prepared, if necessary, to hold that it occurred much earlier, but then, at any rate, it seems to me to be impossible not to hold that they had resumed cohabitation. D

That being so, in my opinion this decision of the justices is wrong, and the appeal must be allowed. E

HENN COLLINS, J. : I agree, and for the same reasons. Indeed, I rather hesitate to add anything, lest I should merely be repeating what LORD MERRIMAN, P., has said, and saying it in less apt language ; but as the thing presents itself to me in its final analysis as quite a short point, I think it right to put it. F

The justices had to solve the question whether, as between these spouses, there had been a resumption of cohabitation, having regard to all the circumstances of the case. One of those circumstances was that there was no matrimonial home in the ordinary sense of a house in which the husband, separated from his wife, was living and carrying on his avocation, and to which he could invite his wife. The wife was living with her mother during the separation, and he was pursuing his avocation in a series of separate employments. G

Looking at the findings of the justices, I think their fundamental error was one of law in thinking that there could be no resumption of cohabitation unless there was something which they could lay their finger on as being, so to speak, a final and complete reconciliation between the parties—if there be such a thing; that is to say, a reconciliation which does not carry in it the seeds of disintegration if one or other commits a matrimonial offence. I think that is probably an idealistic state of things which nobody can expect. Every reconciliation is subject to the condition that it will in fact break down if one or other of the spouses commits a matrimonial offence. The justices seem to me, in approaching the matter, to have accepted the view to which the wife deposed when she used the words "I was giving him a trial," and I think they thought that in law that concluded the question, and that, from her point of view, the resumption being probationary and tentative, there could be no resumption of cohabitation. However, for the reasons LORD MERRIMAN, P., has given—and as the very H

apt illustration (if I may be permitted to say so) which he gave convincingly shows, it is quite wrong in law to say there cannot be a resumption of cohabitation if the resumption is contingent upon the continued good behaviour of one or other or both of the spouses. It is none the less a reconciliation and carries all the consequences, among others, that the separation order comes to an end ; and, therefore, in this particular case I think this appeal should be allowed.

Appeal allowed. Separation order discharged.

- A Solicitors : Robinson & Bradley, agents for Blackhurst, Parker & Blackhurst, Blackpool (for the appellant) ; Boxall & Boxall, agents for Woosnam & Co., Blackpool (for the respondent).

[Reported by D. ARMSTEAD FAIRWEATHER, Esq., Barrister-at-Law.]

B

INLAND REVENUE COMMISSIONERS v. LADY CASTLEMAINE

- C [KING'S BENCH DIVISION (Macnaghten, J.), July 15, 16, 27, 1943.]

Income tax—Annuity—Insufficiency of estate—Payments made before estate found to be insufficient—Whether payments on account of annuity or of capital value of annuity.

By his will dated May 13, 1929, the testator appointed the Royal Exchange Assurance his executor and trustee, and directed that his residuary estate should be held upon trust to pay to his wife, the respondent, and to his brother for their lives each an annuity of a certain sum clear of all deductions. The testator died on July 6, 1937, and between July, 1937, and Jan., 1940, the Royal Exchange Assurance made a number of payments to the respondent on account of her annuity. Subsequently, it was discovered that, at the date of the testator's death, the actuarial value of the annuities was in excess of the value of the residuary estate. The question to be determined was whether the payments should be treated, for the purposes of tax assessment, as payments on account of the annuity or on account of the proportionate part of the residuary estate to which the respondent was entitled :—

HELD : as the estate was from the first insufficient to meet the annuities, the payments must be treated as having been made on account of the capital to which the respondent was entitled. Such payments were not, therefore, liable to income tax or sur-tax.

F

[**EDITORIAL NOTE.** Where the income of the estate of a testator is insufficient to pay an annuity given by him, the annuitant is entitled to have the annuity valued and to receive the capital value of the annuity. That amount when received is clearly a capital payment and not subject to income tax or sur-tax. In the present case it was not realised for some years that the estate was insufficient and certain payments were made to the annuitant in payment of the annual sum due to her. These payments were clearly intended at the time to be income payments, but it is held that, since it is now clear that they must be accounted for as part of the capital sum receivable in respect of the annuity, they are no longer income payments and are not subject to tax.

G

AS TO DEDUCTION OF TAX FROM ANNUITIES PAYABLE UNDER WILL, see HALSBURY, Halsham Edn., pp. 237, 238, para. 478 ; and FOR CASES, see DIGEST, Vol. 28, pp. 66, 67, Nos. 340-350.]

- H Case referred to :

* (1) *Re Bradberry*, [1943] 1 Ch. 35 ; [1942] 2 All E.R. 629 ; 167 L.T. 396.

APPEAL by the Commissioners of Inland Revenue against a decision of the Special Commissioners discharging an assessment to sur-tax on the respondent. The facts are fully stated in the judgment.

The Attorney-General (Rt. Hon. Sir Donald Somervell, K.C.), J. H. Stamp and R. P. Hills for the appellants.

Frederick Grant, K.C., and L. M. Jopling for the respondent.

MACNAGHTEN, J.: The respondent, Lady Castlemaine, is the widow of the 5th Baron Castlemaine, who died on July 6, 1937. By his will dated May 13, 1929, Lord Castlemaine appointed the Royal Exchange Assurance to be the executor and trustee thereof and he directed that, in the events which happened, his residuary estate should be held on trust to pay to the respondent an annuity of such a sum as, after deduction of income tax and super tax and all other deductions, should amount to a clear sum of £3,000 a year during her life and to his brother Robert, who inherited the Barony and became the 6th Baron Castlemaine, an annuity of £250 a year during his life; and subject to those annuities he directed that his residuary estate should be held on trust for his daughter, Evelyn, and her issue. The total value of the testator's residuary estate, which consisted of real and personal property in England and of real property in Eire, subject to a rentcharge of £1,000 a year in favour of the respondent, was estimated by the Royal Exchange Assurance to be £62,677 as at the date of his death.

The respondent was born on Apr. 17, 1873, and the present Lord Castlemaine was born on Apr. 19, 1864. The actuarial values of their annuities at the date of the death of the 5th Lord Castlemaine were £65,224 and £1,774, amounting together to £66,998 or £4,321 more than the value of the testator's residuary estate. The values of the annuities calculated in the manner prescribed by UTHWAT, J., in *Re Bradberry* (1), must needs be greater at the present time than at the date of the testator's death, apart from the increase in the standard rate of income tax and in the rates of sur-tax which has taken place since 1937.

In these circumstances, the income of the estate being insufficient to provide the annuities and its capital being less than their actuarial value, there is no doubt as to the rights of the annuitants. They are entitled to have the values of their annuities ascertained and, when that has been done, they are entitled to have the residuary estate divided between them, each receiving a share proportionate to the values so ascertained.

Between July, 1937 and Jan., 1940, the Royal Exchange Assurance made a number of payments to the respondent, amounting in all to £6,750; and for each of the 3 years ending Apr. 5, 1938, 1939, and 1940, assessments to sur-tax were made on the respondent in respect of these payments on the footing that they were payments on account of her annuity. On appeal the Special Commissioners discharged these assessments. They found as a fact that the residuary estate was insufficient by its income to provide the annuities given by the will and insufficient by its capital to provide their actuarial value. They accordingly held that the gifts of the annuities could not take effect and that the payments made to the respondent represented instalments of her share of the residuary estate. I think that this decision of the Special Commissioners is correct.

It is true, no doubt, that at first the Royal Exchange Assurance, being unaware that the residuary estate was deficient, intended the payments made to the respondent to be payments on account of her annuity; but that fact cannot abrogate or affect her rights. Now that it has been established that, from the first the estate was in fact deficient, all the payments made to her must, in my opinion, be treated as payments on account of the capital sum to which she is entitled.

The Royal Exchange Assurance, with the consent of the respondent, have made payment to the present Lord Castlemaine at the rate of £250. If these payments had been made on account of his annuity, it would have been their duty to deduct the tax therefrom and account for it to the Crown. The payment of the full sum of £250 can only be justified or explained on the footing that it is a payment, not on account of his annuity, but on account of the capital sum to which he is entitled.

I therefore hold that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Wedlake, Letts & Birds* (for the respondent).

[Reported by R. L. ZIAR, Esq., Barrister-at-Law.]

MAURAY v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Macnaghten, J.), July 20, 21, 22, 1943.]

Income Tax—Disposition in favour of child—Interest liable to be diminished by the birth of further children who shall survive the settlor—Whether interest for a period less than life of child—Finance Act, 1922 (c. 17), s. 20 (1) (c).

A By a settlement dated Aug. 5, 1932, it was provided that one-third of the income of the settled fund should be held, during the life of the settlor's wife, upon trust for such of his children as he should appoint and, until such appointment, for the benefit of his daughter J. on attaining 21 years of age or marrying under that age. After the death of the wife the trust fund was to be held on trust for the children or remoter issue of the settlor as he should appoint and, until and subject to such appointment, in trust for all or any of the children who should be living at the settlor's death. B J., who was born on Mar. 18, 1923, was the only child of the settlor and at all material times was an infant and unmarried and both she and her mother were still alive. At all material times the settlor had not made any appointment under the settlement. It was contended by the Crown that the one-third share in the income was applicable for the benefit of J. for a period less than her life and must, therefore, be deemed to be the income of the C settlor in accordance with the Finance Act, 1922, s. 20 (1) (c). The Crown's case was based on the possible contingency that the settlor might beget three or more children and that these children and J. might be alive at the settlor's death and that, therefore, under the terms of the settlement, J.'s share would then be less than one-third:—

Held: the interest of J. in the one-third share of the income was not an interest for a period less than her life within the meaning of the section.

D [EDITORIAL NOTE. It will be noted that the interest of the child in this case was subject to certain special powers of appointment among children and issue and, if these powers were not exercised, the income of the one child of the settlor was subject to be decreased by the birth of further children which on the facts of the case seemed an unlikely happening in respect of the subsisting marriage. It does seem, however, that there were possible events in which the infants' share in the property might be diminished.

E AS TO DISPOSITIONS FOR LESS THAN LIFE OF CHILD, see HALSBURY, Halsbury's Laws of England, Vol. 17, pp. 269, 270, para. 538; and FOR CASES, see DIGEST, Supp., Income Tax, No. 575b.]

APPEAL by the taxpayer by way of case stated from a decision of the Special Commissioners confirming an assessment to sur-tax made under the Finance Act, 1922, s. 20 (1) (c). The facts are fully stated in the judgment.

F J. S. Scrimgeour for the appellant.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), J. H. Stamp and Reginald P. Hills for the respondents.

G MACNAGHTEN, J.: By a settlement dated Aug. 5, 1932, made between the appellant, Maurice Mauray, of the one part, and the Public Trustee and Violet Mauray, the appellant's wife, therein called the trustees, of the other part, the appellant settled certain property which he had transferred to the trustees for the benefit of his wife and children. The settlement provided for the accumulation and capitalisation of the first year's income of the settled property and that the trustees should thereafter hold two-thirds of the annual income upon protective trusts for the benefit of his wife during her life, and that the remaining one-third of the income (and it is that which is the subject of the dispute in this appeal) should be held, during the life of his wife, upon protective trusts for the H benefit of such of his children and in such manner as the settlor should by deed or will appoint and, until and subject to any such appointment, for the benefit of the settlor's daughter Joan on her attaining the age of 21 or marrying under that age with the consent of her mother if then living, or with the trustees' consent if she were dead. Under cl. 5 of the settlement, after the death of the wife of the settlor, the trust fund was to be held in trust for such one or more of the children or remoter issue of the settlor in such manner in all respects as the settlor should by deed or will appoint and, subject to any such appointment, in trust for all or any of the children of the settlor who should be living

at his death. Cl. 6 enabled the trustees, with the consent of the settlor during his life, and after his death at their absolute discretion, to raise out of any accumulated income, other than the accumulations of the first year's income, moneys for the education and advancement of any child of the settlor, provided that the total sum did not exceed £200 per annum. That sum was in fact paid by the trustees for Joan's education in the year 1938-39. Joan, who was born on Mar. 18, 1923, is the only child of the settlor. She is unmarried and she and her mother are both alive.

By the Finance Act, 1922, s. 20 (1), it is provided that :

Any income . . . (c) which by virtue or in consequence of any disposition made, directly or indirectly, by any person after Apr. 5, 1914, is payable to or applicable for the benefit of a child of that person for some period less than the life of the child ; shall . . . if and so long as the child is an infant and unmarried, be deemed for the purposes of the enactments relating to income tax (including super-tax) to be the income of the person . . . if living, by whom the disposition was made . . . and not to be for those purposes the income of any other person.

It is said on behalf of the Crown that one-third of the income of the trust fund is payable to or applicable for the benefit of Joan for a period less than her life. It is common ground that for this purpose the power of appointment reserved by the appellant must be disregarded and that so long as Joan's mother lives this one-third part of the income is applicable for her benefit. If, therefore, Joan dies before her mother, the income will be applicable for her benefit during the whole of her life. So also, if she survives her mother but predeceases her father, the income will be applicable for her benefit during the whole of her life. However, it is said, as I understand it, that there is a contingency in which Joan would get less than one-third of the income, and it is this : if the settlor were to beget more than two other children, and, if Joan and the three other children were alive at the date of the settlor's death, Joan's interest in the fund would be less than one-third ; it would only be one-fourth : and, therefore, in that event Joan's interest in the one-third share would be for a period less than her life.

The question is this : does the supposed possibility that the settlor may beget three other children and that at the date of his death all four children may still be alive make this one-third of the income applicable for the benefit of Joan for a period less than her life within the meaning of the Finance Act, 1922, s. 20 (1) ? In my opinion, it does not. The Special Commissioners held "that the case was within the four corners of that section." I think their decision was wrong. The appeal will, therefore, be allowed with costs.

Appeal allowed with costs.

Solicitors : *Rye & Eyre* (for the appellant) ; *Solicitor of Inland Revenue* (for the respondents).

[Reported by R. L. ZIAR, Esq., Barrister-at-Law.]

COLLINS' v. COLLINS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), July 21, 1943.]

Divorce—Maintenance—Computation of Income—Officer's service allowance—How to be taken into account in ascertaining gross income.

The wife was entitled to maintenance from her husband who, at the material time, was in the services and in addition to his service pay was in receipt of various service allowances. It was contended that the excess of these allowances over the husband's actual extra expenditure should be "grossed up" and added to his service pay in order to arrive at his notional gross income :—

HELD : the suggested calculation was wrong. These allowances were a fact to be taken into account in so far as they increased his ability to pay maintenance out of his service pay. In that sense only, they must be taken into account in deciding what proportion of the joint income should be allotted for maintenance.

[EDITORIAL NOTE. Payments in money which are tax free *prima facie* have to be "grossed up" to arrive at their real income value and this is no doubt more appropriate now that so much income is taxed at the source so that the taxpayer never receives nor has the use of the money. It is held, however, that service allowances are not income in the proper sense. They are paid to mitigate hardship and it would be improper to gross them up in order to arrive at the proper amount of maintenance.

AS TO AMOUNT OF MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 790-792, paras. 1252, 1253; and FOR CASES, see DIGEST, Vol. 27, pp. 502-504, Nos. 5379-5396.]

Cases referred to:

* (1) *Naish v. Naish* (1916), 32 T.L.R. 487; 27 Digest 503, 5380.

* (2) *Chichester v. Chichester*, [1936] P. 129; [1936] 1 All E.R. 271; Digest Supp.; 105 L.J.P. 38; 154 L.T. 375.

APPEAL by the husband against a decision of the registrar as to the computation of his income for purposes of maintenance. The facts are fully stated in the judgment.

Arthian Davies for the husband.

P. R. Hollins for the wife.

LORD MERRIMAN, P.: This is an appeal from the registrar on a question of maintenance which originally came before me as long ago as September last. I then adjourned the matter for further inquiry to be made into certain figures, and it now comes before me again in July, 1943, with such further elucidation as the past 10 months have been able to afford.

The respondent husband is a serving officer, who, since he was divorced by the petitioning wife, whose maintenance is now in question, has married again. It is common ground that as a squadron leader his pay is £528 per annum, and it is common ground that the wife's investment income is in round figures £153, and (subject to a question with which I will deal, so as to get it out of the way) that her total income is in round figures £200 per annum.

The only question in issue, so far as she is concerned, is the value of a house (of which I gather she is the owner), the Schedule A. valuation of which is £52 per annum, but in respect of which the registrar thought that only £27 should be taken into account, because of certain extra repairs and maintenance due, as I gather, to war damage. Whether that figure was right or wrong at the time, and I have really no reason to think that it was wrong, the discussion to-day seems to show that, things being as they are now, the best figure to take in respect of the wife's house would be the rateable value, which, I gather, is £35, because that will have taken into account, or may have taken into account, the necessary expenditure for upkeep. As that figure has become uncontroversial I mention it so that there may be no need for any further discussion. In other words, the wife's income will be reduced by £17.

I come to what is the real point in this case. In addition to his pay the husband had, at the material time, allowances of £22 per month. In order to arrive at the husband's income, the registrar said that as these allowances were not subject to income tax they must be, to use the common expression, "grossed up," so as to represent in income to the husband £44 per month, subject to this: that it was taken that some £6 per month of those allowances represented actual extra cash expenditure to which he would be put, and, therefore, that that sum must be deducted before the "grossing up" process was begun. The result was that £16 a month became £384 per annum, and thus the husband's income was brought up to £912. That is the real point of this appeal.

I am bound to say that it occurred to me at the time, and the same thing occurred to me again to-day the moment I heard the figures mentioned (and there really has been no argument on the other side), that that is a wrong way of dealing with this matter. Whatever else may be said about these allowances, it seems to me to be impossible to treat them as net income which must, therefore, be doubled, and imputed at the gross value, the notional gross value, as income to the husband. It does not represent the fact, and seems to me to be wrong in principle. It is quite clear from the official letters that have been put in that these allowances are really intended to be in mitigation of hardship to the husband for the extra expenses that are incurred by service conditions. In certain circumstances he may draw lodging, fuel and light allowance; in other

circumstances he may draw what is called the consolidated allowance in respect of separation from his family ; and in the circumstances of any given case the allowances may vary almost from day to day and from week to week. They have, in fact, varied very considerably since the time when this matter was before the registrar, and he is at present in receipt—or was at the time when the letters were written—of the consolidated separation from family allowance of 8s. 6d. per day. In my opinion, and counsel for the wife has not attempted to argue the contrary, it is quite impossible to hold that that is net income, or that any part of it is net income, which, in the present state of income tax, must be doubled and imputed to him in the gross calculation at twice its face value as actual income. On the other hand it is not disputed on either side that the sum must be taken into account, though not taken into account as “income” of the husband. Indeed, to take it into account as income of the husband would be to fly straight in the face of the only reported decision of the Court of Appeal to which my attention has been called, *Naish v. Naish* (1). If that case, which was a decision during the 1914-1918 war, was taken literally, one would be obliged to ignore a figure for allowances altogether ; but I do not think that one is obliged to take it as a decision of universal application. The circumstances were peculiar. The soldier in question had come all the way from British Columbia, and, therefore, so to speak, was living under two systems of law ; his family were at the other side of the Atlantic ; and the situation was obviously very special. I do not think I am obliged by that case to say that the fact that he has these allowances must be ignored altogether. As I say, there is really no dissent at the Bar that, provided the allowances are not treated as part of the husband's income and “grossed up” accordingly, they should be taken into account as part of the circumstances of the case ; and I think that their real significance is this : in meal or in malt they enable the husband to live in service conditions, and free his income (his pay, in other words), so that, without any substantial call on it for his own expenses of living, he can devote his pay to the maintenance of his first wife and the maintenance of his new wife. That, I think, is the real significance of these allowances, and, I think, is a matter to be taken into account.

It has been said in the course of the argument that that is all very well, but that it is a vague phrase which will mean nothing when the matter gets back to the registrar. I hope that that will not be so. It ought not to be so if what has been said before is given any weight. I ventured, in *Chichester v. Chichester* (2) to say that there were things of this kind which, though they could not be dealt with as a matter of strict calculation on one side or the other of the account, had to be taken into account in the individual case, in order to arrive at a just solution, a just solution which, as I said then and have said dozens of times since, cannot be arrived at merely by taking a rule-of-thumb calculation as between the respective incomes of the husband and the wife, adding them together, dividing by three, and so on ; and perhaps it is a little significant, as I said in the course of the argument, that in one well-known text book that case is described as the *locus classicus*, whereas in the recent edition of another well-known textbook it is completely ignored. The sort of thing which I said must be taken into account in that case, though it could not be quantified by rule-of-thumb, was the fact that the husband was under an obligation, by covenant, to the children of the marriage with a former wife by whom he had been divorced. I said, at p. 135 ([1936] 1 All E.R. p. 274) :

I am not going to say that the burden of that covenant must as a matter of law be deducted in arriving at any present calculation of maintenance. What I say is that it is quite plainly a circumstance which is to be taken into account, in the words of the statute, in considering the husband's ability . . .

Mutatis mutandis, precisely the same considerations apply here. This man's ability to pay out of his pay of £528 per annum, is increased by the fact that in addition he draws whatever he is, at the moment, drawing by way of service allowances. In that sense, and in no other sense, must this item be taken into account, but it is, as I think, an important matter to be taken into account in deciding what proportion, if any, of the joint incomes the wife should be allotted out of the husband's income properly so called.

I hope that with these directions it will be possible to arrive at a satisfactory figure, and I think it will probably not be necessary to go into any further

elaborate calculation of what the allowance is at a given moment, for this reason, that, if the matter is approached in the way I have indicated, that, roughly speaking, the allowances which the husband draws are conditional upon the extra expense of his service for the time being, their precise amount at any given moment is not of importance. What is of importance is that he is drawing some such allowance or allowances.

A With these observations I think it would be better that the matter should be sent back to the registrar for the settlement of the amount.

Case remitted to the registrar to ascertain the amount to be allowed for maintenance. The wife allowed full costs.

Solicitors : *Kenneth Brown, Baker, Baker* (for the husband) ; *Judge, Hackman & Judge* (for the wife).

[*Reported by D. ARMSTEAD FAIRWEATHER, Esq., Barrister-at-Law.*]

GARCIA v. HARLAND & WOLFF, LTD.

[KING'S BENCH DIVISION (Atkinson, J.), July 23, 1943.]

C *Factories and Workshops—Shipbuilding yard—Wet dock—Contractors wiring decks of ship—Occupier—Insufficient lighting—Factory and Workshop Act, 1901 (c. 37), s. 79—Factories Act, 1937 (c. 67), ss. 60, 106, 159—Shipbuilding Regulations, 1931 (S.R. & O., 1931, No. 133).*

Master and Servant—Liability of master—Provision of safe system of working.

D The plaintiff, in an action brought against her husband's employers under the Law Reform (Miscellaneous Provisions) Act, 1934, claimed damages in respect of the death of her husband. The deceased was employed by the defendants in wiring the underside of the deck of a ship in a wet dock, and while returning to work, on account of the insufficiency of the lighting, he tripped over obstructions on the deck, fell down an open hatchway and was killed. It was agreed that there had been a breach of the Shipbuilding Regulations, 1931, made under the Factory and Workshop Act, 1901, but it was contended for the defendants that these regulations only bound the occupier of the shipbuilding yard or a contractor undertaking the repair of a ship in a public dry dock. By the Factories Act, 1937, s. 106, certain provisions, including sect. 60 which empowered the Secretary of State to make regulations with regard to factories, were made to apply to work in a wet dock, and for the purposes of such provisions a ship was deemed to be a factory and anyone undertaking work on a ship was deemed to be the occupier of a factory. By sect. 159, the 1901 Act was repealed, with a saving for any order already in force which, in so far as it could have been made under a provision of the 1937 Act, was to be deemed to have been made under that provision. It was contended for the plaintiff (i) that since the regulations could have been made under sect. 60 they must be deemed to have been so made and that the ship must be deemed to be a factory and the persons undertaking the work were liable as occupiers of a factory, (ii) that the uncovered hatchway and the lack of adequate lighting constituted conditions of danger and that the employers had failed in their common law duty to take reasonable precautions for workmen's safety and to provide a safe system of work :—

H **HELD :** (i) the Factories Act, 1937, s. 159, empowered the Secretary of State to vary existing regulations in order to bring them into conformity with the Act if desired, but unless this was done their interpretation must remain as it was and they imposed no liability on the defendants as persons undertaking work on a ship in a wet dock.

(ii) the defendants were liable for negligence in failing to provide a safe system of work for their employees.

[**EDITORIAL NOTE** It was suggested in this case that the effect of the Factories Act, 1937, was not only to keep the Shipbuilding Regulations, 1931, in force, but to give them a wider effect than they had before the passing of the new Act. It was also contended that this view had been taken in an unreported case. The judge has found himself unable to take this view and has decided that the regulations must be construed to give them the same meaning as before the passing of the 1937 Act. At the close

of the judgment will be found a consideration of the effect of the decision in *Benham v. Gambling* (10). It will be remembered that in that case the House of Lords dealt with the assessment of damages for loss of expectation of life generally, but in the particular case the deceased was a child of 2½ years. In the present case the deceased was a married man of 27 years of age and appears to have been entitled to the maximum award for an adult person.

AS TO POWER OF SECRETARY OF STATE TO MAKE REGULATIONS, see HALSBURY, *Hailsham Edn.*, Vol. 14, pp. 614-616, para. 1169; and FOR CASES, see DIGEST Supp., *Factories and Shops*, Nos. 138a—138j.

AS TO PROVISION OF SAFE SYSTEM OF WORKING, see HALSBURY, *Hailsham Edn.*, Vol. 22, pp. 189, 190, para. 317; and FOR CASES see DIGEST, Vol. 34, pp. 196-203, Nos. 1602-1657.]

Cases referred to :

- (1) *Smith v. Cammell, Laird & Co., Ltd.*, [1940] A.C. 242; [1939] 4 All E.R. 381; Digest Supp.; 109 L.J.K.B. 134; 163 L.T. 9.
- (2) *Fitzpatrick v. C. & H. Crichton* (1921), *Ltd.*, (1941), unreported.
- (3) *Smith v. Baker & Sons*, [1891] A.C. 325; 34 Digest 202, 1657; 60 L.J.Q.B. 683; 65 L.T. 467.
- (4) *Sword v. Cameron* (1839), 1 Dunl. (Ct. of Sess.) 493; 34 Digest 199, 1624 *vii*.
- (5) *Bartonhill Coal Co. v. Reid* (1858), 3 Macq. 266; 34 Digest 126, 971; 31 L.T.O.S. 255.
- * (6) *Williams v. Birmingham Battery & Metal Co.*, [1899] 2 Q.B. 338; 34 Digest 195, 1590; 68 L.J.Q.B. 918; 81 L.T. 62.
- (7) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1938] A.C. 57; [1937] 3 All E.R. 628; Digest Supp.; 106 L.J.P.C. 117; 157 L.T. 406; *affg.* [1936] S.C. 883.
- * (8) *Speed v. Thomas Swift & Co., Ltd.*, [1943] 1 K.B. 557; [1943] 1 All E.R. 539; Digest Supp.; 169 L.T. 67.
- * (9) *Taylor v. Sims and Sims*, [1942] 2 All E.R. 375; Digest Supp.; 167 L.T. 414.
- *(10) *Benham v. Gambling*, [1941] A.C. 157; [1941] 1 All E.R. 7; Digest Supp.; 110 L.J.K.B. 49; 164 L.T. 290.

ACTION by the widow of the deceased workman who was employed by the defendants for the recovery of damages in respect of his loss of expectation of life. The facts are fully set out in the judgment.

F. A. Sellers, K.C., and *J. R. Ogilvie Jones* for the plaintiff.

H. I. Nelson for the defendants.

ATKINSON, J.: In this case Mrs. Garcia is claiming damages under the Law Reform Act in respect of the death of her husband. The action is brought against her husband's employers, Messrs. Harland & Wolff, Ltd., and the facts (about which there is no dispute) are these.

The deceased was a young man of 27 years of age. He was an expert electrician in very good health. He was very happily married to his wife, the plaintiff in this case, and they had two small boys; and the evidence which I have heard established that he was a man with good prospects of a happy and contented life.

In August, 1941, he was in the employ of the defendants, and in that month the defendants undertook the job of wiring for a system of alarm and signal bells in the upper tween decks of No. 4 hold of the motor vessel Tuva. The work was carried out at No. 9 shed King George V Dock, London, in a wet dock. The work involved fixing tubing along the underside of the deck above, which was the main deck of the ship. The work began on Aug. 6, 1941, and the deceased met his death on Aug. 8, 1941.

I do not know the size of the hold in which the man was working—that was not stated—but there was a hatchway on the main deck overhead, and there was a hatchway in the deck on which the work was being carried out. The latter was 26ft. long by 25ft. broad. Out of the hold on the starboard side was a ladder leading up to a hole in the deck above. The hole was about 2ft. square, and this ladder and hole were mostly used by the men coming down from and going up to the main deck, but it was a hole so small and so far away from the part of the deck where they were working that it would be of no material value as a source of light. Between the aft end of the hold and the hatchway there is a space of approximately 6ft., and this was almost entirely blocked by a fender which was 5ft. wide and 7ft. long; this left a very narrow space—a space that looks about 8ins. —between the fender and the hatchway. On the port side of the hatchway there was a large propellor lying on the deck, coming up to within some 3ft. or 4ft. of the hatchway. A little forward of

the propeller there were piles of hatchway covers, each about 15ins. high. There were two piles lying side by side and coming right up to the hatchway. It is not in dispute that all round this hatchway, so long as it was an open hatchway, the situation was one of considerable danger for men working there. The men did not have their food down in the hold, but they all came up and had it where they liked. When the dinner hour came, on Aug. 8, 1941, Thompson, the deceased man, and the witness Farmer, came up on deck, and it is presumed—
A indeed, I do not think there is much doubt—that Farmer and the deceased came up the ladder to which I have referred.

When it came to going back to work, Farmer thought that Garcia was just behind him. Farmer went down this ladder, and, he said, he thought that Garcia was following him. He himself went the way he had come—shuffled round, and got to his work that way in safety, and he supposed that Garcia was going the way Garcia usually went. After a bit he spoke to Garcia and received no answer. Then he shouted; there was still no answer, and he got frightened. He realised the sort of thing that might have happened, so he got hold of a cluster of lights resting on the covers, turned it down into the hold, and there he saw the deceased man lying at the very bottom of the ship. He was not dead, but he was unconscious and died soon afterwards. He had fallen just opposite the pile of loose covers at the aft end.

C The postmortem examination disclosed that the deceased man had a recent cut on his shin. It was about 15ins. up the leg, exactly in the place where you would expect to find a bruise if a man had walked into this pile of covers and tripped over it. I have not the slightest doubt (and I do not know that anyone else has) that what happened was that in walking along the port side of this open hatchway, he walked into this pile of covers, tripped over them and fell down into the bottom of the hold. At any rate, I find that as a fact, that is
D the only inference that one could reasonably draw, and it was not challenged at the trial before me.

The question which then arises is whether the man's employers are liable for this accident. As I have said, it was conceded in terms by counsel (and it is beyond question) that the place where the man was required by the defendants to work was very dangerous. It was dangerous with the overhead covers on, and the man in charge of the work realised that the place was dangerous even with the overhead covers off. On the morning of Aug. 8, when these covers were put in position depriving the hold where these men were working of all light, the danger was multiplied enormously. Moreover, no additional artificial light was used, even the cluster which the men had when they finished work was not turned up so that it lighted up the route which they had to take in
E returning to their work. Thompson permitted these men to wend their way out of this hold in what must have been almost absolute darkness, and he allowed them to find their way back in absolute darkness.

F Now there are two grounds of liability alleged. First, it is said that there was a breach of various statutory duties imposed on the employers for the protection of their workmen; and secondly, it is said that, at any rate, there is a common law liability.

G The regulations relied upon were three of the Shipbuilding Regulations, 1931, made by the Secretary of State under the Factory and Workshop Act, 1901, s. 79. They were regulations made in respect of the construction and repair of ships in shipbuilding yards and the opening words are:

In pursuance of the Factory and Workshop Act, 1901, s. 79, I hereby make the following regulations and direct that they shall apply to the construction and repair
H of ships in shipbuilding yards . . .

It shall be the duty of the employer to comply with Parts I to VIII of these regulations.

The three regulations relied upon are regs. 1, 10 and 42, which read as follows:

(1) Safe means of access shall be provided to all parts of the ship to which persons employed may be required to proceed in the course of their employment.

(10) All openings in decks and tank tops shall be securely protected. Such protection shall be maintained in position and when necessarily removed in the course of work shall be replaced as soon as practicable . . .

(42) (a) All parts of a ship where work is being carried on shall be efficiently lighted.

It is, of course, perfectly plain that every one of those three regulations was broken, but the question is whether those regulations impose any duty upon these defendants. As I read the words "It shall be the duty of the employer," those words in conjunction with the opening words—that the regulations are to apply to the construction and repair of ships in shipbuilding yards—lead, as has been decided in *Smith v. Cammell, Laird & Co., Ltd.* (1), to this conclusion: that the regulations only bind the occupier of the shipbuilding yard, and, therefore, do not bind an employer of labour working upon a ship.

In that case there had been an accident to a workman employed by a company carrying on some insulation work. These regulations had been ignored, and it had been held, I think by the Court of Appeal, that his employers were bound by the regulations, but the House of Lords said that the language was clear that the only employer who could be referred to was the occupier of the shipbuilding yard.

After the words: "It shall be the duty of the occupier to comply with Parts I to VIII of these Regulations" there is a proviso which reads as follows:

Provided that, when a ship is being repaired in public dry dock, the person who contracts with the owner of the ship or with his agent to execute the work of repair, shall be deemed to be the occupier for the purposes of Parts I to VIII, and it shall be his duty to comply with the said parts, except as follows . . .

The final result of the regulations was plainly this: the occupier of the shipbuilding yard was bound, but if a ship was being repaired in a public dry dock the firm or person undertaking work of repair in a ship was also bound by the regulations; and, if the work in this case had been done in a public dry dock, it is quite clear that the defendants would be bound by these regulations.

That, however, does not conclude the question. In the year 1937 there was passed a new Factories Act, and that Act repealed the Factory and Workshop Act, 1901, and, unless something was done by the new Act to keep the regulations in force, they, too, would have disappeared along with the Act by virtue of which they had been made. It is said in this case that the result of the provisions of the 1937 Act was not merely to maintain these regulations in full force and effect, but to give them a much wider interpretation. The section relied upon is sect. 106.

Subject as hereinafter in this section provided the provisions of this Act hereinafter in this section mentioned shall apply to any work carried out in a harbour or wet dock in constructing, reconstructing, repairing, refitting, painting, finishing or breaking up a ship or in sealing, scurving or cleaning boilers (including combustion chambers and smoke boxes) in a ship, or in cleaning oil-fuel tanks or bilges in a ship, that is to say: (a) the provisions of Part III with respect to welfare regulations; (b) the provisions of Part IV with respect to special regulations for safety and health . . .

The main argument rested upon the fact that sect. 106 applies the provisions of Part IV to anyone working in a wet dock. When one turns to Part IV, the relevant section is sect. 60, which provides as follows:

(1) Where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour, used in factories is of such nature as to cause risk of bodily injury to persons employed in connection therewith or any class of those persons, he may, subject to the provisions of this Act, make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case.

(2) Special regulations so made may, among other things, . . .

(c) modify or extend with respect to any class or description of factory any provisions of Part I, Part II or this Part of this Act, being provisions imposing requirements as to health or safety . . .

Sect. 106 of the Act which provides that certain provisions shall apply to, *inter alia*, wet docks is in its terms made subject to certain other parts of the Act there mentioned, among which is included sect. 159, which provides as follows:

Subject as hereafter provided the enactments referred to in the Fourth Schedule to this Act are hereby repealed . . .

Provided that any order, regulation, byelaw, requirement . . . which is in force at the commencement of this Act shall continue in force and shall have effect as though it had been made or given under this Act, and, in so far as it could have been made or given under a particular provision of this Act, shall be deemed to have been made

or given under that provision, and any such order or regulation made by the Secretary of State under a power which is exercisable under a corresponding provision of this Act by a different class of instrument shall be deemed to be an instrument of that class, so, however, that any order or regulation of the Secretary of State which continues in force by virtue of this proviso may, in so far as may be necessary to bring it into conformity with this Act, be varied or revoked by an order made by him under this Act.

These regulations could have been made under sect. 60, and, therefore, they continue in force. Sect. 106 ends in this way :

A . . . and for the purpose of such provisions the ship shall be deemed to be a factory, and any person undertaking such work shall be deemed to be the occupier of the factory.

B The argument is that these regulations could have been made under sect. 60 ; they could have been made applicable to a factory as defined by sect. 106, and, therefore, they are to be deemed to be applicable to such a factory, and, as by sect. 106, a ship " shall be deemed to be a factory, and any person undertaking such work shall be deemed to be the occupier of a factory ", therefore, it is argued, these regulations must be deemed to include what grammatically they do not include, but must be construed as if they had included a factory of this kind.

C For this purpose, a decision is relied upon of STABLE, J., who took that view in a similar case to the one with which I have to deal, *Fitzpatrick v. C. and H. Crighton* (1921), *Ltd.* (2), and I have been provided with a transcript of the shorthand note of the judgment of STABLE, J., in that case delivered on Nov. 14, 1941. Having read sect. 106 and the words that the provisions of the Act :

. . . shall apply to any work carried out in harbour or wet dock.

STABLE, J., then read sect. 60, enabling the Secretary of State to make special regulations and so on. He then proceeded :

D The Factories Act of 1901 is repealed by the Act of 1937, and under the Factories Act of 1901, which gave the Secretary of State or the appropriate authority power to make certain regulations, when that Act, the 1901 Act, was repealed, the effect of that repeal might be to repeal the regulations which had been made under the Act, but this possible danger, in my judgment, is met by sect. 159 of the Act of 1937. That section, first of all, sets out that the enactments set out in the Fourth Schedule are repealed and included in the repeal is the whole of the Factories Act of 1901. Then it goes on to say : Provided that any order or regulation, etc., given under any enactment repealed by this Act which is in force at the commencement of this Act shall continue in force.

E I looked at the regulations that were made under the Factories Act, and I find that those are regulations made under an Act repealed by the 1937 Act which were in force at the time the 1937 Act became law. That section goes on that those regulations shall continue in force, but the section does not stop there. It goes on " and shall have effect as though it had been made or given under this Act, and, in so far as it could have been made or given under a particular provision of this Act, shall be deemed to have been made or given under this provision and so anxious is the legislature to see that nothing is destroyed, there is a provision (which I need not bother to read) to this effect, that where a particular order or regulation, or whatever it is, is made by an instrument in a particular form, and the new Act gives the appropriate authority power to make a similar regulation by a different sort of instrument, the instrument under which the regulation was in fact made shall be deemed to be the same sort of instrument as it would have been made by if it had been made (as it was not) under the new Act.

G It seems to me to be an excess of such subtlety (a degree of subtlety which I am quite incapable of comprehending) to contend that I, today, have not got to look at these regulations as being regulations in full force and effect, and as being regulations which were made under a combined power of sect. 60 and sect. 106 of the Factories Act of 1937.

H That being so, what is the position ? Sect. 106 says that " for the purpose of such provisions the ship shall be deemed to be a factory, and any person undertaking such work shall be deemed to be the occupier of a factory " ; and when one looks at regs. 10 and 42, it seems to me that whether it is fair or unfair, whether it is wise or whether it is foolish, the legislature has imposed upon the defendants the obligation to light that part of the ship properly in which they were working, and the further obligation to see that the hatches, at all events in that part of the ship in the vicinity of their work, were properly covered up, and that that statutory duty imposed on them in this case was clearly neglected, and that the combination of the hole in the hatch and the absence of light constituted a trap which was in this case literally a death trap.

I am asked to follow the decision of STABLE, J. Regretfully I cannot bring myself to take the same view. It seems to me that all that those final words in sect. 106 do is to say this: "and for the purposes of such provisions," that is the provisions of sect. 60, "the ship shall be deemed to be a factory." It does not say "for the purposes of existing regulations the ship shall be deemed to be a factory," but "for the purpose of such provisions" that is, that the Secretary of State under sect. 60 shall have power to make regulations which shall refer to a factory in a wet dock, and to impose upon persons undertaking work there any duties which he thinks fit. A

I am asked to say that these regulations are to be deemed to be recast, but in what way and in what form is the recasting to take effect? I cannot for one moment think there is anything in the sections in the Act of Parliament which is to change the wording of the regulations. They are deemed to be kept alive. If they had been made under one form of order, and this Act required a different form of order, those regulations could be deemed to be made under the different form of order, and it seems to me that the final words of sect. 159 (1) really support very strongly the view which I take: B

... and any order or regulation of the Secretary of State which continues in force by virtue of this proviso may, in so far as may be necessary to bring it into conformity with this Act, be varied or revoked by an order made by him under this Act.

What that meant was this, that, if the Secretary of State thought it right to vary the existing regulations and make them apply to a ship being repaired in a wet dock, that provision gave him power so to do. I say it very regretfully, because I am differing from a brother judge who has formed a different view, but I cannot bring myself to see how anything in this Act can be relied upon as recasting the existing regulations. It appears to me that they remain as they were and that their interpretation must remain as it was, binding merely the occupier of a shipbuilding yard or a person contracting with the owner of a ship to carry out repairs in a public dry dock, and, therefore, I think that the plaintiff's case, in so far as it is based on these regulations, must fail. C D

I have then to consider the alternative way in which the case is framed. There is no doubt at this time of day about, at any rate, two overriding duties which are imposed upon employers. The first I will take from *Smith v. Baker* (3), and I cite the words of LORD WATSON, at p. 353: E

It does not appear to me to admit of dispute that, at common law, a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety. The rule has been so often laid down in this House by LORD CRANWORTH, and other noble and learned Lords, that it is needless to quote authorities in support of it.

Again lower down the page, LORD WATSON refers to *Sword v. Cameron* (4), and *Bartonskill Coal Co. v. Reid* (5), to show that the same rule prevails in Scotland. F

In *Williams v. Birmingham Battery and Metal Co.* (6) the principle is enunciated equally clearly in the judgment of ROMER, L.J., at p. 345: G

[The cases] appear to me to establish the following propositions as to the liability at common law of an employer of labour. If the employment is of a dangerous nature, a duty lies on the employer to use all reasonable precautions for the protection of the servant. If by reason of breach of that duty a servant suffers injury, the employer is *prima facie* liable; and it is no sufficient answer to the *prima facie* liability for the employer to show merely that the servant was aware of the risk and of the non-existence of the precautions which should have been taken by the employer, and which, if taken, would or might have prevented the injury.

That duty, therefore, is quite clear.

It may be the same duty expressed in another way, but it is equally clearly established that employers are bound to provide a safe system of work. I am looking now at *Wilsons and Clyde Coal Co., Ltd. v. English* (7), where the House of Lords reaffirmed that there was an obligation upon owners of a mine to provide a safe system of work; and as to these overriding duties, it was made abundantly clear in that case that the obligation is one which cannot be delegated, or at least, that, if it be delegated to a manager or other servants, the employers remain liable for any breach of duty on their part and cannot rely upon the doctrine of common employment. H

The plaintiff argues that here was work of a dangerous character being carried out under conditions of extreme danger, and that the system of work adopted by Thompson was a dangerous one. It is urged that no steps were taken to minimise the obvious danger, and that the system of work was one which was not safe. The answer of counsel, on behalf of the defendants, was this. He said that these duties are all very well when the work is being carried on on the employer's premises—that the only obligation imposed by the common law is an obligation to have their own premises safe, and to have systems of work on their own premises that are safe and proper; but that, if the work is being done on premises which do not belong to the employer, he is under no obligation as to the safety of those premises, and on this a decision of LEWIS, J., is relied upon to which I will come in a moment.

It is necessary to draw a clear distinction here between what is meant by being responsible for the safety of the premises on which a man is working, and the necessity for having a proper system of working. If the danger is one which is part and parcel, shall I put it, of the premises where a man is engaged to work, for instance, if this man had met his death through the deck on which he was working giving way and collapsing—it may very well be that the employers can say: We are under no obligation as to the safe construction of the premises to which we have to send you to work, but that is something quite distinct from the system of work which they adopt when they are working on premises belonging to other people.

The distinction, I think, is made very clear in a case which in my view, governs the action entirely, *Speed v. Thomas Swift & Co., Ltd.* (8). In that case the employers, who were stevedores, engaged the injured man to assist in the unloading of cargo from a ship, so that he was not working on premises occupied by or belonging to the employers. The facts are stated in the headnote:

The starboard rail was broken and it was not protected or removed during the operations. Moreover, the port winch was defective and the danger arising from these matters was increased by the presence of dunnage lying on the deck. Owing to a hook catching the rail, either the rail or part of the cargo fell upon the respondent who was working in a barge alongside the ship. The appellants [that is the employers] contended that they had provided a safe system of working and that the accident was due to the failure of a fellow-servant of the respondent to carry out the system properly and, therefore, they were exonerated from liability by the doctrine of common employment. Held: the employers had failed to provide a safe system of working, and the accident was due to that failure and not to the failure of a servant to carry out a proper system.

I want to read as little as possible from the judgments: I am only going to pick out odd passages here and there, but I think they are sufficient for my purpose. LORD GREENE, M.R., said this at 562 ([1943] 1 All E.R. at pp. 541).

The real question is whether or not, in the particular circumstances of this case, failure to remove or protect the rail constituted the system of working an unsafe one...

In my opinion the latter view [that is, the view that the system was not a safe one] is the correct one. What exactly is meant by a safe system of working has never, so far as I know, been precisely defined. The provision of such a system falls within the master's province of duty: if he delegates it, he remains responsible for any inadequacy in the system just as much as if he had personally provided it and he cannot excuse himself by saying that he had good grounds for relying on the competence of the person to whom he delegated the duty.

Then LORD GREENE, M.R., quotes from the Lord Justice Clerk in the Court of Session in *Wilsons and Clyde Coal Co. v. English* (7), and I need not read that. He goes on to say at p. 563 ([1943] 1 All E.R. at pp. 541, 542).

... in many kinds of work there is no such regularity or uniformity, and what is a safe system can only be determined in the light of the actual situation on the spot at the relevant time. A system of working may consist of a number of elements and what exactly it must include will, it seems to me, depend entirely on the facts of the particular case. For example, one element may be the sequence in which a particular job ought to be carried out, e.g., in a combined job of demolition and excavation it may be dangerous to excavate before a neighbouring structure is demolished. The decision as to which task is to be performed first appears to me to be within the master's province and to be a matter of system. It is part of the lay-out of the job which it is the master's duty to decide and in doing so he must pay proper regard

to the conditions affecting the safety of his men. The lay-out of the job is logically prior in time to the commencement of the work although, of course, it may have to be modified as the work proceeds, e.g., if in the course of the work a neighbouring bank threatens to collapse upon the workmen, the taking of proper steps to shore it up is, it appears to me, a matter of system. It is logically prior in time to the continuance of the work and is concerned not with the work itself, but with the safety of the conditions in which it is performed. I do not venture to suggest a definition of what is meant by system, but it includes, in my opinion, or may include according to circumstances, such matters as the physical lay-out of the job—the setting of the stage, so to speak—the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices and the issue of special instructions . . . If the master is unable to give such close attention to every job which he undertakes as will enable him to provide a safe system for all of them and is thus compelled to leave its provision to others, he cannot escape responsibility. The way to test the correctness of my view is to consider the case where the master is present himself. In such a case, if he lays out the job in a way which is not reasonably safe and sets his men to work in dangerous conditions which could be eliminated by the exercise of due skill and care, it appears to me impossible for him to say that he had not failed in a duty which lies upon him and upon no one else.

He then went on to hold that there was this unprotected rail and he thought that a reasonable master, looking at the job would say: "The presence of that rail is unsafe, a hook may foul it, you must have that rail removed," and he treated that as part of the system under which the men were working. MACKINNON, L.J., came to the same conclusion, though with greater difficulty, his doubt being whether the accident might have been in that case due to a failure in the carrying out of a proper system, but in the end he agreed that it was the result of the employer's neglect vicariously to provide such a system.

The view expressed by GODDARD, L.J., was just as strong as that of LORD GREENE, M.R. He said at p. 571, 572 ([1943] 1 All E.R. at pp. 546).

If the master were himself in charge of the operation and saw that the rail was properly protected, he would be fulfilling his duty of providing a proper system. If, when his back was turned or he had gone to another job, one of the men removed the protection and an accident happened, I cannot see that it could be said that the master had failed in his duty . . .

Precautions which are necessary for the safety of workmen seem to me to be necessary parts of any system, for, if they are neglected, the system is at once unsafe.

With that decision before me it seems to me quite impossible to say that in this case a proper system of work was provided by Thompson. There were conditions of danger which could and ought to have been provided against. There was this open hatchway. He realised the danger but he was content when merely one end of the hatchway was covered instead of seeing that it was all covered, or that a lifeline was put round. At any rate on the third day once these covers were put overhead depriving the hold of all artificial light, there was then the obvious duty to see that artificial light was provided; and to let the work go on in conditions of almost absolute darkness with this great unfenced hole, seems to me to have been letting the work go on under a system which was dangerous in the extreme; and I think that that was negligence on the part of Thompson for which the employers are clearly liable.

I must also deal with *Taylor v. Sims and Sims* (9), relied upon by counsel for the defendants. In that case, it was argued that there is no duty to provide for the reasonable safety of premises which are not occupied by the employers and are premises over which they have no control. The facts in that case were completely different. The contractors were employed to effect certain first-aid repairs in a row of houses which had been damaged by enemy action. The contractors' manager inspected the premises before the work began and the London County Council had labelled certain of these houses dangerous, but those upon which the repair was to be carried out had not been marked as dangerous. While a carpenter employed by the contractor was doing repair work on the premises, a floor collapsed beneath him and he was injured. It was there sought on behalf of the injured man to say: These are premises where you are ordering your employee to work, and, therefore, there is an obligation upon you to make quite sure that the premises where he is working are safe. That, of course, is a totally different class of case. The contractors had no control over the part of the floor where the man was working. They had

no knowledge of the unsafe condition of the floor, and it was quite true to say they were not in occupation and that they had no control over the premises at all.

In his judgment LEWIS, J., said at p. 378 :

... I see very great difficulty in saying that there is a duty upon the employer to see that the premises are reasonably safe upon which he asks his workmen to work when he has no control over those premises whatever.

- A There LEWIS, J., is dealing with the question of the safety of the premises themselves. There was nothing wrong with this ship, it was a perfectly good ship and there was no complaint about any part of it. In the case of a ship, however, there are certain necessary parts, such as the holds, which are in darkness when the covers are on, where there are dangers which can be guarded against and to make no provision against obvious dangers of that sort, to my mind, is part and parcel of the system of working and is something quite different from the duty which LEWIS, J., was considering, the duty of having the premises in themselves safe on which the men were to work. I think, therefore, that that case, interesting though it is as showing where the line is to be drawn, has no bearing upon the case which I have to decide. I think that the plaintiff here is entitled to damages.

- C I am not dealing with any claim under the Fatal Accidents Act. I think that is because the time had gone by in which any action can be brought under that Act. The plaintiff is, however, entitled to make a claim as administratrix of her husband to recover damages in respect of the loss of the prospect of life. Until *Benham v. Gambling* (10) I think all judges found themselves in the greatest difficulty in estimating what were the fair damages in respect of the shortening of expectation of life. That case went to the House of Lords and gave the House an opportunity of laying down principles for the guidance of judges who have to deal with these matters. The case with which their Lordships were there dealing was that of a small child who was unconscious from the moment of the accident. The child was 2½ years old and was run over and killed. I propose to refer to two passages only in the speech of VISCOUNT SIMON, L.C., which was the only opinion given, all the other learned Lords merely expressing agreement. In that case, it is, of course, quite clear that the Lords were impressed not with the injustice, but with the difficulty of giving damages to A. because B. has had his life shortened. It is one thing to give damages to the person injured in an accident, but you cannot give damages to the dead man, and the House of Lords was obviously impressed with the difficulty of awarding large damages to one person because another person has had his or her life shortened. VISCOUNT SIMON, L.C., said at p. 166, ([1941] 1 All E.R., at p. 12 :

- F ... in any case the thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life. The age of the individual may, in some cases, be a relevant factor.

He went on to point out that in the case of a child it was a factor which tended to reduce damages. He went on to say at p. 167 ([1941] 1 All E.R., at p. 13):

- G The main reason, I think, why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made. When an individual has reached an age to have settled prospects—having passed the risks and uncertainties of childhood and having in some degree attained to an established character and to firmer hopes—his or her future becomes more definite and the extent to which good fortune may probably attend him at any rate becomes less incalculable. I would add that, in the case of a child, as in the case of an adult, I see no reason why the proper sum to be awarded should be greater because the social position or prospect of worldly possession are greater in one case than another. Lawyers and judges may here join hands with moralists and philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth or status.

In the last paragraph of his speech VISCOUNT SIMON, L.C., says :

My Lords, I believe that we are all agreed in thinking that the proper figure in this case would be £200, and that even this amount would be excessive if it were not that the circumstances of the infant were most favourable.

There, then, is the guidance ; but one cannot forget that life is deemed by the law to be our most precious asset. The severest punishment that the law

knows is that of depriving a man of his life; it is considered of greater value than liberty and to be a more severe punishment than depriving a man of his liberty for the rest of his natural life, which usually means at the outside, I suppose, something under twenty years.

The case with which I have to deal is precisely the case to which VISCOUNT SIMON, L.C., was referring at p. 167. Here I have a workman who has reached the age of 27. He had settled prospects, good health, and the valuable industrial knowledge of an expert worker. He had a wife whom I had the pleasure and advantage of seeing, and the evidence was that they were very happy together, and they had two small boys. I cannot help feeling that counsel for the plaintiff was right when he said that I have to deal with a case where really the maximum damages that could ever properly be given, should be given, that, if ever anyone had the prospect of future happiness, this man Garcia had everything which would tend to it. Nevertheless, I have regard to what the House of Lords obviously thought, namely, that large damages ought not to be given in such cases, and I think that the proper figure in this case is to give the plaintiff the sum of £500. I give judgment accordingly for the plaintiff for £500 with costs.

Judgment for plaintiff for £500 with costs.

Solicitors: Rowley, Ashworth & Co. (for the plaintiff); Carpenters (for the defendant).

[Reported by R. BOSWELL, Esq., Barrister-at-Law].

SCHERING, LTD. (IN VOLUNTARY LIQUIDATION) v. STOCKHOLMS ENSKILDA BANK AKTIEBOLAG.

[COURT OF APPEAL (Lord Greene, M.R., Lord Clauson and du Parcq, L.J.),
July 19, 20, 23, October 12, 1943.]

Contract—Illegality—Enemy debt to neutral guaranteed by English company—Contract completely performed except for payment—Whether contract abrogated on outbreak of war.

By a contract called a contract of debt made in February, 1936, the appellants, a Swedish bank, agreed to advance to a German company reichmarks to the value of £84,000 sterling at the official rate of exchange, in respect of which the German company agreed to be indebted to them for the sum of £50,400 sterling without interest to be repaid in 8 years. The respondents, an English company (now in liquidation), and an Indian company (both of whom were controlled by the German company) constituted themselves jointly and severally guarantors of that debt, and they further agreed to purchase the Swedish bank's claim (£50,400) against the German company by instalments of varying amounts to be paid over a number of years. In April, 1936, the terms of the contract were varied, *inter alia*, by the respondents and the Indian company undertaking to pay the instalments as principals and not as guarantors, and the payment of such instalment was to be a *pro tanto* satisfaction of their liability under the guarantee. It was also agreed that the contract between the Swedish bank and the respondents should be governed by English law. Instalments were paid under the contract until the outbreak of war in 1939, and in 1941 the Court of Appeal held that it would be an offence under the Trading with the Enemy Act to pay the instalment then due. The respondents contended that the April contract was dissolved on the outbreak of war on the ground, *inter alia*, that its continued existence would inure for the benefit of the German company to the detriment of English interests:

HELD: (i) since the contract was with a neutral and was completely performed except for payment and the possibility of benefit to an enemy was vague and uncertain, its continued existence was not against public policy and it was not abrogated on the outbreak of war.

(ii) the contract was not frustrated by the outbreak of war.

Decision of SIMONDS, J. ([1943] 1 All E.R. 418) reversed.

[**EDITORIAL NOTE.** Two points of fact must be clearly noted and kept in mind in considering the judgment in this case. The first is that the contract was an executed contract, for it had been wholly performed on one side and on the other nothing remained to be done but payment of the sums due. The other is that it was a contract between a British company and a neutral. It could not directly benefit the enemy and the only possible benefit which might accrue to the enemy was that payments made under the contract might possibly be employed in trading with the enemy. The possibility of benefit to the enemy was thus vague and uncertain and it is held to be altogether too remote to cause an abrogation of the contract on the ground of illegality. The law prohibits as illegal and contrary to public policy contracts which give opportunities for the conveyance of information which may affect the conduct of a war or which may tend to increase the resources of the enemy or decrease those of the King's subjects, but, so far as the authorities go at present, those contracts must be contracts with enemy subjects or persons residing in enemy countries. Contracts with subjects of a neutral country stand on a different footing. The only decision on such a contract is *Esposito v. Bowden* (2) and there the performance of the contract involved trading with an enemy by a British subject. In the case of a contract with an enemy there at once arises the presumption of benefit to the enemy, but in the case of a contract with a neutral, although he is known to have enemy connections, it is not to be presumed that funds which will accrue to him to deal with as he pleases will be used in benefiting the enemy. That is to go further than public policy requires.

AS TO SUPERVENING ILLEGALITY DUE TO WAR, see HALSBURY, Hailsham Edn., Vol. 7, pp. 218, 219, para. 297; and FOR CASES, see DIGEST, Vol. 12, pp. 386-404, Nos. 3172-3252.]

Cases referred to:

- (1) *Stockholms Enskilda Bank Aktiebolag v. Schering, Ltd.*, [1941] 1 K.B. 424; [1941] 1 All E.R. 257; Digest Supp.; 110 L.J.K.B. 229; 165 L.T. 19.
- * (2) *Esposito v. Bowden* (1857), 7 E. & B. 763; 2 Digest 168, 371; 27 L.J.Q.B. 17; 29 L.T.O.S. 295.
- * (3) *Re Badische Co.*, [1921] 2 Ch. 331; 12 Digest 397, 3219; 91 L.J.Ch. 133; 126 L.T. 466.
- * (4) *Ertel Bieber & Co. v. Rio Tinto Co.*, *Dynamit Act. v. same*, *Vereinigte Koenigs and Laurahuette Act. v. same*, [1918] A.C. 260; 12 Digest 395, 3211; 87 L.J.K.B. 531; 118 L.T. 181.
- (5) *The Hoop* (1799), 1 Ch. Rob. 196; 2 Digest 155, 253.
- (6) *Naylor, Benzon & Co., Ltd. v. Krainische Industrie Gesellschaft*, [1918] 2 K.B. 486; 2 Digest 176, 409; 87 L.J.K.B. 1066; 118 L.T. 783 *affg.* [1918] 1 K.B. 331.
- (7) *Daimler Co., Ltd. v. Continental Tyre and Rubber Co. (Gt. Britain), Ltd.*, [1916] 2 A.C. 307; 2 Digest, 145, 195; 85 L.J.K.B. 1333; 114 L.T. 1049;
- (8) *Schmitz v. Van der Veen & Co.* (1915), 84 L.J.K.B. 861; 2 Digest 161, 308; 112 L.T. 991;
- (9) *Veithardt & Hall, Ltd. v. Rylands Bros., Ltd.* (1917), 86 L.J.Ch. 604; 12 Digest 395, 3210; 116 L.T. 706.
- (10) *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 2 Digest 128, 49; 71 L.J.K.B. 857; 87 L.T. 372.
- (11) *Distington Hematite Iron Co., Ltd. v. Possehl & Co.*, [1916] 1 K.B. 811; 2 Digest 175, 403; 85 L.J.K.B. 919; 115 L.T. 412.
- (12) *Halsey v. Lowenfeld*, [1916] 2 K.B. 707; 2 Digest 157, 272; 85 L.J.K.B. 1498; 115 L.T. 617.
- (13) *Seligman v. Eagle Insurance Co.*, [1917] 1 Ch. 519; 2 Digest 172, 388; 86 L.J.Ch. 353; 116 L.T. 146.
- (14) *Robson v. Premier Oil Pipe Line Co., Ltd.*, [1915] 2 Ch. 124; 2 Digest 169, 379; 84 L.J.Ch. 629; 113 L.T. 523.
- (15) *Tingley v. Muller*, [1917] 2 Ch. 144; 2 Digest 142, 163; 86 L.J.Ch. 625; 116 L.T. 482.
- (16) *Soufracht (V/O) v. Van Udens*, [1943] A.C. 203; [1943] 1 All E.R. 76; Digest Supp.; 112 L.J.K.B. 32; 168 L.T. 282.
- (17) *Tamplin (F.A.) S.S. Co., Ltd. v. Anglo-American Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 12 Digest 390, 3194; 85 L.J.K.B. 1389; 115 L.T. 315.

APPEAL by the defendants from an order of SIMONDS, J., dated Mar. 10, 1943, reported [1943] 1 All E.R. 418. The facts are fully set out in the judgment of LORD GREENE, M.R.

D. A. Scott Cairns and *I. J. Lindner* for the appellants.

N. L. C. Macaskie, K.C., and *J. A. Wolfe* for the respondent company.

J. Pennycuik for the respondent trustees.

Scott Cairns: The judge has treated the rule relating to public policy as being much wider than it actually is. An executed contract is not abrogated when

war breaks out. The appellants have already done everything which, under the guarantee, they can be called upon to do. If the appellants were to lose their rights under the guarantee, they would be deprived of accrued rights. The decided cases do not show that every contract will be dissolved by the outbreak of war even though performance might benefit the enemy. The foundation of a large part of the legislation which sets up the Custodian of Enemy Property is based upon the continuance of contracts. *Schmitz v. Van der Veen & Co.* (8) was a case in which the benefit of a certain charge arose in favour of an enemy and it was held that the contract was one which continued to exist although the enemy would be entitled to benefit from it at the end of the war. When one is dealing with a contract between a person in this country and a person in a neutral country, one is dealing with what is lawful. If, however, the contract is between a person in this country and a person in an enemy country and the contract involves a benefit to the enemy during the war, that contract is dissolved in so far as it is an executory contract. *Veithardt & Hall, Ltd. v. Rylands Bros., Ltd.* (9) and *Re Badische* (3) were cases of contracts between parties who were not enemies and it was held that the contracts were abrogated on the ground that trading with the enemy would be involved. Both those cases dealt with contracts for supplies to be obtained from or to be delivered to the enemy after the outbreak of war. Different considerations, however, apply to the present case. The continued existence of the contract in the present case does not require intercourse with the enemy. Performance of it during the war does not require intercourse with the enemy. The contract in the present case provides for an assignment by a Swedish bank to an English company. It may be that as a result of the assignment the English company would communicate eventually with the German company for the purpose of enforcing the right assigned, but that is not a form of intercourse which is required by the contract. [Counsel referred to *Janson v. Driefontein Consolidated Mines, Ltd.* (10), *Distington Hematite Iron Co., Ltd. v. Possehl & Co.* (11), *Halsey v. Lowenfeld* (12), *Daimler Co., Ltd. v. Continental Tyre and Rubber Co. (Gt. Britain), Ltd.* (7), *Ertel Bieber & Co. v. Rio Tinto Co.* (4), *Seligman v. Eagle Insurance Co.* (13), *Robson v. Premier Oil and Pipe Line Co., Ltd.* (14), *Tingley v. Muller* (15), and *Sovfracht (V/O) v. Van Udens* (16).]

Macaskie, K.C. : Assuming that I can satisfy the court that the policy of the law strikes at all contracts which in the course of their performance may involve intercourse with or a benefit to the enemy or a detriment to this country, the question will then be whether the contract of Apr., 1936, falls within the principle laid down by LORD DUNEDIN in *Ertel Bieber & Co. v. Rio Tinto Co.* (4), or whether it falls within the more limited class of case in which accrued rights have arisen before the outbreak of war. At the date of the outbreak of the war, nothing was owing by either of the surety companies to the appellants. Therefore, it cannot be said that at the outbreak of war, the appellants had an accrued right either against the respondents or against the Indian company. So far as the appellants and the respondents were concerned, the contract was wholly executory. Something had still to be done by both parties. *Schmitz v. Van der Veen* (8) is clearly distinguishable from the present case. The appellants cannot gain much help from *Halsey v. Lowenfeld* (12) as that case is distinguishable on its facts and the contract was not executory. If the performance of the contract by a British subject is going to result in a benefit to a German company, the resources of the country to which the company belongs will be increased. In the present case, the contract is more than a guarantee. It is a contract for the purchase of a debt. There has also been supervening impossibility of performance of the contract in the present case and thus there is frustration. Performance of the contract has been rendered illegal for the time being. [Counsel referred to *Tamplin S.S. Co. v. Anglo-American Petroleum Products Co., Ltd.* (17), *Janson v. Driefontein Consolidated Mines, Ltd.* (10), *Re Badische* (3), *Seligman v. Eagle Insurance Co.* (13), and *Sovfracht (V/O) v. Van Udens* (16).]

Scott Cairns in reply.

LORD GREENE, M.R. : I have the authority of LORD CLAUSON to say that he has read the judgment which I am about to deliver and agrees with it.

In the previous litigation between the present appellants (whom I will refer to as "the Swedish bank") and the respondents Schering, Ltd., *Stockholms*

Enskilda Bank Aktiebolag v. Schering, Ltd. (1), the Swedish bank was claiming payment of £3,360, being the amount of the instalment due to it on Oct. 28, 1939, under the contract of Apr. 16, 1936 (which I will refer to as the April contract). The action was dismissed with costs by HAWKE, J., and his judgment was affirmed on appeal by this court. The ground of the decision was that this payment under the April contract would be for the benefit of the Schering-Kahlbaum Aktiengesellschaft (which I will refer to as "the German company") and was in consequence prohibited by the Trading with the Enemy Act, 1939. In the statement of claim delivered in the present proceedings Schering, Ltd. (now in liquidation) claimed that the April contract as a whole had become impossible of performance on the ground that all future payments during the war would be illegal under the Trading with the Enemy Act. In the alternative they claimed that the April contract had been frustrated. They also claimed the release of a sum of £25,000 standing in the joint names of the liquidator and the respondents Arthur William Edwards and Henry Morris which represents the security provided by Schering, Ltd., in connection with the April contract. During the course of the trial before SIMONDS, J., Schering, Ltd., raised an entirely new case. They applied for and obtained leave to amend their statement of claim by alleging that on the outbreak of the present war the April contract became contrary to public policy and unenforceable against them. On this argument they were successful and SIMONDS, J., made a declaration that the April contract had been abrogated by the outbreak of war. He also made a consequential order for the release of the security.

The case which thus succeeded before SIMONDS, J., was not raised in the previous proceedings. It would have afforded a complete defence to those proceedings: yet neither was it mentioned in the defence nor was it raised by counsel in the course of the argument. This is all the more striking when it is observed that a month before the issue of the writ in those proceedings Schering, Ltd., themselves claimed in a letter to the Swedish bank that the April contract had been dissolved by the outbreak of war. This claim was not adopted by counsel who signed the defence in those proceedings. That defence was limited to an allegation that payment of the particular sum then in suit would be illegal under the Trading with the Enemy Act. I do not mention these facts as suggesting that the claim is not a good one. They do, however, show that it is certainly not one which obtrudes itself upon the attention of experienced persons and that it calls for careful examination.

I can at this stage conveniently dispose of one argument raised by counsel for the Swedish bank. It was that some observations which I made in my judgment in the previous appeal, *Stockholms Enskilda Bank Aktiebolag v. Schering, Ltd.* (1), were directed to the question of the continuing legality of the April contract and amounted at any rate to a *dictum* in his favour. This argument is entirely misconceived. The passage relied upon is to be found on p. 441 ([1941] 1 All E.R., at pp. 267, 268), and is as follows:

It is true that so far as anything in this Act of Parliament is concerned, the prohibition of payment is a temporary one. It only exists so long as the payee, or the person to receive the benefit, is an enemy. If and when he ceases to be an enemy, and in the absence of further legislation affecting his rights, he will, according to ordinary principles, be entitled to receive the benefit which was to flow to him under the machinery of these agreements. At the moment, that benefit is prohibited, and it seems to me that that circumstance in this case is a defence to the action.

As I have already said, the only argument raised in that case was that the payment in suit was prohibited by the Trading with the Enemy Act. My words were directed solely to the operation of that Act and the whole passage is clearly governed by the words in the opening sentence "so far as anything in this Act of Parliament is concerned." What the position of the contract might be at common law was not a matter which was before the court.

In my judgment I set out at some length the history of the relationship between the parties and I summarised the terms of the relevant contracts. I do not propose to repeat what I then said. It will be sufficient to supplement my statement by adding to it in the course of this judgment certain particulars which are of importance in the present appeal.

The instalment in question in the previous action was that falling due in Oct., 1939. The last instalment will become due in Apr., 1944. The effect

of the payment of the instalments upon the liability of the German company to the Swedish bank is explained in the previous proceedings at p. 433 ([1941] 1 All E.R., at p. 262). One of the arguments addressed to us calls for an amplification of what I there said. The relevant provision is contained in cl. 4 of the contract of Feb. 24-28, 1936 (to which I will refer as the February contract). Under it, default by the guarantors in acquiring the debt of the German company at the dates specified for the payment of the instalments deprives the German company of the benefit of the discount so far as regards that part of the debt which remains to be acquired by the guarantors. Such default by the guarantors would, therefore, operate to the prejudice of the German company. A letter addressed by the Swedish bank to the German company and dated Mar. 17, 1936, purported to place a special construction upon cl. 4 of the February contract. Whatever the effect of this may be as between the Swedish bank and the German company, Schering, Ltd., and the Indian company were not parties to it as they had been to the February contract itself. By this letter cl. 4 was to be understood to mean that the German company would only lose the benefit of the discount if the sureties failed to acquire the claim at the dates stated "and Enskilda is not satisfied by payment by third parties or by execution on the property of the sureties or in some other way in full that is to say including all expenses incurred, if any." The significance which is attached to this letter on behalf of Schering, Ltd., I will explain in due course.

The security of which the release is claimed was provided by Schering, Ltd., under the terms of a letter addressed to the Swedish bank and dated Apr. 16, 1936. It originally consisted of goods to the value of at least £25,200 which were pledged to the Swedish bank as security for the liability of Schering, Ltd., whether as guarantors or as principals, under the April contract. The goods were to be kept warehoused in the name of the respondent Edwards as trustee. Schering, Ltd., were to be entitled to sell the goods from time to time provided that the value of the goods pledged was kept up to the minimum value of £25,200. As soon as instalments amounting to £28,560 (that is to say, the first five instalments) had been paid, this minimum value was to be reduced to £21,840—the amount of the remaining instalments—and thereafter by amounts equal to the remaining instalments as and when they were paid. The obligations of Schering, Ltd., under this agreement were to be determined when the liability for which the security was given had been discharged in full.

The assets of Schering, Ltd., have all been sold in the liquidation and the sum of £25,000 has been placed in the joint names already mentioned to answer the obligations of Schering, Ltd., under the letter of Apr. 16, 1936.

These being the relevant facts, two questions only have been discussed before us. The first and most important is that decided by SIMONDS, J., in favour of Schering, Ltd., namely, whether on the outbreak of war the April contract became an illegal contract at common law. The second is whether in the events which have happened the April contract has been frustrated. No other ground was suggested for holding that the April contract has been abrogated. No relief is asked in respect of the February contract.

The effect of war upon contracts between a British subject and an enemy has been discussed in a large number of authorities and the main principles governing it are well settled. The same is not true of the effect of war upon contracts between a British subject and a subject of a neutral state. The only case of such a contract which was relied upon was *Esposito v. Bowden* (2). This was a case where performance of the contract necessarily involved trading with the enemy by a British subject and it throws no light upon the questions which we have to consider. It is, of course, indisputable that upon the outbreak of war between this country and another country a contract between a British subject and a neutral may be abrogated at common law. *Esposito v. Bowden* (2) is one example. Another obvious example would be where the contract provided in terms that goods supplied by the British subject to the neutral should be resold by the neutral to the enemy country. I will mention another example when I come to discuss the *Badische* case (3) later in this judgment. But the questions immediately arise, what are the limits within which this rule operates and what are the principles which underlie it?

There are, as it seems to me, two considerations to be borne in mind at the outset of the inquiry. The first is that the maintenance of commercial relations

and the loyal performance of contracts with neutrals are matters which it is to the interest of this country to foster and encourage. From this it would appear to follow that, in cases where the outbreak of war compels the common law to interfere with and control the performance of such contracts upon the ground of public policy, the measure of interference ought not to exceed what is required by the public interest in regard to the successful prosecution of the war. This leads me to the second consideration. In the case of contracts between a British subject and an enemy, a state of war (to use the words of LORD DUNEDIN) abrogates and puts an end to all executory contracts which for their further performance require intercourse between the British subject and the enemy: see *Ertel Bieber & Co. v. Rio Tinto Co.* (4), at p. 267. Later in the same speech LORD DUNEDIN, speaking of the judgment in *The Hoop* (5), says, at p. 273:

A The ground of the judgment was that all trading with the enemy is unlawful at common law as against public policy. Why? Not because of the terms of the particular contract but because contract in general might enhance the resources of the enemy or cripple those of the subjects of the King.

Observations to the same effect are to be found in the speeches of LORD ATKINSON at p. 277, and LORD SUMNER at p. 291. In the case of a contract with a neutral this absolute rule against the maintenance of contracts clearly cannot apply. Trading and intercourse with a neutral are not unlawful at common law during times of war. Restrictions may, of course, be placed on such activities. Export of certain goods may, for example, be prohibited or restricted under war-time legislation so that the contract cannot be performed. But this is not to say that an executory contract with a neutral is made unlawful at common law. Again, a contract with a neutral is not abrogated on the ground that its performance or continued existence might tend to cripple the national resources. A contract to sell to a neutral essential goods in short supply might, if performed, have a serious effect upon the ability of this country to provide itself with materials required for the prosecution of the war. It cannot surely be suggested that this circumstance will abrogate the contract. If it is desired to prevent the ill effects which would follow from its performance, that must be done by means of a prohibition against export or some means of that character. The common law is not effective for such a purpose.

E There remains the case where the performance of a contract with a neutral "might enhance the resources of the enemy." In the case of a contract with an enemy there is no need to inquire whether this will be so in fact. The law assumes that it will be so and prohibits the performance of the contract accordingly merely because the contract is a contract with an enemy. LORD ATKINSON in the *Ertel Bieber* case (4), said, at p. 277:

F Trading with the subject of an enemy state or with a person resident in that state is assumed to be beneficial to the enemy state.

No such consideration applies in the case of a contract with a neutral. No assumption can be made that such a contract might enhance the resources of the enemy. If such a contract is to be abrogated by the outbreak of war, it can only be upon the ground that its performance will in fact enhance the resources of the enemy or that, at least, there is shown to be a substantial probability that this will be the case. These are matters which must be established by those who impugn the contract. They are not to be assumed as matters of law although of course the provisions of the contract itself may settle the question.

This conclusion, if it be correct, only takes us part of the way. In the case of an executory contract with an enemy it is not merely performance so long as the state of war persists that is prohibited. The whole contract is abrogated. The reason for this is that, even if performance were postponed until after the war, the mere existence of the contract during the war might benefit the enemy by, for example, improving his credit or assisting him in his prosecution of the war by the knowledge that, after the war the contract will remain on foot for his benefit. In the *Ertel Bieber* case (4) the main argument turned on the effect of a suspensory clause. In spite of this clause intercourse with the enemy would still have been necessary during the war and this alone prevented it from having the effect of saving the contract. But the House of Lords dealt with the point on a wider ground and held that the clause was bad as being against public policy. LORD DUNEDIN pointed out at p. 275 that the clause would operate to secure rights in the future by the maintenance of the commercial

relation in the present; that it would hamper the trade of the British subject (and through him the resources of the Kingdom) by tying his hands in regard to the disposal of his goods; and that it would increase the resources of the enemy by enabling him to denude himself of present stocks in the assurance of obtaining supplies after the war and to realise in the present the value of this assurance by assigning the benefit of the contract to neutrals. It was, therefore, the possible benefit of the mere maintenance of the contract to the enemy while he was an enemy that constituted the vice of the suspensory clause in that case. It is true that LORD DUNEDIN points out the way in which that benefit might have accrued upon the particular facts. But I am disposed to think from the whole tenor of his speech that the same principle must in his view apply to a suspensory clause as that which applies in a contract without such a clause, viz., that it is vitiated:

... not because of the terms of the particular contract but because contract in general might enhance the resources of the enemy or cripple those of the subjects of the King.

At p. 286, LORD SUMNER dealt with the suspensory clause in rather a different way. He said:

If upon public grounds on the outbreak of war the law interferes with private executory contracts by dissolving them, how can it be open to a subject for his private advantage to withdraw his contract from the operation of the law and to claim to do what the law rejects, merely to suspend where the law dissolves? A prohibition, which arises at common law on the outbreak of war, has for this purpose the effect of a statute.

However the matter be put in the case of a contract with an enemy, I am of opinion that, in the case of a contract with a neutral the performance of which during the war is illegal, a suspensory clause postponing performance until after the end of the war can only be bad if it is at least shown that the continued existence of the contractual relation between the British subject and the neutral will in fact tend to increase the resources of the enemy while he is an enemy or that there is at least a substantial probability that this will be the case. I can see no ground in principle or good sense why the continued existence of a contract with a neutral under a suspensory clause should be held to be contrary to public policy for any reason short of this. To hold otherwise would be to interfere with contractual relations with neutrals to an extent beyond what is necessary to safeguard the interest of the country in war.

I have referred to this matter of suspensory clauses because it appears to me to be germane to the question which we have to consider. So far as this court is concerned, it is settled that the performance of the April contract during the war is illegal under the Trading with the Enemy Act. I am also prepared to agree with SIMONDS, J., that such performance would be illegal at common law. The only effect so far is that performance is suspended during the war. Is there anything contrary to public policy in the continued existence of this contract on that basis? This question does not appear to me to be any different in principle from that which would arise if the suspension were consensual and not one imposed by law.

For the purpose of answering the question which I have formulated, it is convenient to examine the two parts of the April contract separately. If the contract had been one of guarantee only, the position would have been as follows. The Swedish bank has performed its part of the contract. It has, at the request of the guarantors, made the advance to the German company. Nothing remains for it to do and it is entitled to expect from the guarantors the promised benefit in consideration of which the advance was made. The contract, therefore, is in this respect executed and not executory. Now the obligation of the German company in respect of which the guarantee was given is to pay to the Swedish bank on the expiry of 8 years from the date of the advance (that is, some time in April, 1944), the sum of £50,400 in sterling (or the equivalent in blocked reichsmarks as the case may be): or, if the special provisions of cl. 4 of the February agreement come into operation, a larger sum calculated in accordance with the provisions of that clause. If the war with Germany is still continuing when the obligation of the German company matures in April, 1944, it will, in my opinion, be impossible for the Swedish bank to sue Schering, Ltd., on their guarantee or to have recourse to the security so long as the war lasts. This follows from what I said in the earlier appeal, at p. 438

([1941] 1 All E.R., at pp. 265, 266). I was there dealing, it is true, with the payment of instalments; but a payment under the guarantee would, in the same way as payment of an instalment, benefit the enemy by substituting for a Swedish creditor a British creditor who could not enforce his claim by subrogation against the German debtor until after the war, a manifest advantage to the German debtor.

But now let me assume that payment under the guarantee is only suspended.

- A The position then will be that, on maturity, the Swedish bank will have no immediate recourse against anyone but the German company—I am assuming that a payment by the Indian company under its guarantee would be prohibited by the Indian law—and it may or may not call upon the German company to pay. If it does call upon it to pay and the German company discharges its debt, the obligation of Schering, Ltd., will be at an end. But it is impossible to foresee what the action of the Swedish company may be. Let me assume, therefore, that it prefers not to claim against the German company but to wait until the end of the war to enforce the guarantee against Schering, Ltd. It would have been impossible at the outbreak of war in Sept., 1939 (which is the relevant date to consider) to predict that the Swedish bank would be likely to take this course in April, 1944. Any attempt to prophesy would have been pure speculation. Had the Swedish bank been asked the question in June, 1940, it is as likely as not that it would have considered action against the German company as its more probable choice, since, if Germany had quickly won the war, a debt owing by a German company might well have been more valuable to it than a debt owing by a British company. But be this as it may, the questions to be considered are (a) on the footing that the guarantee is suspended for the period of the war and that the Swedish bank will not on the due date claim against the German company but will wait until the end of the war and then enforce the guarantee against Schering, Ltd., what will be the position at the end of the war? and (b) will the fact that the position will be what, as so ascertained, it will be, benefit the enemy during the war? I will deal with these questions in order.

- (a) If, after the end of the war the Swedish bank enforces the guarantee against Schering, Ltd., the latter will then be entitled by subrogation to sue the German company. The war being at an end, no difficulty will presumably exist in enforcing the rights of Schering, Ltd., in the German courts, whether E in their own name or in the name of the Swedish bank according as German law may prescribe.

- (b) During the war the German company will be confronted by the necessity of providing for payment of the debt when the war ends. All that will have happened will be that the amount of the debt will have to be paid at the end of the war to a different creditor, viz., Schering, Ltd. This can hardly improve F the credit of the German company during the war or otherwise confer an advantage upon it.

- It is said, however, that, if the obligation of Schering, Ltd., under the guarantee is merely suspended during the war by operation of law, and if the due date arrives before the war is ended, and if it be assumed that, when the due date arrives, the Swedish bank will refrain from claiming against the German company and prefer to wait until the end of the war in order to enforce the guarantee the G German company will benefit by obtaining in effect a moratorium between the due date and the end of the war. This is true, and such a moratorium, if it were to take place, would presumably be of benefit to the German company during the war. But, putting ourselves at the outbreak of war—for it is by the outbreak of war itself, if at all, that the contract is said to have been abrogated—was it possible to say that the existence of the contract in a state of suspension H would benefit the enemy during the war? That there was a possibility of benefit in the events supposed is, indeed, clear. But whether or not such benefit would ever materialise depended on the duration of the war and on the action which the Swedish bank might decide to take on the due date, assuming that the war was then still continuing. It may be right to assume—I express no opinion upon it—that, as on Sept. 3, 1939, the duration of the war must have been regarded for the purpose of the present inquiry as being indefinite and that the question must be examined on the basis that it will still be continuing when the due date arrives. But the other contingency remains, namely, the action of

the Swedish bank in the events stated. As I have already said, what that action might be was at the outbreak of war and still is a pure matter of speculation, and we have no means of forming any reliable opinion upon it.

Is it, therefore, to be said that a possibility of benefit to an enemy so vague and uncertain is to free a British subject from his obligation to a neutral, undertaken years before the war in respect of a guarantee of a sum of money advanced by the neutral to a German company at the request of the British subject? If I am right in drawing the distinction explained earlier in this judgment between the effect of war upon contracts with an enemy and the effect of war upon contracts with a neutral, the answer to this question must, as it appears to me, be in the negative. If such a mere possibility of benefit to an enemy is sufficient to abrogate a contract with a neutral, a large number of contracts with neutrals must necessarily fall. Many neutrals who have commercial relations with this country also have relations with Germany. The performance of, for example, a contract to buy goods from a neutral may place the neutral in funds which may enable him to discharge his obligations to a German whose customer he is or otherwise to facilitate his trading with Germany. On the other hand, it may not. It seems to me as impossible as it is on public grounds undesirable to lay down that mere possibilities of this character must as a matter of law abrogate a contract with a neutral. It is not for the law to act on suspicion or vague possibilities. It may well be, as is so often the case in war-time, that, in the public interest action of some sort ought to be taken upon them, but such action is appropriate to executive discretion and not to judicial decision, which can only proceed upon the basis of facts sufficiently established.

The guarantee, however, forms only part of the contract. It remains to consider the effect of suspension upon the remainder of the contract which deals with the purchase of the debt by instalments. Here, as it seems to me, very similar considerations apply. There is a special point arising under the letter of Mar. 17, to which I will refer later. But, apart from this, if the war does not come to an end until after April, 1944, when the last instalment is payable, all the remaining instalments will become immediately payable as soon as the war ends and the position will in effect be the same as that already discussed in relation to the guarantee. If, however, it was, at the outbreak of war, to be supposed that the war could come to an end earlier, only those instalments which had been postponed during the war would become payable at the end of the war; the remainder would fall to be paid on their due dates. On payment of these postponed instalments, Schering, Ltd., would acquire the corresponding instalments of the debt, but it would have no right to sue the German company before the due date for payment by that company arrived, viz., Apr., 1944. If, after the war, Schering, Ltd., proceeded to pay the remaining instalments, they would on the due date be entitled to sue the German company for the whole debt and the position for all practical purposes would be the same as it would have been if Schering, Ltd., had paid under their guarantee and not by instalments.

Here the result of cl. 4 of the February agreement must be considered. Under that clause in its original form, failure by the sureties to pay an instalment on the due date deprives the German company *pro tanto* of the benefit of the discount difference between £84,000, the sterling value of the Spermarks acquired, and £50,400, the amount agreed to be paid for them. Postponement, therefore, puts the German company in a worse position than it would have been in if punctual payment had been made. But it is said that this result will not necessarily follow in view of the terms of the letter of Mar. 17, 1936. What the effect of this letter may be as between the Swedish bank and Schering, Ltd., or as between Schering, Ltd. and the German company, I do not pause to inquire. As I have already pointed out, Schering, Ltd. were no parties to the arrangement contained in it. But on the assumption that they are bound by it, it is said that mere unpunctuality in payment does not of itself deprive the German company of the benefit of the discount since the Swedish bank might obtain payment of an instalment at a date subsequent to the due date "by execution on the property of the sureties or in some other way," in which case the benefit of the discount would be preserved. I very much doubt whether this is the true effect of the letter. Its more probable effect appears to me to be to extend the meaning of the words "acquire the

claim " by adding other methods by which the Swedish bank may be satisfied without altering the requirement of punctuality. But even if the interpretation contended for is correct, the case for abrogation of the contract is in no way strengthened. In giving my reasons for thinking that there is nothing in the contract to purchase the debt by instalments which calls for its abrogation, I ignored the special results of cl. 4 of the February agreement in its original form. I have only referred to that clause as showing that, under it, postponement would operate to the detriment of the German company, and the only effect of the letter, construed as it is sought to construe it, is to make this reference inapposite.

The conclusion to which I have so far provisionally come is that the contract was not abrogated by the outbreak of war on the grounds of public policy. But I cannot finally adopt that conclusion without an examination of the judgment of SIMONDS, J., and some further reference to authorities.

As the basis of his judgment, SIMONDS, J., took two citations. One was from the speech of LORD DUNEDIN in the *Ertel Bieber* case (4), and is as follows :

From these cases I draw the conclusion that, upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which gives (i) opportunities for the conveyance of information which may hurt the conduct of the war, or (ii) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law.

I have already referred to the essential differences between the case of a contract with an enemy and that of a contract with a neutral. SIMONDS, J., did not find it necessary to examine that matter, for he said in reference to the April contract (at p. 422) :

... that contract is bound up with the earlier contract [*i.e.*, the February contract] to which the German company was a party, and, in fact, it was the German company for whose benefit and at whose instance the whole transaction was carried out.

I am not sure whether I follow the exact implications of the phrase " bound up with the earlier contract." It is true that the April contract was made in consequence of the February contract : but in itself it was self-contained and it was made in consideration of the Swedish bank having, at the request of the guarantors, made the advance contemplated by the February contract. The fact that the February contract was originally made for the benefit of the German company does not, with all respect, appear to me to affect the matter. The German company obtained the full benefit to which it was entitled under the contract long before the outbreak of war. It only remained for it to discharge its obligations. Moreover, if, by his statement, SIMONDS, J., meant that the German company alone benefited by the whole transaction, I cannot agree with him. The transaction was presumably as much for the benefit of the Swedish bank, which possessed a commodity, namely, Sperrmarks, that it was willing to sell, as it was for the benefit of the German company which was anxious to buy. The transaction was in effect an ordinary transaction of sale and purchase as between the Swedish bank and the German company, the peculiar features of it being due entirely to the fact that the Swedish bank required payment in sterling which, owing to German exchange laws, could only be effected by bringing Schering, Ltd., into the transaction.

A passage in the judgment of RUSSELL, J. (as he then was) in *Re Badische Co*, (3). was then referred to by SIMONDS, J. It is at p. 373, and is as follows :

But assume a contract between British subjects, but of such a nature that either its further performance involves intercourse with the enemy or its continued existence would confer upon the enemy an immediate or future benefit. Does such a contract become void on the ground of illegality upon the outbreak of war ? The illegality being based upon considerations of public policy, I can see no reason why a contract of such a nature should not become void on the outbreak of war, irrespective of any question whether the parties thereto are enemies or friends. The test should be, in my opinion, not whether one of the parties to the contract is an enemy, but whether the contract involves intercourse with the enemy or confers an immediate or future benefit on the enemy.

Now it will be observed that RUSSELL, J., gives two reasons why a contract between British subjects will be abrogated by the outbreak of war and his observations obviously cover also the case of a contract between a British subject and a neutral. The second of the two reasons is, as I understand it,

because either the further performance or the continued existence of the contract will in fact confer an immediate or future benefit on the enemy, and when I say "in fact," I mean that it must be established to the satisfaction of the court that the result stated will take place. I do not understand RUSSELL, J., as meaning that a mere suspicion will be enough or that it is sufficient to show that, in some supposed event, the probability of which the court has no means of judging a benefit may accrue to an enemy. If I am rightly understanding the language of RUSSELL, J., it accords with the view which I have myself expressed earlier in this judgment.

The *Badische* case (3) requires somewhat closer examination. The contract there in issue was between a British firm and a British company. It contained a suspensory clause. RUSSELL, J., held that the company on the facts possessed enemy character and that the contract was dissolved for that reason upon the outbreak of war; but he proceeded to express his views upon the situation as it would have been if the company had not assumed enemy character at the outbreak of war, and it is from this part of his judgment that the citation relied on by SIMONDS, J., is taken. RUSSELL, J., dealt with this assumption upon the footing that the goods referred to in the contract would come only from Germany. The contract, therefore, could not have been performed without trading with the enemy, and the suspensory clause also was necessarily bad since, to use the words of RUSSELL, J., the continued existence of the contract would have conferred upon the enemy an immediate or future benefit. The expectation of future orders necessary to fulfil the contract would clearly have benefited the enemy during the war, since he would be helped by the assurance of a post-war market for his goods. If the contract had been with a neutral instead of with a British company, the same result, I apprehend, would have followed since, on the facts, the continued existence of the contract under the suspensory clause would necessarily have conferred a benefit on the enemy. I cannot read the observations of RUSSELL, J., as having any wider application than this. The facts of the present case are very different.

The reasons given by SIMONDS, J., for thinking that the second condition mentioned by RUSSELL, J., is fulfilled are as follows. He repeats that "the whole transaction from beginning to end was for the benefit of the German company," a matter with which I have already dealt. He then points out that the performance of the contract—by which I understand him to refer to its performance during the war—must benefit the enemy. In this I respectfully agree. Lastly, he deals with the position on the hypothesis that performance of the contract is suspended during the war. Here I venture to part company with him. He did not find it necessary to analyse the results of the contract. The analysis which I have made, if it is correct, appears to me to establish that the condition laid down by RUSSELL, J., is not satisfied on the facts. SIMONDS, J., based his view as to the illegality of the continued existence of the contract under suspension not upon the facts, but upon authority; for he said of the argument that the contract might validly remain in existence although its performance were suspended during the war "it seems to me that this is just the argument that was put forward and long ago rejected in *Esposito v. Bowden* (2) and also in *Naylor Benzon & Co., Ltd. v. Krainische Industrie Gesellschaft* (6), and in the *Ertel Bieber* case (4)." With all respect, I cannot agree that any of these authorities decide that a contract between a British subject and a neutral the performance of which is prohibited during the war as being for the benefit of an enemy is necessarily incapable as a matter of law of remaining in existence under suspension, whether such suspension be due to operation of law or to a contractual term. Of the cases to which SIMONDS, J., refers, *Esposito v. Bowden* (2) was the only one in which a contract with a neutral was in issue. In that case the contract was necessarily vitiated for the simple reason that its performance would have involved trading with the enemy by a British subject. The question of suspension only entered into the case by reason of a rather obscure argument that the contract could have been fulfilled after the war by purchasing a cargo during the war from subjects of Her Majesty or allied subjects at Odessa who had grain to dispose of at that port. But such a purchase, even if it had been possible, would itself have been illegal and the goods, if purchased, could not lawfully have been shipped.

The *Naylor Benzon* case (6) was a simple case of a contract with an enemy.

The contract contained a suspensory clause which McCARDIE, J., held not to apply to the case of the war then in progress between this country and Austria. But McCARDIE, J., went on to discuss the position on the footing that the suspensory clause did not apply, and he held that the clause was void as being against public policy for reasons substantially the same as those approved by the House of Lords in the *Ertel Bieber* case (4). With all respect to SIMONDS, J., I cannot extract from this judgment any proposition of law which concludes the present controversy. The *Ertel Bieber* case (4) had already been decided in this court, but had not yet reached the House of Lords. When the *Naylor Benzon* case (6) reached this court, the court said no more than that, after the judgment of the House of Lords in the *Ertel Bieber* case (4), which had been delivered in the meantime, the case for the appellants was unarguable. I have already referred to the *Ertel Bieber* case (4) itself and pointed out what appear to me to be the essential distinctions between a contract with an enemy (with which alone the House was dealing) and a contract with a neutral.

The first of the two reasons for abrogating a contract given by RUSSELL, J., namely, that "its further performance involves intercourse with the enemy," was also relied upon by SIMONDS, J. He held that, in the present case, performance of the April contract would, having regard to ordinary commercial practice, be reasonably expected to involve communication with the enemy. This, he said, would take place since Schering, Ltd., would not perform any of their obligations under the contract without inquiring of the principal debtor what was the position in regard to the principal debt. With all respect, I do not think that there is substance in this point. I myself see no necessity to assume that any such communication would be necessary or likely. But, quite apart from this, as performance of the contract is in any event suspended during the war, communications of this character are *ipso facto* ruled out during the war. The fact that, if performance had not been suspended, communication would have been likely does not appear to me to throw any light on the question which has to be decided, viz., does the law on the facts of the case demand not merely suspension but abrogation?

One other argument put forward on behalf of Schering, Ltd., requires passing mention. It was said that the maintenance of the security which contractually was to be in goods, would hamper the trading operations of Schering, Ltd., and so be detrimental to this country. But the security is maintained for the benefit of a neutral and, as I have already pointed out, it cannot be the case that a contract with a neutral is abrogated on the outbreak of war merely because its performance or existence is detrimental to this country. Moreover, even if a debt had been owing by Schering, Ltd., to the German company and the security had been given in respect of that debt, I do not see on what principle the security could have been said to be set free on the outbreak of war. If this were the case, every mortgage in favour of an enemy would be abrogated on the outbreak of war so far as the security was concerned, a proposition which is quite contrary to the well-established rule that an enemy is not at common law deprived of his proprietary rights in this country.

Upon the general question it is, I think, useful to consider what the position would have been if the Swedish bank had been a British company. The first question would have been whether or not the February contract would have been dissolved on the outbreak of war as between the supposed British company and the German company. In my opinion, quite clearly it would not have been dissolved. I ignore for this purpose the special provisions of cl. 6, 7 and 8 of the February contract. Apart from these provisions (whatever the effect of war upon them might have been) the contract would, as between the British company and the German company, have been not an executory but an executed contract since the only obligation of the parties remaining unfulfilled would have been that of the German company to discharge the debt on the due date. How, then, could it have been said that a contract between the supposed British company and Schering, Ltd., under which Schering, Ltd. (i) guaranteed a perfectly good debt owing by the German company to the British company, and (ii) undertook to purchase that debt by instalments would be abrogated by the outbreak of war as being against public policy? I cannot imagine anything more unjust. I need not consider the question whether or not payment of instalments during the war to the supposed British company would have been

illegal. There would, at any rate, have been no question of a benefit to the German company by a substitution of a British for a neutral creditor. But whether or not it be assumed that such performance would have been illegal, the argument, as it seems to me, is in nowise affected.

To conclude this part of the argument, I must refer to one matter which is not in evidence, but which was mentioned by counsel before us. I do so, not because it has in any way affected my conclusions, but because, to quote an author whose name is particularly appropriate to the situation, "things are seldom what they seem." We were informed that all the shares in Schering, Ltd., are held by the German company and have been made the subject of a vesting order: and that the liquidation has been brought about by the Custodian appointed under the Trading with the Enemy Act. If, therefore, the contract was abrogated by the outbreak of war, the German company would benefit by having the sterling assets of its subsidiary freed from the obligations under the contract. It is true that the German company may never reap this benefit: but this, if it happens, will be due not to any rule of common law, but to some special arrangements to be made as to the disposal of enemy assets in this country. If the position had in this respect been governed by the common law as stated by LORD PARKER in the *Daimler* case (7), the situation on the respondents' argument would have been truly described as Gilbertian.

The alternative argument to the effect that the April contract has been frustrated can be dealt with quite shortly. The frustration is said to have taken place at the outbreak of war by reason of the fact that all payments under it became illegal during the war. The argument assumes that the contract itself was not abrogated on the ground that the continuance of contractual relations became illegal: frustration is said to have taken place because of the suspension of payments by operation of law. There are cases where suspension of a contract by reason of illegality may lead to abrogation of the contract by reason of frustration. The contract may be of such a nature as to call for the implication that, if its performance is indefinitely delayed, it is to come to an end. But I cannot see how the present can be such a case. All that is here in question is the payment of money and the assignment of that part of the debt which remains unassigned. That assignment may take place according to events either under the guarantee or under that part of the contract which relates to the purchase of the debt by instalments. The liability of the German company to the Swedish company cannot, in any event, be affected by a postponement of the obligations of Schering, Ltd., to the Swedish bank for the period of the war. The most that can happen is a delay in the performance by Schering, Ltd., of its pecuniary obligations and a consequential delay in the assignment of the debt in respect of which those obligations were incurred. It seems to me impossible to suggest that the parties, if their attention had been called to the point at the time when the contract was made, would have agreed that, in the events which have happened, the contract should be at an end.

In my opinion, the appeal should be allowed with costs here and below.

DU PARCQ, L.J.: I have had the advantage of reading the judgment which has just been delivered by my Lord, and I agree that the appeal should be allowed for the reasons stated.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Slaughter & May* (for the appellants); *Kenneth Brown, Baker, Baker* (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

Re JOHNSON'S SETTLEMENT TRUSTS, McCLURE v. JOHNSON.

[CHANCERY DIVISION (Cohen, J.), July 20, 1943.]

Perpetuities—Power of appointment—Direction to apply capital if income falls below certain sum—Contingent interest—Gift over to other appointees if share of appointee fails to vest absolutely in her child on her death—Appointees not born at date of settlement.

A By a marriage settlement the wife, J.E.J., was given power to appoint the trust fund among her children or other issue. In exercise of this power J.E.J. appointed the property in trust, as from her death, in equal shares for the five children of the marriage; the share of the eldest daughter to be held in trust to apply the income for her maintenance and benefit during her life and, after her death, as to both capital and income, in trust for such of her children living at the appointor's death, or born afterward during the 21 years from death, as should during the said period attain the age of 21 years, or being female marry under that age, or should be living immediately before the expiration of the said period and, if more than one, in equal shares. There followed a gift over in the event of no part of the share becoming absolutely vested in a child of the daughter. It was further provided that, if the net income of the share in any year during the daughter's life, after the payment of income tax, should not amount to £400, the trustees were to raise the deficiency out of capital. There were similar provisions and trusts in respect of the shares of two other daughters. None of the appointees were born at the date of the settlement. The appointor died on February 9, 1927. On a summons taken out by the trustees to determine two questions arising under the appointment: (a) whether the direction to make up the income of the eldest daughter's share to £400 was valid; and (b) whether the gift over of the eldest daughter's share after her death in the event of no child of hers taking an absolute vested interest was wholly or partly invalid and what interest the daughter would take:—

E HELD: (i) the effect of the appointment was to give a life interest in the income of the share and a contingent interest in the capital so far as might be necessary to bring the income up to £400, and the appointment as to the contingent interest was void as infringing the rule against perpetuities.

(ii) as none of the appointees were born at the date of the settlement the gift over was dependent on a contingency which would not necessarily occur within the period allowed by the rule against perpetuities.

F (iii) on a true construction of the appointment the share to the eldest daughter was in the first place given absolutely and certain subsequent limitations were then engrafted on that absolute interest. Upon the failure of the subsequent limitations, the absolute gift remained and the daughter took an absolute interest.

G [EDITORIAL NOTE. A gift of a life interest in property with power, if the life interest should not produce a net income of £400, to resort to capital for the deficiency was here said to be the same thing as a gift of an annuity of £400. The court has, however, decided that, although the result of the first form of gift is in effect the same as the second, the two gifts are quite distinct forms of gift and it is impossible to treat the first form as a gift in the second form in order to escape the operation of the rule against perpetuities.

AS TO REMOTENESS IN CONTINGENT EVENTS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 91-95, paras. 179, 180; and FOR CASES, see DIGEST, Vol. 37, pp. 109-111, Nos. 422-432.]

Cases referred to:

- H * (1) *Re Cassel, Public Trustee v. Mountbatten*, [1926] Ch. 358; 37 Digest 79, 194; 95 L.J.Ch. 281; 134 L.T. 724.
 (2) *London and South Western Ry. Co. v. Gomm* (1882), 20 Ch.D. 562; 37 Digest 79, 195; 51 L.J.Ch. 530; 46 L.T. 449.
 (3) *Re Whiteford, Whiteford v. Whiteford*, [1915] 1 Ch. 347; 44 Digest 1097, 9472; 84 L.J.Ch. 584; 112 L.T. 577.
 * (4) *Re Legh's Settlement Trusts, Public Trustee v. Legh*, [1938] Ch. 39; [1937] 3 All E.R. 823; Digest Supp.; 107 L.J.Ch. 6; 157 L.T. 270.
 (5) *Rucker v. Scholefield* (1862), 1 Hem. & M. 36; 37 Digest 122, 545; 32 L.J.Ch. 46.

SUMMONS by the trustees of a marriage settlement to determine the validity

of certain appointments made thereunder. The facts are fully set out in the judgment.

E. G. Eardley-Wilmot for the trustees.

Horace Freeman for Mary Cecil Johnson, the eldest daughter, an appointee.

H. H. King and *R. Gilbert* for the other appointees.

COHEN, J.: By a settlement made on Sept. 22, 1882, on the occasion of the marriage of Josephine Emily Dobree to Alfred Cecil Johnson, Mrs. Johnson was given power, in the event which happened, to appoint the trust fund among her children or other issue as therein mentioned and it was declared that, in default of such appointment, and so far as no such appointment should extend the trust fund was to be held upon trust for all and every her children or child who being sons or a son should attain the age of 21 years or being a daughter should attain that age or marry.

Mrs. Johnson had five children, of whom four were daughters. They are the defendants, Mary Cecil Johnson, Evelyn Dobree Johnson, Lilian Emily Johnson and Hilda Catherine Johnson. They are aged 59, 58, 55 and 53 years respectively and none of them has ever married. She had one son, the defendant, Vernon Cecil Johnson, who is aged 56 years. Her husband died on June 13, 1920, and Mrs. Johnson never remarried. In exercise of the power conferred on her by the marriage settlement, Mrs. Johnson directed and appointed on Feb. 18, 1926, by a deed of appointment of that date, that the trustees of the marriage settlement should as from her death hold the property for the time being subject to the trusts of the settlement upon the trusts and subject to the provisions following, namely:

(i) In trust in equal shares for her four daughters and her son and so that the respective shares of her daughters (other than Hilda) should be subject to the provisions in the deed of appointment concerning the same respectively. (ii) The trustees were to retain the share of Mary and stand possessed of the same and the income thereof upon trust to pay or apply such income to or for the maintenance benefit and support of Mary during her life and after her death as to both capital and income in trust for such of her children living at her (Mrs. Johnson's) death or born afterwards during the period of 21 years from her death as either should during the said period attain the age of 21 years or being female marry under that age or should be living immediately before the expiration of the said period, and if more than one in equal shares. (iii) The trustees were to retain the share of Lilian and hold the same and the income thereof upon such trusts as would be applicable thereto if the last preceding subclause were repeated with the name of Lilian inserted therein in the place of the name of Mary. (iv) The trustees were to retain the share of Evelyn and hold the same and the income thereof upon trust as to one equal half part thereof for such persons and for such purposes as Evelyn should by deed or will appoint and as to the other equal half part thereof or (in default of any such appointment) as to the whole thereof upon such trusts as would be applicable thereto if the same subclause were repeated with the name of Evelyn inserted therein in the place of the name of Mary. (v) If no part of the share appointed to Mary, Lilian and Evelyn should become vested absolutely under the trusts above mentioned in a child of such daughter (otherwise than by an appointment by Evelyn under the power already mentioned above) the trustees were to hold the share which should so fail to vest (otherwise than as above mentioned) and the income thereof but subject to the life interest therein of such daughter in trust for such of them Mary, Lilian and Evelyn, as should be living at the date of the determination of such life interest and for Hilda in equal shares but so that any share accruing under the subclause I am now stating to any of them, Mary, Lilian and Evelyn, should, be retained by the trustees and should with the income thereof be held upon the trusts applicable to their original shares; and if no one of them, Mary, Lilian and Evelyn should be living at the date above mentioned the trustees were to stand possessed of the share in trust for Hilda absolutely. (vi) Notwithstanding anything thereinbefore contained if the net income in any year remaining after payment of income tax of the share of any of them, Mary, Lilian and Evelyn, in the trust property during their respective lives should not amount to the sum of £400, the trustees were to raise the deficiency out of the capital of such share and pay

or apply the same to or for the maintenance support and benefit of such daughter.

Mrs. Johnson then proceeded to appoint trusts on which the share of her son was to be held, and reserved to herself the power by deed or will wholly or partially to revoke the appointment and to make fresh appointments. Mrs. Johnson died on Feb. 9, 1927. By her will dated Feb. 18, 1926, and proved (with a codicil, which is not material to the point before me) on Feb. 18, 1927, she confirmed the directions and appointments made by the above-mentioned deed of appointment and devised, bequeathed and appointed all the residue of her property, real and personal, to her trustees upon trust to sell and convert the same into money and directed that they should stand possessed of the trust fund so constituted in trust in equal shares for such of her five children as should be living at her death, but so that the respective shares of Mary, Lilian, Evelyn and Vernon should be retained by her trustees upon the like trusts in all respects as were by the deed of appointment directed and appointed concerning their respective shares in the property subject to the trusts of the marriage settlement, but not so as to increase or multiply the sum of £400 mentioned in cl. 1 (vi) of the deed; and, if the trustees of the marriage settlement were to accept such payment and transfer, then Mrs. Johnson directed her trustees to pay and transfer to the trustees of the marriage settlement the moneys and investments for the time being representing the shares of Mary, Lilian, Evelyn and Vernon in the property bequeathed to them by her will. It is to be observed that both under the appointment and the will the defendant Hilda Catherine Johnson took her share absolutely.

Shortly after the death of Mrs. Johnson, Hilda's share was paid and transferred to her with an exception which is immaterial; and the investments and property representing the other children's shares in Mrs. Johnson's residuary estate were transferred pursuant to the direction in her will to the trustees of the marriage settlement.

Owing to the incidence of income tax the net income of a share is now only about £200 and in these circumstances the direction to make up each of the three daughters' shares to £400 net out of capital which is imperative in terms has *prima facie* become operative. The first question I have to decide is whether this direction is valid or is void as infringing the rule against perpetuities. The direction applies, of course, also under Mrs. Johnson's will to Mary's share of the residuary estate, but as to that no question of perpetuity can arise.

The summons only raises the question as to Mary's share, but my decision thereon will, I understand, be treated as governing the other shares also.

Mr. Freeman relies on the decision of RUSSELL, J., in *Re Cassel* (1). In that case the headnote is as follows:

By his will the testator bequeathed "Brook House and contents" and the stables held therewith, the leases of which would expire in 1995, to trustees upon trust to permit his granddaughter E. to have the use and enjoyment thereof during her life, and after her death upon trust for such one or more of her children or issue as she should by will or deed appoint, and in default of such appointment for the first of her sons, or, failing any son, the first of her daughters attaining twenty-one. Subject to these trusts the trustees were to hold "Brook House and contents" upon similar successive trusts in favour of (1) his granddaughter R. and her family, (2) his nephew and his family, and (3) his niece and her family. The testator then directed that: "the rent outgoings rates and taxes for the time being payable in respect of the said messuage and premises and keeping the same and the contents thereof insured against fire and burglary and in a proper state of preservation shall be always paid by my trustees out of the income of my residuary personal estate."

In upholding the validity of that direction, RUSSELL, J., said at p. 368:

True it is that assuming the leases remained unsold, the interest of the person or persons absolutely entitled might enure beyond the period of lives in being and 21 years after; and it was suggested that this possibility would avoid the clause. In my opinion this suggestion is unsound. The perpetuity rule is concerned with the creation and vesting of interests, not with their duration. If the interest must necessarily arise and be vested within the period, its duration beyond the period is no infringement of the rule. As is pointed out in *GRAY ON PERPETUITIES*, 3rd Edn., p. 207, an interest is not obnoxious to the rule if it begins within lives in being and 21 years, although it may end beyond them. In other words the rule prohibits vesting outside the period. It does not prohibit distribution beyond the period. It was, however, further argued that the uncertainty of the quantum of the annual sum rendered the disposition void, because the exact quantum of the interest could not be ascertained

within the limit of the rule. This contention, if sound, would produce far-reaching results. A bequest of an annuity of £100 per annum for 1,000 years to A. for life and after his death to any wife of his for her life and after her death to A.'s children for life would be good; but if given free of tax would be bad, for the actual amount payable to the children might not be ascertainable within the perpetuity period. The answer seems to me to be that the interest arises and is vested during the period, and that although the amount necessary to satisfy it is expressed in uncertain terms it is always capable of being rendered certain; and that the whole property (that is to say the interest in question and the property which is subject to that interest) is vested in some person or persons during the necessary period. A

Mr. Freeman argues that the position is exactly the same here. According to him Mary's right to have her income made up to £400 per annum vested within the period allowed by the rule against perpetuities, and it is immaterial that distribution may continue beyond the prescribed period and that the amount, if any, to be distributed cannot be ascertained until each period of distribution arrives. Mr. King and Mr. Gilbert distinguish *Re Cassel* (1) on the ground that in that case the right vested immediately and sums became immediately payable under the bequest then under consideration; the uncertainty was only as to the quantum that would have to be paid. In the present case nothing, they say, may be payable at all and the whole right is contingent on an event which might never occur and certainly might not take place within the prescribed period, that is, the event of such an increase in the rate of income tax as would reduce the net income below £400 per annum. B

On this basis to quote the words of KAY, J., in *London and South Western Ry. Co. v. Gomm* (2), at p. 573—which were approved by the Court of Appeal although his decision was reversed on another ground—Mary's right is : C

... a present right to an interest in property which may arise at a period beyond the legal limit [but] is void notwithstanding that the person entitled to it may release it. D

This argument is, in my judgment, well founded and it is supported by the decision in *Re Whiteford* (3). In that case a tenant for life had, in the events which happened, a power of appointment among her four sons, one of whom was of unsound mind. She exercised that right, as stated by NEVILLE, J., at pp. 351, 352, by directing the trustees :

... to hold two-fifth parts of the funds subject to the trusts of the marriage settlement and to apply the whole or so much of the income of such two-fifths "as shall be required for making up the total income from all sources of the said Walter Whiteford to the sum of £200 per annum in such manner as the said trustees shall in their uncontrolled discretion think proper and most beneficial for the maintenance support and comfort of the said Walter Whiteford during his life and to divide the residue (if any) of such income equally between my other four sons." That is the appointment which I have to consider. It is obviously an appointment of an interest among five persons, and the question I have to determine is : Is it a vested interest or is it a contingent interest ? On the one side it is argued that it depends upon the happening of a contingency. On the other side it is argued that it is a vested interest from the death of the appointor, although the amount of income to be received by any one of the five could only be ascertained from year to year and might have to be ascertained after the expiration of 21 years. I think the question really is whether you can have a vested interest depending in whole or in part upon the happening of a particular event. It seems to me that to say you can is to state what is a contradiction in terms, because the thing cannot be both vested and contingent. The contingency really is the amount of the yearly income of the appointee, which may involve the payment of the whole income of the two-fifths in one year and none of it in the next. It seems to me that is a contingency affecting the payment to the other four takers because as one share is reduced the other is increased by the same amount, and consequently the other four sons may as well as the first appointee get either something or nothing in each year. It is an interest of a peculiar kind, but it seems to me to be essentially a contingent gift, and a gift of which it is impossible to say that it vested in any particular person. E

I could not, I think, decide this point in favour of Mary unless I take the view, which I am not able to do, that it is inconsistent with *Re Cassel* (1) and I have to decide which to follow. Mr. Freeman finally argued that the bequest was in substance a bequest to Mary of an annuity free of tax, and that such bequest would, as stated by RUSSELL, J., in the passage which I have read from *Re Cassel* (1), be valid. I will assume in Mr. Freeman's favour that the bequest could have been framed as a gift of an annuity free of tax, and that so framed it would be valid. But I must bear in mind the important principle of construc- F

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tion which is stated by SIR WILFRID GREENE, M.R., in *Re Legh's Settlement Trusts* (4), at p. 44 ([1937] 3 All E.R., at pp. 824, 825), in the following terms :

The will must be construed without reference to the rule against perpetuities. If upon the true construction of the language used the legal character of the interest created is one which attracts the operation of the rule, it is immaterial that this result might have been avoided by the use of different language creating an interest different in legal character though the same in practical effect. Thus in a gift upon trust to pay the income to A. during his life and after his death to transfer the capital to B. if he shall be then living, B.'s interest is contingent and will fail if A.'s death is an event falling outside the limit permitted by the rule. On the other hand, if the gift to B. is in terms absolute with a gift over in the event of his predeceasing A., his interest will be a vested one and the rule will not apply, notwithstanding that the practical result in the two cases will be the same. The rule is strict and highly technical in its operation and the temptation to construe words in such a way as to exclude its application is one which must be firmly resisted.

As I construe the appointment in the case before me, Mrs. Johnson appointed a life interest in income and a contingent interest in capital. To construe the appointment as the gift of an annuity of £400 per annum free of tax charged on capital as well as income, plus a further gift of the surplus (if any) of the income of each year would, in my judgment, be doing unjustifiable violence to the language of the appointment.

I must, therefore, declare on para. 1 of the summons that the direction contained in the deed of appointment dated Feb. 18, 1926, under the hand and seal of Josephine Emily Dobree (then Josephine Emily Johnson) and purporting to be made under the power of appointment conferred on her by the settlement for the raising out of the capital of the share of the defendant Mary in the trust fund constituted by the marriage settlement if the sum by which the net income of that share in any year during the life of the said defendant should fall short of £400 is bad as infringing the rule against perpetuities, and that the whole of such sum should be raised out of the capital of the share of the said defendant in the residuary estate of the said Josephine Emily Johnson. The last part of the declaration is, of course, due to the fact that it is not disputed that the direction is valid so far as the will fund is concerned.

I now turn to the second question, which is whether the gift over of Mary's share after her death contained in the deed of appointment in sub-cl. (5) of the deed in the event of no child of hers taking an absolute vested interest is wholly bad or is bad to some and what extent as infringing the rule against perpetuities or otherwise, and, if and so far as such gift over is bad, whether such share or sum or what part of it will in that event on her death form part of her estate, or pass under the trusts declared in default of appointment by the settlement.

A similar question may arise as to the shares of Lilian and Evelyn, but no separate question has been raised thereon, as it is agreed that my decision in the case of Mary will govern the case of the other two shares. The question is a future question, but having regard to the fact that Mary, Evelyn and Lilian are all unmarried and that the youngest of them is 55, it is practically certain to arise. I am told that it is important to them to know what rights they have in order that they may be able to deal therewith, and in these circumstances I have agreed to determine the question.

It is common ground that, on the first branch of this question, this case is governed by *Re Legh's Settlement* (4) and that I am bound to declare the gift over is wholly bad, since none of the appointees had been born at the date of the settlement under which the appointment was made and the interests of the survivors are, therefore, contingent on an event which will not necessarily occur within the period allowed by the rule against perpetuities. That being so, I have to determine whether there is an absolute gift in the first instance to Mary which remains in full force and effect now that the gift over has gone, or whether there is no absolute gift but merely a whole system of trusts including only in the first instance a life interest to Mary. Mr. Gilbert relied on the decision in *Rucker v. Scholesfield* (5), where SIR W. PAGE WOOD, V.-C., stated the principle to be applied at p. 41, as follows :

In all cases of this kind, the question turns upon the language in which the appointment is attempted to be made. If you find a clear and definite gift of the property to be appointed, and then, engrafted upon that, subsequent provisions directing the

fund to be settled, so as to show that the purpose was, first, to make the gift to and for the benefit of the person named, and then to have the fund settled; in a case of that kind, if the limitations of the proposed settlement are such as cannot become operative, the first absolute gift is held to take effect without restriction. So, if you find a clear gift followed by words which effect to divest it, and the limitations over are inoperative, then the court will uphold the gift, striking out the limitations which cannot have any legal effect. But if the words of the original gift are coupled with the whole series of limitations over, so as to form one system of trusts, then all that can be done is to give effect to so much of the limitations as may be consistent with law.

SIR W. PAGE WOOD, V.-C., then went on to deal with the facts of that case, saying, at pp. 41,42:

The question is, to which of these two classes the instrument under consideration belongs? The trusts declared by the deed of appointment are, first, "to appropriate one-fifth of the principal to and for and for the benefit of" each of the daughters, exclusively of the other children; and if these words stood alone, they would suffice to vest the absolute interest in the five daughters; but the clause runs on thus, "and to pay and apply the interest, dividends and annual proceeds of each such one-fifth part or share unto or permit the same to be received by each and every of the said several children for her own sole and separate use"; "and upon trust from and after the decease of each such daughter to pay, apply, and dispose of the said fifth part or share of such daughter so dying unto and amongst the children of such daughter"; and then follow the limitations which are clearly bad.

Now, I confess, that upon that language I feel compelled to hold that the trust for the daughters is for their lives only. The appointment is made in this form: The trustees are first directed to stand possessed of the fund "upon the trusts following, that is to say, upon trust," then follow the trusts I have read. The reference to the trusts following must be considered to take in all the trusts, following as they do in one connected series. It is impossible to stop after the first part, which, if it stood alone, would no doubt confer absolute interests on the daughters; but you must take the reference to be to the whole system of trusts, including the restriction of the daughters' interests to life estates, and the gift over to their children. This is not the case of a good appointment being made, and then followed by an attempt to engraft an invalid restriction upon it. There can be no doubt that the gifts over are void, because they extend to issue generally, and are not confined to issue born within the lifetime of the survivor of the appointors. The result is that each daughter took a life interest in one-fifth for her separate use, and subject to that the fund goes as upon default of appointment.

In some respects that case is like the one I have to decide, in particular in that the trustees are first directed to hold the fund "upon the trusts and subject to the following provisions"; but there is the salient difference that in the present case the whole fund is not settled by the appointment and that the gift to Hilda who, it is admitted, takes her share absolutely, is comprised in the same gift as the gift to her sisters and her brother. In these circumstances, I think I am bound to hold that the effect of the words "in trust in equal shares for my daughters Mary, Lilian, Evelyn and Hilda and my son Vernon" was a clear and definite appointment to each of one-fifth of the appointed property and that the intention of the testatrix was to make a gift to and for the benefit of each of them, and then, except in the case of Hilda, as a separate direction to have each appointed share settled. The case, therefore, falls within the first of the two classes mentioned by SIR W. PAGE WOOD, V.-C., and I must declare that Mary's share will, in the event of no child of hers taking an absolute vested interest therein on her death, form part of her estate.

Declaration accordingly. Costs to be paid as to two-thirds out of the marriage settlement fund and as to one-third out of the whole fund.

Solicitors: Travers Smith, Braithwaite & Co. (for all parties).

[Reported by HUBERT B. FIGG, ESQ., Barrister-at-Law.]

Re PRICE, MIDLAND BANK EXECUTOR AND TRUSTEE CO.,
LTD. v. HARWOOD AND OTHERS.

[CHANCERY DIVISION (Cohen, J.), July 6, 1943.]

Charities—Validity—Bequest to unincorporated society—Gift to society to be used for specified purpose—Society free to expend both capital and income of gift.

A By a will dated June 13, 1940, the testatrix directed that one-half of her residuary estate should be held on trust for payment to the Anthroposophical Society to be used at the discretion of the chairman and executive council of the society for carrying on the teachings of the founder, Rudolf Steiner. The testatrix died on July 12, 1940, and it was contended on behalf of the society that the bequest was valid on three alternative grounds: (i) that it was an absolute gift to the society; (ii) that, although given for a particular purpose, there was nothing to prevent the society from expending capital as well as income on that purpose; (iii) that it was a valid charitable gift:—

B HELD: (i) upon the proper construction of the will the gift was not a gift which the members of the society were free to expend as they thought fit. The society was bound by the terms of the will to apply the gift to the stated purposes only, but it was free to expend the capital and income for those purposes.

C (ii) since both capital and income could be applied to the stated purposes the gift did not infringe the rule against perpetuities.

(iii) the gift was a valid charitable gift.

D **EDITORIAL NOTE.** The first two points decided are sufficient to validate the gift whether or not it is a charitable gift. Since it is decided that the gift is charitable, the decision of the first two points is in a way immaterial. In the case of a gift to an unincorporated body of persons, it may be shown that that body is free to spend the gift, both capital and income, how it pleases. It is then an absolute gift to that body and is good in any event. It may be, as it is held to be in the present case, a gift which that body is not to spend how it pleases, but which must be applied to a stated purpose. In this case it will not be rendered invalid by the rule against perpetuities if both capital and income can be applied to that purpose. It is only where income alone can be applied that a perpetuity arises and then the gift will be invalid unless it is in law a charitable one.

E AS TO GIFTS TO UNINCORPORATED BODIES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 128, 129, para. 170; and FOR CASES, see DIGEST, Vol. 8, pp. 261-265, Nos. 240-267.]

Cases referred to:

- F * (1) *Re Drummond, Ashworth v. Drummond*, [1914] 2 Ch. 90; 8 Digest 265, 267; 83 L.J.Ch. 817; 111 L.T. 156.
- * (2) *Re Clarke, Clarke v. Clarke*, [1901] 2 Ch. 110; 8 Digest 263, 250; 70 L.J.Ch. 631; 84 L.T. 811.
- (3) *Macaulay v. O'Donnell* (1933), unreported; Cases on Appeal to the House of Lords, Vol. 775, p. 42.
- (4) *Carne v. Long* (1860), 2 De G.F. & J. 75; 8 Digest 325, 1078; 29 L.J.Ch. 503; 2 L.T. 552.
- (5) *Re Hummeltenberg, Beatty v. London Spiritualistic Alliance*, [1923] 1 Ch. 237; Digest Supp.; 92 L.J.Ch. 326; 129 L.T. 124.
- G (6) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 8 Digest 241, 1; 61 L.J.Q.B. 265; 65 L.T. 621.
- (7) *Thornton v. Howe* (1862), 31 Beav. 14; 8 Digest 250, 96; 31 L.J.Ch. 767; 6 L.T. 525.

SUMMONS by the testatrix's executor to determine the validity of a bequest. The facts are fully set out in the judgment.

H J. A. Hay for the plaintiff company.
R. F. Roxburgh, K.C., and A. J. Belsham for the chairman of the executive council of the society.

H. B. Vaisey, K.C., and H. E. Salt for the testatrix's sons, residuary legatees.

C. D. Myles for the testatrix's daughter, a legatee.

H. O. Danckwerts for the Attorney-General.

COHEN, J.: By her will dated June 13, 1940, the testatrix appointed the plaintiffs to be executors and trustees of her will. By cl. 1 she gave certain property to her daughter, the defendant, Gladys Freda Price, the last of such

gifts being in the following terms :

... one-half of my estate or as much of the whole as will bring her an annual income of £250 whichever shall be the greater.

She then gave certain pecuniary legacies and directed the payment of the premium on a policy which she stated to belong to her sister-in-law, and she finally directed her trustees to hold her residuary estate on the following trusts :

... to pay and divide my residuary estate as to one-quarter thereof to my son Stanley Vernon Price, whose address is 57, Accession Street, Bardon 4, Brisbane, Queensland, Australia, and as to another quarter thereof to my son Raymond Selwyn Price of Ryecotes, Frog Grove Lane, Wood Street, near Guildford in the county of Surrey and as to the remaining half of my residuary estate to the Anthroposophical Society in Great Britain to be used at the discretion of the chairman and executive council of the society for carrying on the teachings of the founder Dr. Rudolf Steiner.

By cl. 6 she explained that the absence of any legacies to charities was due to the fact that she had contributed regularly to them during her lifetime.

The testatrix died on July 12, 1940, and her will was proved by the plaintiffs on Nov. 28, 1940. She left three children only, namely, the defendants Stanley Vernon Price, Raymond Selwyn Price, and Gladys Freda Price, and there were no issue of any deceased child. The net value of her estate as valued for probate was some £21,000, and the income arising therefrom was approximately £686 per annum.

The question that I have to determine is the validity of the gift of one-half of the residuary estate to the Anthroposophical Society in Great Britain. This society according to the affidavit of Harwood who has been for 18 years a member of the society, for 14 years a member of its executive council, and for 5 years chairman thereof, is an unincorporated voluntary association founded in 1923 at a meeting at which Dr. Rudolf Steiner was president and by which he was appointed president for life. The society is financed entirely by members' subscriptions and donations, and has its headquarters at Rudolf Steiner House, 35, Park Lane, London. The headquarters consist of a bookshop, library and lecture rooms, all of which the society occupies as tenant of the Anthroposophical Assn., Ltd. Its constitution is divided into three parts, statutes, rules and byelaws. The statutes are in the following terms :

2. The aim of the society is to form, in the words of Rudolf Steiner, a union of human beings who desire to further the life of the soul, both in the individual and in human society, on the basis of a true knowledge of the spiritual world. 3. The society will endeavour to fulfil its tasks : (a) by providing adequate facilities for individual study and mutual aid in the study of spiritual science ; (b) by encouraging practical activities which will bring into the civilisation of our time the beneficial results of spiritual science . . . The society is an entirely public organisation and in no sense a secret society. It is averse to any sectarian tendency and does not consider politics to be among its tasks. A dogmatic position in any sphere whatsoever shall be excluded from the society.

Harwood says in para. (2) of his affidavit.

"Spiritual science" was one of the two names ordinarily used by the late Dr. Rudolf Steiner for the subject-matter of all his writings and teachings. The other name was anthroposophy—the wisdom of mankind.

It will be observed that the expression "teachings of Dr. Rudolf Steiner" does not appear in these statutes, but it would clearly be within the ambit of its activities to carry on these teachings and, indeed, Harwood says that this has, in fact, been the sole purpose for which the society was founded and now exists. The objects of the society are, however, not necessarily limited to those expressed in its existing statutes, for by cl. 1 of the rules there is power to alter the statutes in the manner therein specified, and there is no limit to the nature of the alterations that can be effected.

I need not refer to any other of the rules, and the only byelaw to which I must refer is cl. 3, the first paragraph of which is as follows :

The control of the affairs of the society shall be in the hands of an executive council consisting of 12 members of the society, including the hon. treasurer. The secretary of the society shall be appointed by the council. The hon. treasurer shall be appointed by the annual general meeting once every 3 years and be nominated in the same way as other members of the council.

It is to be observed that there is no provision in the constitution as to endow-

ments or for the appointment of trustees in whom such endowments should be vested. There appears, however, from para. 2 of Harwood's affidavit to be an incorporated body, the Anthroposophical Assoen., Ltd., which is the landlord of the premises occupied by the society. I have no evidence as to what other functions this incorporated body performs. The testatrix herself is stated by Harwood to have been an active and enthusiastic member of the society for 6 years before her death, and from 1938, until shortly before her death, to have been the assistant treasurer thereof. She was also a donor of moneys to the Anthroposophical Assoen., Ltd.

Counsel for the society invited me to uphold the validity of the gift on three alternative grounds : (i) that it was an absolute gift to the society ; (ii) on the principle of *Re Drummond* (1) that though given for a particular purpose, there was nothing to prevent the society expending capital as well as income on that object ; (iii) as a valid charitable gift.

In support of the first alternative counsel for the society referred me to *Re Clarke* (2), where, at p. 114, BYRNE, J., lays down the principles to be applied in determining the validity of gifts to perpetual institutions as follows :

It is, I think, established by the authorities that a gift to a perpetual institution not charitable is not necessarily bad. The test, or one test, appears to be, will the legacy when paid be subject to any trust which will prevent the existing members of the association from spending it as they please ? If not, the gift is good. So also if the gift is to be construed as a gift to or for the benefit of the individual members of the association. On the other hand, if it appears that the legacy is one which by the terms of the gift, or which by reason of the constitution of the association in whose favour it is made, tends to a perpetuity, the gift is bad.

Counsel for the society, relying, no doubt, on Harwood's statement that the carrying on of the teachings of Rudolf Steiner were the sole purpose of the society, said that the phrase "to be used at the discretion of the chairman and executive council of the society for carrying on the teachings of the founder, Dr. Rudolf Steiner," were merely descriptive and did not limit the objects to which the testatrix's gift could be applied. I am unable to accede to this argument. In the first place, much of the statutes, and particularly cl. 3 (which I have already read), seem clearly to go outside this purpose ; in the second place, there is unlimited power to alter the statutes, and it would, therefore, be possible to include in the objects of the society purposes entirely unconnected with the teachings of Rudolf Steiner. In my judgment the testatrix clearly intended to limit the purposes to which her benefaction could be applied to carrying on these teachings. I am unable, therefore, to hold that there was an absolute gift to the society.

I turn to the argument based on *Re Drummond* (1). In that case the testator devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion and to hold the proceeds upon trust for the Old Bradfordians' Club, London (being a club for old boys of the Bradford Grammar School) to be utilised as the committee of the club should think best in the interests of the club or school. EVE, J., dealt very shortly with this question, on p. 97. He said he could not hold, as the result of the will and codicil together, that the residuary gift of realty and personalty for the Old Bradfordians' Club was a gift to the members individually. There was, in his opinion, a trust, but there was abundant authority for holding that it was not such a trust as would render the legacy void as tending to a perpetuity, and he cited *Re Clarke* (2). The legacy was not subject to any trust which would prevent the committee of the club from spending it in any manner they might decide for the benefit of the class intended. In his opinion, therefore, there was a valid gift to the club for such purposes as the committee should determine for the benefit of the old boys or members of the club.

That case was approved by the House of Lords in *Macaulay v. O'Donnell* (3). It was pointed out by LORD BUCKMASTER that the feature which distinguished the gift in *Re Drummond* (1) from such gifts as bequests for the maintenance of a library was that in the latter class of cases the bequest was an endowment, the income only being available for the stated purpose, whereas in *Re Drummond* (1) the capital and income of the bequest, according to the construction placed on it by the court, could freely be expended as the committee thought fit in the interests of the club. I will read the relevant passages from LORD BUCKMASTER'S

speech. He said, at p. 60 :

In the first place it is clear that the mere fact that the beneficiary is an unincorporated society in no way affects the validity of the gift. A group of people defined, and bound together by rules, and called by a distinctive name can be the subject of a gift as well as any individual or incorporated body. The real question is what is the actual purpose for which the gift is made. There is no perpetuity if the gift were for the individual members for their own benefit, but that, I think, is clearly not the meaning of this gift. Nor again is there a perpetuity if the society is at liberty in accordance with the terms of the gift, to spend both capital and income as they think fit. *Re Drummond* (1) is an excellent illustration of this. There there was a gift upon trust for the Old Bradfordians' Club to be utilised as the committee of the club thought best in the interests of the club. It was held that the words did not prevent the committee of the club from spending the money in any manner they might decide was for the benefit of the club, and it was, therefore, good ; but, on the other hand, in *Carne v. Long* (4) a gift to a library at Penzance "to hold for the use, benefit, maintenance, and support of the library" was held a gift in perpetuity. These two cases illustrate exactly the point for consideration. If the gift is to be an endowment of the society, to be held as an endowment, and the society is, according to its form, perpetual, the gift is bad, but if the gift is an immediate beneficial legacy, it is good.

Into which category does the bequest I am considering fall ? There is nothing on the face of the will to restrict the freedom of the society to expend capital and income on the stated purpose ; but counsel for the testatrix's sons invited me to hold that the expression "carrying on" necessarily connotes permanency which can only be achieved if I construe the will as intending to create an endowment. He referred to the decision in *Macaulay v. O'Donnell* (3). In that case, at p. 43, the testatrix gave her residuary estate to :

... the Folkestone Lodge of the Theosophical Society (but not the headquarters or other lodges of such society) absolutely for the maintenance and improvement of the Theosophical Lodge at Folkestone . . .

Both *CRAUSON, J.*, and the Court of Appeal held that the effect of this gift was to entitle the Folkestone Lodge of the Theosophical Society to expend both capital and income on the specified purpose. In the judgment of both courts considerable reliance was placed on the word "absolute." The House of Lords however, took a different view. It will be sufficient if I refer to the speech of *LORD TOMLIN*. He said, at p. 61 :

That the lodge to be maintained is a body or association of persons and not the building occupied by such body or association I have no doubt. Further, the fact that the gift is made to the lodge by the name prescribed by its rules, viz., the Folkestone Lodge of the Theosophical Society, and is coupled with an express exclusion from the benefit of the gift of the headquarters and other lodges of the society makes it plain that it is the local body or association at Folkestone and no other body which is to benefit. Why, then, were there added the words "for the maintenance and improvement of the Theosophical Lodge at Folkestone" ? To my mind these words have been added in order to express that it is the permanency of the Lodge at Folkestone which the testatrix is seeking to secure, and this, I think, necessarily involves endowment. The use of the word improvement in addition to the word maintenance does not in my opinion weaken the argument. If endowment is of the essence of the gift in order to secure the purpose of maintenance there is nothing inconsistent in making that which is available for expenditure on maintenance, viz., the income of the fund, available also for some other purpose, such as improvement.

Counsel for the testatrix's sons argued that the words "carrying on" in the present case correspond to the word "maintenance" in *Macaulay v. O'Donnell* (3) that it necessarily implies permanency and that such permanency can only be achieved through an endowment. The question is, however, purely one of construction of the particular document, and I have come to the conclusion that on the construction of the will before me the society is free to expend the capital of the gift in carrying on the teachings of Rudolf Steiner. A complete discretion is given to the "Chairman and Executive Council of the Society." A discretion to do what ? To use the "remaining half of my residuary estate" for carrying on the teachings of Rudolf Steiner. "To use," according to the *NEW ENGLISH DICTIONARY*, at p. 471, heading No. ii, sub-heading 7, means "to employ for a certain end or purpose." I am unable to see that I should be allowing the chairman and executive council of the society to employ half the residuary estate of the testatrix at their discretion for the stated purpose if I were to limit them as regards capital to investing it in suitable investments, and I do not think the words "carrying on" justify me in imposing any such

limitations. This conclusion which I have reached purely on the wording of the will itself is, I think, supported by the facts that the constitution of the society does not appear to contemplate that the society, as distinct from the Anthroposophical Asscn., Ltd., should hold permanent endowments and that the testatrix had herself been treasurer of the society and a donor of money to the association; yet she has given half of her residuary estate, not to the association, but to the society.

- A Counsel for the testatrix's sons argued, however, that in any event a bequest cannot be upheld on the principle of *Re Drummond* (1) if there is such uncertainty as to the purpose on which the bequest is to be expended that the court would be unable to come to a conclusion as to the propriety of any item of expenditure that might be challenged. Counsel for the society agreed with this argument as a proposition of law, but said, and, in my judgment, correctly, that there was no such uncertainty in the case before me. The proposition of counsel for the testatrix's sons was that both the area and the content of Rudolf Steiner's teachings were so vague and indeterminate that the gift failed for uncertainty. So far as area was concerned, his argument was based on the wide range of Rudolf Steiner's writings as appeared from Harwood's affidavit. This was the catalogue of publications on Anthroposophy, issued by the Rudolf Steiner Bookshop, and it indicated that his writings ranged from philosophy and religion, through sociology, natural science, medicine and the art of healing to architecture, music and other arts. This is no doubt a wide range, but, although the range of subjects a man may claim to teach may cast doubts on the value of the instruction he gives, it cannot, I think, entitle the court to hold that his teaching is so uncertain that a gift to carry it on must fail.

- C As regards content, counsel for the testatrix's sons relies in part on a short extract appended to one of the affidavits and which is the only piece of Rudolf Steiner's original work which is before the court. I cannot accept the views there expressed; but, at any rate, on the question of uncertainty the value of the teachings is immaterial. Counsel for the testatrix's sons also said that the court was without any other information as to the nature of Rudolf Steiner's teachings, but we have the evidence of Harwood, who is the teacher in the principal school conducted on Rudolf Steiner's educational principles. In para. 6 of his affidavit he says as follows:

- E The teachings of Steiner are directed to the extension of knowledge of the spiritual in man and in the universe generally and of the interaction of the spiritual and the physical. He sought to show both how this knowledge could be acquired and how it could be applied for the benefit of man in a wide range of activities. It could be acquired, he taught, by the development of consciousness and with it of the perceptive faculties. He expounded a theory of knowledge, the philosophical basis of which is set forth by Steiner in certain of his books, in particular "The Philosophy of Spiritual Activity." In such books he sought to show the capacity of the spiritual or supersensible in the world at large. In other books Steiner taught a method of mental and moral discipline designed to train the imaginative, creative and devotional faculties of the mind and so to develop the faculties of spiritual intuition and perception. This teaching is to be found in such a book as Steiner's "Knowledge of the Higher Worlds and its Attainment." In yet other books and lectures Steiner taught and developed the application of this knowledge to religion and education generally including medicine, art and agriculture, for example, in his books called "Lectures to Teachers," "Christianity as Mystical Fact," and his published lectures on the four Gospels.

- G This evidence is not challenged. It indicates the general lines of Rudolf Steiner's teachings, and I cannot think that the court would be unable, if the matter ever arose for decision, to decide on the evidence which would be adduced whether any item of expenditure that was challenged was or was not being expended in carrying on the teachings of Rudolf Steiner.

- H I have, therefore, come to the conclusion that the principle of *Re Drummond* (1) applies and, subject to any observations that counsel may desire to make on the form of the declaration, I propose to declare that upon the true construction of the will of the testatrix the gift of one-half of the net residuary estate of the testatrix to the Anthroposophical Society in Great Britain is a valid and effectual gift to the society and that the society is at liberty to apply capital and income for the purposes of carrying on the teachings of Rudolf Steiner at the discretion of the chairman and executive council for the time being of the society.

As I have come to the conclusion that the gift does not tend to a perpetuity, it is not strictly necessary for me to decide whether the purpose for which this bequest was given is charitable; but as the matter was fully argued I might perhaps state shortly the reasons why I should have been inclined to hold that the purpose was charitable. I accept for my guidance the principles laid down in *Re Hummeltenberg* (5), to which counsel for the testatrix's sons called my attention. At pp. 240 and 241, RUSSELL, J., as he then was, referred to the well-known classification of "charitable gift" in *Pemsel's* case (6), and went on:

But no matter under which of the four classes a gift may *prima facie* fall, it is still, in my opinion, necessary (in order to establish that it is charitable in the legal sense) to show (i) that the gift will or may be operative for the public benefit, and (ii) that the trust is one the administration of which the court itself could if necessary undertake and control.

So far as the second point is concerned, I have already indicated my reasons for thinking that the court could, if necessary, control the administration of the trust, and I agree with counsel for the Attorney-General that there would be no difficulty in formulating a scheme. I cannot, therefore, hold that the trust is one which the court would be unable, if necessary, to undertake and control.

As regards the first point, I agree with counsel for the society (a) that on the evidence the teachings of Rudolf Steiner are directed to the mental or moral improvement of man; (b) that provided this teaching is not *contra bonos mores* the court is not concerned to decide whether it will result in mental or moral improvement of anyone, but only whether on the evidence before the court it may have that result. I cannot say that the only piece of Rudolf Steiner's writings before the court would be likely to have that effect on me, but that, as was pointed out by SIR JOHN ROMILLY, M.R., in *Thornton v. Howe* (7), is not the point. SIR JOHN ROMILLY, M.R., dealing with the question of charitable bequests, there said, at pp. 19, 20:

In this respect, I am of opinion that the Court of Chancery makes no distinction between one sort of religion and another. They are equally bequests which are included in the general term of charitable bequests. Neither does the court, in this respect, make any distinction between one sect and another. It may be, that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that they are subversive of all morality. In such a case, if it should arise, the court will not assist the execution of the bequest, but will declare it to be void; but the character of the bequest, so far as regards the Statute of Mortmain, would not be altered by this circumstance. The general immoral tendency of the bequest would make it void, whether it was to be paid out of pure personality or out of real estate. But if the tendency were not immoral, and although this court might consider the opinions sought to be propagated foolish or even devoid of foundation, it would not, on that account, declare it void, or take it out of the class of legacies which are included in the general terms charitable bequests.

What is there said of religion would apply, I think, also to logic. I have before me the affidavits of Harwood and Barfield, who both depose to the beneficial effect upon them. I have also Dr. Heidenreich's pamphlet giving his views on this point to the same effect. I have the further facts from Harwood's affidavit that societies for the propagation of Rudolf Steiner's teachings exist in many countries of Europe and in the United States of America. In these circumstances I should be inclined to hold that the purpose of the bequest is a perfectly valid charitable purpose.

This view seems to me to be supported by the decision in *Macaulay v. O'Donnell* (3). CLAUSON, J., in the court of first instance, says as follows, at p. 72:

The objects of the Theosophical Society are thus expressed in the rules: "(A) To form a nucleus of the Universal Brotherhood of Humanity, without distinction of race, creed, sex, caste or colour; (B) to encourage the study of comparative religion, philosophy and science; (C) to investigate the unexplained laws of nature and the powers latent in man". To my mind, on the authorities as they stand, if the objects had been confined to (B) and (C) there would have been a very strong case for saying the object of this society was an object for philosophical and scientific research and for the general improvement of those engaged in study of that character, and I think there would be a strong case for holding that the objects of the lodge were charitable. There is, however, a question because of object (A) which seems to me to be clearly associated with the other two. I must confess, speaking for myself, after all the arguments I have heard I am left in doubt as to whether or not object (A) does not have the effect of extending the objects of the society to objects which are not clearly charitable.

From this passage it would seem that CLAUSON, J., would have held that objects (B) and (C) of the Theosophical Society were valid and charitable purposes, and the observations of LORD TOMLIN in the House of Lords indicate that he did not dissent from this view. I will refer to one passage in the speech of LORD TOMLIN. After stating the objects of the Theosophical Society (which I need not read again), LORD TOMLIN said, at p. 62 :

- A Whatever may be said of the objects indicated in cl. (B) and (C) the object covered by cl. (A) read by itself cannot in my opinion be regarded as charitable. I am content to take the explanation of that clause given by Mr. Leonard Syer-Bristowe, who filed an affidavit on behalf of the respondents. He said : " In the first object of the society, namely, ' to form a nucleus of the Universal Brotherhood of Humanity without distinction of race, creed, sex, caste or colour,' the nucleus referred to means a central body of persons formed to study and understand the principles of theosophy as a nucleus to which other individuals can be added." I see no reason to think that this statement (though its admissibility as evidence is open to question) is not a fair and accurate statement of the purpose of the clause and the clause so regarded discloses in my opinion no charitable objects at all. But it is said that the three clauses should be read together and so read should be construed so as to confine the object of cl. (A) to the formation of a body devoted exclusively to carrying out the objects indicated in cl. (B) and (C) respectively. I do not think the clauses can be so read. Each clause in my opinion expresses a distinct and independent object. Even if, however, there be interdependence between the clauses I do not see how cl. (A) can be considered as having for its object merely the formation of a body to be devoted exclusively to carrying out the objects of the other two clauses.

The objects (B) and (C) of the Theosophical Society bear a distinct resemblance to the objects of the Rudolf Steiner teachings as explained by Harwood and Heidenreich, and had it been necessary for me to deal with the point I should have been inclined to uphold the gift to the Anthroposophical Society as a valid charitable gift.

- D *Appeal allowed. Leave to appeal.*

Solicitors : *Geo. W. Bower & Son* (for the plaintiff company) ; *Barfield & Barfield* (for the society) ; *J. B. Borer*, agents for *G. T. M. Methold*, Guildford (for the testatrix's sons and daughter, legatees) ; *Treasury Solicitor* (for the Attorney-General).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-law.]

E

Distinguished. PEEK v. PEEK.
[1948] 2 All E.R. 297.

PETTY v. PETTY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Henn Collins, J.), July 14, 1943.]

F

Divorce—Rehearing—Jurisdiction of divisional court in divorce—"Error" of court—Evidence adduced by each party—Application to adduce fresh evidence—Matrimonial Causes Rules, 1937 (S.R. & O., 1937, No. 1113), r. 36 (1).

The applicant petitioned for the dissolution of her marriage on the grounds of cruelty and desertion, her husband cross-petitioned on the ground of desertion by the applicant. Both spouses were heard in full and witnesses were heard on both sides, examined and cross-examined. The trial judge granted a decree in favour of the husband, having preferred his credibility as a witness. The wife applied under the Matrimonial Causes Rules, 1937, r. 36 (1), to the Divisional Court for a rehearing of the cause on the ground that the preparation of her case had been interfered with by enemy action, and that she was now able to produce evidence which, it was alleged, would show that credence should be attached to her case and not her husband's :—

G

HELD : to adduce fresh evidence where evidence had been given on behalf of each party would show that the trial judge believed the wrong set of witnesses and had made an "error" within the meaning of the Matrimonial Causes Rules, 1937, r. 36 (1). The Divisional Court, therefore, has no jurisdiction to rehear the dispute.

H

[EDITORIAL NOTE.] It was held in *Winter v. Winter* (4) that a new trial might be ordered by the Divisional Court in Divorce where a party had abstained from taking

any part in the previous proceedings. The application in that case could, of course, be viewed as an application to call further evidence, and thus the present application might be brought into line with it. The court has shown, however, that there is an important distinction between the position where one side has not been heard and that where both sides have been heard. In the latter case it is held that an application to call further evidence imputes an error of the court at the first hearing, and is an application which the Divisional Court has no jurisdiction to entertain.

AS TO REHEARING OF DIVORCE SUITS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 779, 780, para. 1233; and FOR CASES, see DIGEST, Vol. 27, p. 490, Nos. 5220-5233.] A

Cases referred to:

- (1) *Westhead v. Westhead and Gordon* (1876), 2 P.D.1.
- (2) *Robinson v. Robinson* (1877), 2 P.D. 77.
- * (3) *Manners v. Manners and Fortesque*, [1936] P. 117; [1936] 1 All E.R. 41; Digest Supp.; 105 L.J.P. 26; 154 L.T. 271.
- * (4) *Winter v. Winter*, [1942] P. 151; [1942] 2 All E.R. 390; Digest Supp.; 111 L.J.P. 95; 167 L.T. 258.
- (5) *Harriman v. Harriman*, [1909] P. 123; 27 Digest 321, 2995; 78 L.J.P. 62; 100 L.T. 557. B

APPLICATION under the Matrimonial Causes Rules, 1937, r. 36 (1), by the petitioner for a rehearing of a divorce petition. The facts are fully set out in the judgment of LORD MERRIMAN, P.

P. R. Hollins for the applicant.

Walter E. Lloyd for the respondent. C

LORD MERRIMAN, P.: This is a wife's application for the rehearing of a cause tried by HODSON, J. The application is based on the Matrimonial Causes Rules, 1937, r. 36, and it would be well that I should begin by reading the rule: D

(1) An application for rehearing of a cause heard by a judge alone where no error of the court at the hearing is alleged shall be made to a divisional court of the Probate Division.

(2) Any other application for rehearing shall be made by way of appeal to the Court of Appeal.

The wife is, therefore, asserting that her application fulfils the condition that no error of the court at the hearing is alleged, and, unless that condition is fulfilled, it is plain beyond any doubt whatever that this court has no jurisdiction and that the only jurisdiction to entertain the application rests in the Court of Appeal. E

This was a suit based upon charges of cruelty and desertion. It was a defended suit, and it was not merely a defended suit, but by his answer the husband made a cross-charge of desertion against his wife upon which he asked for a decree of dissolution. There was a contest which we are informed lasted for at least a day and a half. Witnesses were called on the one side and on the other, and in particular both spouses were heard in full, examined and cross-examined, the one asserting that all the matrimonial misconduct was on the one side and the other rebutting it and saying that the misconduct was on the other side in respect of the same parting and the events leading up to it. F

It has not been necessary, nor have we been invited, to go through the details of the evidence, but it is not disputed that, on the face of his judgment, HODSON, J., based his decision to dismiss the wife's charges of desertion and cruelty and to find in favour of the husband's cross-charge of desertion against the wife on his preference, plainly stated, in favour of the credibility of the husband as a witness. It is now said that the preparation of the wife's case was to some extent interfered with by enemy action, and that she has now obtained statements from several witnesses the result of whose evidence, it is asserted, will be to induce the tribunal, if any, which is ordered to rehear this cause to say that the party to whom the credence in this matrimonial dispute should rightly be attached is the wife and not the husband. G

In passing, though this is a minor point, I ought perhaps to call attention to the fact that, whereas the motion asks simply for a rehearing of the suit, there is no specific request for a reversal of the decree in favour of the husband. However, this is perhaps merely a technical point which could be put right; but, as counsel for the respondent quite rightly pointed out, if it is taken literally the wife's petition will be reheard with the assumed result that she might be given a decree on the ground of desertion, while at the same time the decree in favour of the husband for desertion might, so far as the motion is concerned, H

be allowed to stand, which would, of course, result in an absurdity ; but, as I say, I do not attach any practical importance to that point because it is merely a matter of putting the motion into proper form.

A The question for our decision is whether it is possible to bring an application for rehearing in these circumstances within the condition which appears on the face of the rule, that no error of the court at the hearing is alleged. I am going in a moment to refer to two reported decisions of this Divisional Court in which such an application has been granted, but, before alluding to those cases, I would like here and now to emphasise something which was made plain in both of them, and that is that this court bears very fully in mind the necessity of avoiding any semblance of trespassing upon the exclusive jurisdiction of the Court of Appeal. We feel, and we have said this very emphatically on these earlier occasions, that the peculiar jurisdiction vested in this court by r. 36 and its predecessor in the Matrimonial Causes Rules, 1924, should only be exercised in cases in which it is plain that this court is intended to have the jurisdiction to the exclusion of the Court of Appeal ; and that brings me to the point at issue : what exactly is meant by the words "no error is alleged" ? In considering this question, we have tried, not for the first time, to find out whether there is any historical meaning to be attached to these words—for instance, should the question, "error" or "no error," be decided upon the principles applicable to proceedings in Error as that procedure was understood before it was abolished ? I cannot think that that can be so here. It would, I think, be a strained and artificial interpretation to attach to the word "error," first used in this connection in Rules promulgated in 1924, the technical meaning attached to it in procedure which was abolished 50 years before.

D On the other hand, we have again gone rather exhaustively through the statutes and the earlier rules governing every form of appeal or application for a rehearing since the Matrimonial Causes Act, 1857, and, so far as is necessary to understand that Act, before that time. For example, the Matrimonial Causes Act, 1857, s. 23, gives a special jurisdiction to set aside decrees for judicial separation when a party is able to show, first, that the decree was given in absence, and, secondly, that there is reasonable ground on the merits for setting it aside—I am paraphrasing the section—and, further, there was power originally vested in the full court, but subsequently by statute it was transferred to the Judge Ordinary, to order a new trial where questions of fact had been decided by a jury. I need not go into the limitations upon that, but it was a jurisdiction which was clearly established, and, what is more, it is a jurisdiction which was held by the Court of Appeal, when the Court of Appeal was set up, to have survived the setting up of that court. That is made perfectly clear by *Westhead v. Westhead* (1), which was reaffirmed the following year in *Robinson v. Robinson* (2), both decisions of the Court of Appeal. The latter case was argued by counsel of such calibre as to make it plain that it was a test case intended to induce the Court of Appeal to reconsider the decision which it had already given in *Westhead's* case (1).

F By the Judicature Act, 1881, s. 9, the power to grant an application for a new trial was transferred from the full court of this division to the Court of Appeal, and the only exception to their universal jurisdiction to deal with applications for new trials is this special case provided for by r. 36. I think, myself, it is impossible to attach to the word "error" any interpretation or limitation based solely upon any of the earlier history of this court. I think it is much more likely that the words were deliberately chosen as being supposedly apt to impose a limitation upon our special jurisdiction to order a rehearing, notwithstanding the vesting in the Court of Appeal of the general right to deal with such applications from this division. I think, in other words, that this phrase has to be translated upon its own merits.

H The question then is : Where is the line to be drawn ? I think, if I remember rightly, it was LORD BLACKBURN who said that although it might be very difficult to say where the line should be drawn, it may be quite easy to say that a particular case was on one side or the other of any line that could possibly be drawn, and I have no doubt at all that the case to which I myself was a party, *Manners v. Manners* (3), was on the right side of any such line, because it depended upon our finding that there had been complete, if unintentional, failure in service of the process ; and that justification for the decision is in no

way affected by the subsequent history of the case in question. Equally I have no doubt at all that a divisional court consisting of LANGTON and HENN COLLINS, JJ., was right in its decision in *Winter v. Winter* (4). That case is rather more difficult, because had the application been one in a common law case it is extremely doubtful whether any Court of Appeal would have listened to it, for the simple reason that the spouse making the application, the husband, had deliberately abstained from taking any part in the proceedings at all. But, of course, the court bore in mind the fact so often stressed both in this division and in the Court of Appeal, and nowhere more clearly than in the decision of the full Court of Appeal in *Harriman v. Harriman* (5), that in these matrimonial disputes there is another interested but uncited party, namely, the State, and that it has an overriding interest that the court should be satisfied not merely in the interests of the parties as parties, but in the interests of public morality and the preservation of the sanctity of marriage that a decree has been rightly obtained. Those two cases, which, so far as I know, are the only two cases in which a decision of this court on this point has been reported, are, as I think, clearly on the right side of the line; but equally it seems to me impossible to assert that a case in which a judge having seen both spouses and their respective teams of witnesses and having deliberately attached the credibility to one side and not to the other, and in which this court is asked to say that the production it may be of a document or a new witness or a new set of witnesses is going to induce some other tribunal to say that the judge believed the wrong set of witnesses, is on the same side of the line or that it is possible to assert of such a case that no error of the court at the hearing is alleged.

In saying this I do not ignore the point that in a case in which the process has not been served, or in which the party has deliberately abstained from attendance, it is not possible logically to deny that it is being said that the judge has believed a witness wrongly. In such cases, of course, an affidavit has been sworn that the process was served—it may have been mistaken identity, or it may have been perjury—and the petitioning spouse has sworn to the truth of his or her story, whatever it may happen to be, and the witness of adultery, if the charge was adultery, has sworn to the fact; again it may be mistaken identity, or, as, I am afraid, is sometimes the case, it may be deliberate perjury. But although it is true that what is being asked is that it shall ultimately be held that the judge believed a witness wrongly and at the rehearing the judge is to be invited to believe witnesses who will swear exactly the opposite, still, in those circumstances, unless there was something which made the story self-condemnatory, the judge had no option but to believe the witness; there was no contest; there was no test of the credibility of the witnesses believed, unless it were what I might call some psychic test which would manifest itself through mere demeanour during the brief appearance of the witness in the witness box. There was no sort of possibility of testing the credibility of the evidence. Such a case as the present is, in my opinion, on the other side of any line which can be drawn, and is quite plainly a case which must be dealt with by the Court of Appeal. In my opinion this application is misconceived and must be rejected.

HENN COLLINS, J. : I agree. I do not believe it is desirable, even if it were possible, to define the words "error of the court" so as to embrace all cases which fall within them and exclude those which do not. One thing, however, seems to me to be quite clear, that, if it is alleged that on the materials before it that the court has arrived at a wrong conclusion, that is an error of the court. What exactly is meant by "the material before the court" is another matter. In this case the materials before the court were witnesses on one side or the other, and the stories to which they deposed. The court accepted the credibility of one set of witnesses and rejected it on the other. It is now said that in truth and in fact HODSON, J., believed the wrong set of witnesses; if he had known some separate facts which it is proposed to adduce he would have discredited those whom he believed and believed those whom he discredited. That really must mean that he was unable to arrive at what is now alleged to be the truth on the materials before him—in other words, that he made an error. As long as those are the circumstances, I myself do not see how a case can be brought within the exception expressed in the words "an error of the court." I have said that I do not propose to try and define what is meant by those words, but I

am not at all sure that they are not, as I said in the course of argument, so to speak the mummified remains of the Matrimonial Causes Act, 1857, s. 23, which created an exceptional jurisdiction, which was vested in the Judge Ordinary, to set aside decrees in the cases in which he had sole jurisdiction—that is to say, jurisdiction to act alone—where the respondent had not appeared. Without saying that the present rule is confined to such cases, it is to be observed that in the only two reported cases in which the scope of this rule has come in question, sect. 23 of the 1857 Act, had it still been operative, would have applied. With that addition I entirely agree with what has fallen from LORD MERRIMAN, P., and this application must be dismissed.

Application dismissed. No order as to costs.

Solicitors : *Gibson & Weldon*, agents for *Thomas (Hobson)*, *Sherwell & Wells*, Portsmouth (for the applicant) ; *Amphlett & Co.*, agents for *R. V. Stokes & Metcalfe*, Cosham (for the respondent).

[*Reported by D. ARMSTEAD FAIRWEATHER, Esq., Barrister-at-Law.*]

Re GOSSET'S SETTLEMENT, GRIBBLE v. LLOYDS BANK AND ANOTHER.

[CHANCERY DIVISION (Cohen, J.), July 9, 1943.]

Settlement—Construction—Strict settlement—Limitation of tenancy in tail—Remainder to first and other sons of younger daughters in tail male—Whether entitled successively as tenants in tail male.

By a deed of settlement certain property was limited to the settlor's eldest son, A.W.G., for life, with remainder to the first and other sons of A.W.G. successively in tail male. In default of such issue there were similar limitations to the other sons of the settlor and then to his eldest daughter for life, with remainder to her first and other sons successively in tail male, and, failing such issue, to his other daughters successively with remainder to their first and other sons in tail male. The question at issue was whether on the death of such a younger daughter who had become tenant for life, the elder of her two sons became tenant in tail or whether he and his younger brother were jointly entitled :—

HELD : the limitation to "the first and other sons" of the younger daughters in tail male imported that they were to be entitled successively as tenants in tail male.

[**EDITORIAL NOTE.** The strict settlement in general followed the principle of primogeniture and the greater part of the property was given to the eldest child. This has led to the general rule of construction of such settlements that successive interests in the whole property are intended and not interests as co-owners. The matter here considered is well-settled in the case of the construction of wills but it was suggested that a different rule applied to settlements since a deed is more strictly construed than a will.

AS TO LIMITATIONS IN A SETTLEMENT OF REALTY FOR SONS IN REMAINDER, see HALSBURY, Hailsham Edn., Vol. 29, pp. 626, 627, para. 905 ; and FOR CASES, see DIGEST, Vol. 40, pp. 636-638, Nos. 1753-1760.]

Cases referred to :

* (1) *Lewis d. Ormond v. Waters* (1805), 6 East. 336 ; 44 Digest 1013, 8719.

(2) *Cradock v. Cradock* (1858), 32 L.T.O.S. 48 ; 44 Digest 609, 4367.

(3) *Surtees v. Surtees* (1871), L.R. 12 Eq. 400 ; 44 Digest 1014, 8726 ; 25 L.T. 288.

(4) *De Windt v. De Windt* (1866), L.R. 1 H.L. 87 ; 44 Digest 1014, 8725 ; 35 L.J.Ch. 332 ; 14 L.T. 529.

SUMMONS by the trustee of the settlement to determine the extent of the interest limited by the words "first and other sons" in a deed of settlement.

C. V. Rawlence for the plaintiff trustee.

H. A. Rose for the defendant, Lloyds Bank, executor of the elder son.

C. D. Myles for the younger son.

COHEN, J. : This summons raises a question as to the construction of an indenture dated April 11, 1876, made between Arthur Gosset, the settlor, of the one part, and Arthur Wellesley Gosset, his eldest son, of the other part. By this indenture certain land and hereditaments were settled in strict settle-

ment. The first limitations were to the use of Arthur Wellesley Gosset for life without impeachment of waste, with remainder :

... to the use of the first son of the said Arthur Wellesley Gosset and of the heirs male of the body of such first son lawfully issuing and in default of such issue to the use of the second and every other son and sons of the said Arthur Wellesley Gosset severally successively and in remainder according to their respective seniorities and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing the elder of such sons and the heirs male of his body issuing being always to be preferred to and to take before the younger of such sons and the heirs of his and their body and respective bodies issuing and in default of such issue ...

Pausing there, it is clear that the effect of the settlement so far is that on failure of the limitations in favour of the eldest son of Arthur Wellesley Gosset and his issue successive interests are given to his younger sons and their respective issue. Then follow similar provisions as to the second, third and fourth sons of the settlor. The settlement goes on to provide that in default of the issue of any son the property is to be held :

... to the use of the first daughter of the said Arthur Gosset for life and after her decease to the use of her first and other sons and of the heirs male of the body and bodies of such first and other sons successively and in remainder ...

Here again the principle of successive interests is maintained. The settlement then proceeds as follows :

... and in default of such issue to the use of the second and every other daughter and daughters of the said Arthur Gosset severally successively and in remainder according to their respective seniorities. ...

Here, also, the principle of succession is maintained. Now come the words which are said to give rise to an ambiguity :

... and after her and their decease to the use of her and their first and other sons and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing the son and sons of the elder of such daughters and the heirs male of his and their body and respective bodies issuing being always to be preferred to and to take before the younger of such daughters and before the son and sons of the younger of such daughters and the heirs of her and their body and respective bodies issuing and in default of such uses to the use of the said Arthur Gosset his heirs and assigns for ever.

To state shortly the history of the family, there were four sons and eight daughters. The four sons all died without issue except one, who had a child who pre-deceased his father but died without disentailing. On June 10, 1941, a daughter, Octavia Gosset, the then tenant for life, died a spinster, and on her death the children of another sister or one of them became entitled to the settled property. There were two such children, the elder of whom is dead and is represented in these proceedings by his executor, Lloyds Bank Ltd., the other of whom is alive. The question raised by the summons, putting it shortly, is whether on Octavia's death the elder son became entitled as tenant in tail male in possession or whether he and his brother took interests as joint tenants or tenants in common. If the elder son became entitled as tenant in tail male, he executed a disentailing deed before he died.

My attention has been called to a number of authorities dealing with the construction of limitations similar to those I am considering. They are all of them to be found in wills. I shall refer to two of these cases later on, but for the moment it is sufficient to say that they leave me in no doubt that, were I construing a will, I should be bound to hold that the interests were successive and that the elder son became entitled to the property as tenant in tail male. Counsel for the second defendant, however, points out that a deed is construed more strictly than a will. I agree, and I must, therefore, see whether there is to be derived from the cases any general principle of construction which is applicable not only to wills but to deeds. The important words in the limitation I am considering are the words "first and other sons" and I think that counsel for the first defendant is right in saying that there is a general principle of construction not confined to wills which binds me to hold that these words connote successive interests. That principle is, in my opinion, established by *Lewis v. Waters* (1). In that case, according to the headnote :

Under a devise to D.O., the testator's eldest son, for life, remainder to trustees, etc., remainder to the first and other sons of his said eldest son and their heirs, and for want

of such issue to the testator's second son, J.O., etc., with like remainders to his first and other sons; and for want of such issue to the testator's own right heirs; held, that the first and other sons of D.O. the eldest son took estates tail in succession, and consequently the remainders over vested, and were not contingent and defeated upon the event of D.O. having a son, who died in the lifetime of D.O.; and, therefore, that D.O. having died without any son living at his death, but leaving daughters, a son of J.O. was entitled to take in preference to such daughters of his elder brother.

A The judges were unanimous in holding that the limitation to "the first and other sons of D.O." conferred successive interests. GROSE, J., at p. 345, says:

The limitation to "the first and other sons" imports that they were to take successively according to priority of birth; it is the abridged language of conveyances. And then the words "for want of such issue," referring to the antecedent limitation to the first and other sons of David and their heirs, will give them estates tail, according to all the cases, and will vest the remainder to John Ormond, the brother of David.

B It appears clear from this judgment that, in the view of GROSE, J., the words "first and other sons" in conveyances and not merely in wills do import the idea of successive interests. That being so, I think I am bound to place the same meaning on those words in the limitations in the deed before me.

Lewis v. Waters (1) was followed in *Craddock v. Craddock* (2), and other cases. I will not refer to those cases in full, but I would like to adopt the observations which STUART, V.-C., made in *Craddock v. Craddock* (2) as applying to this case.

C In my view, the construction which I am placing on this deed is a construction which gives a meaning and effect to every word of the language which the settlor has used, and the language of the settlor, which gave the estate to "the first and other sons" is as much answered by giving to all in succession as in any other way. I am satisfied that, if there be a doubt as to the meaning of those words, the construction I am adopting is the only construction which will bring the particular limitation into accord with the consistent scheme to be found in the settlement as a whole.

D My attention was directed to two cases which were said to be authorities the other way; *Surtees v. Surtees* (3), and *de Windt v. de Windt* (4), but in neither of these cases were words "first or other son" or any words at all like them used, and I think they are clearly distinguishable from the case with which I have now to deal.

E I therefore declare that upon the true construction of the settlement the freehold property at Eltham in the county of Kent thereby settled and now represented by a sum of stock, was limited, subject to certain prior interests which have failed or determined, to the said Lancelot Horace Augustus Shadwell as tenant in tail male.

Declaration accordingly.

F Solicitors: *Dimond & Son*, agents for *Blaker & Peters*, Chichester (for the plaintiff trustee); *Andrew, Purves, Sutton & Creesy*, agents for *Blaker & Peters*, Chichester (for the defendant, Lloyds Bank); *Robins, Hay & Waters* (for the other defendant).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-law.]

G MATTOUK v. MASSAD.

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Lord Porter, Lord Clauson and Sir George Rankin), Aug. 5, 1943.]

Privy Council—West Africa—Master and servant—Seduction—Rape—Whether action can be brought if rape proved.

H In an action for seduction, the master's cause of action is for the loss of the girl's services. It is immaterial whether the loss of services is caused by intercourse with consent or rape, for the action may be based on the special wrong done to the master by persuading the girl to have intercourse, or on the wrong done to the girl by the felony of rape by which the master suffered damage.

[EDITORIAL NOTE.. It has been thought that the term seduction implied a consent by the seduced person, although that consent was obtained by improper means. It was, therefore, suggested that, where rape was proved, no seduction could be alleged.

The Privy Council have rejected this contention and have held that an action for seduction may be brought even where the facts disclose a case of rape.

AS TO WHEN ACTION MAY BE BROUGHT FOR SEDUCTION, see HALSBURY, Hailsham Edn., Vol. 22, p. 247, paras. 428, 429; and FOR CASES, see DIGEST, Vol. 34, pp. 171-174, Nos. 1342-1372.]

Cases referred to :

(1) *Norton v. Jason* (1653), Sty. 398; 34 Digest 173, 1362.

* (2) *Osborn v. Gillett* (1873), L.R. 8 Exch. 88; 34 Digest 182, 1480; 42 L.J.Ex. 53; 28 L.T. 197.

APPEAL by the plaintiff from a judgment of the West African Court of Appeal who set aside a decision of FUAD, J., in the Supreme Court of the Gold Coast in favour of the plaintiff. The plaintiff brought an action against the defendant for the seduction of his daughter. The girl was 15 years of age and living with her father. She deposed that she was, in effect, raped by the defendant on two occasions. The defendant gave evidence and denied the whole of the girl's story. There was nothing intrinsically improbable about the girl's story of the first occasion, but the circumstances in the second case threw the gravest suspicion on the credibility of her story. No corroborative evidence of the girl's story was offered and the Court of Appeal refused to accept it. Both the trial judge and the Court of Appeal attached importance to the difference between rape and intercourse with consent, and appear to have inclined to the view that proof of the former would not support a case of seduction. On this point only the decision of the Board is reported.

C. S. Rewcastle, K.C., and *J. P. Valetta* for the appellant.

H. J. Wallington, K.C., and *E. Holroyd Pearce* for the respondent.

LORD ATKIN [delivering the judgment of the Board]: The father's or master's cause of action is for the loss of the girl's service; and it seems illogical in the extreme to suppose that he could recover if the girl yielded, but not recover if he lost the service because the girl was forced. In one of the earliest cases, *Norton v. Jason* (1) the declaration was in trespass on the case that the defendant assaulted and carnally knew the plaintiff's daughter *per quod*, etc. The case turned on the point that, although the daughter had lost her cause of action in trespass by reason of limitation (then 4 years), the father retained his independent action in case with a longer period of limitation. The fact is that, in the case of rape, the master would have precisely the same action, basing it on the wrong done to his servant, as in the case of any other tort to the servant by which the master was deprived of her service. The action can be brought for seduction whether based on the special wrong done to the master by persuading the girl to have intercourse or on the wrong done to the girl by the felony of rape by which the master suffered damage. It has also been decided that the fact that the wrong to the servant was a felony has no bearing on the master's action, see *Osborn v. Gillett* (2), where the alleged felony was manslaughter.

Their Lordships cannot pass over what appears to have been an unfortunate proceeding of the trial judge in sending to the Chief Registrar of the Supreme Court of the Gold Coast, after the hearing and decision of the appeal, what purports to be a fuller statement of his reasons for judgment as delivered by him. It is not clear at what stage these notes were prepared; the trial judge says they were intended for the assistance of counsel for the defence: but there can be no doubt that part of the note must have been prepared after the criticism of the Court of Appeal on the absence of any detailed reference to the evidence. However well meaning the intention, it appears to their Lordships that any practice of preparing such a note and placing it on record after appeal is objectionable, and it is to be hoped that it will not be repeated. Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed with costs.

Solicitors: *A. L. Bryden & Co.* (for the appellant); *Layton & Co.* (for the respondent).

[Reported by HUBERT B. FIGG, ESQ., Barrister-at-Law.]

Re CORELLI deceased, WATT AND OTHERS v. BRIDGES AND OTHERS.

[CHANCERY DIVISION (Cohen, J.), July 29, 1943.]

Charities—Charitable gift—Trust of premises as hostel for distinguished foreign visitors, as air zone for the health of the town and as meeting place for scientists connected with a certain society—Trust of income of estate to maintain premises and for promotion of arts—Gift to legatees of right to reside on premises.

By her will dated June 5, 1922, the testatrix directed her trustees to hold the residue of her estate and effects including a house called Mason Croft, after the decease of a tenant for life, upon trust to preserve the same intact and in good condition; and she provided for the enclosure of the freehold land as a breathing space and air zone for the health of the town of Stratford-on-Avon; she further declared an intention that the ultimate trusts of the premises should, after the decease of certain specified beneficiaries, be continued in perpetuity for the benefit and service of distinguished visitors from overseas to be selected or recommended by a named society, and also as a meeting place, as and when required by the President of the Royal Institution of Great Britain, for the annual or provincial gatherings of scientists connected with that institution, so that the premises should be at the service of any such selected or distinguished person or persons whom her trustees should approve and who otherwise would seek quarters in an hotel; and she declared that the income of her estate should be held for the upkeep of Mason Croft to be used on the lines and with the intention as manifested in the Leighton House Assocn. of London for the promotion of science, literature and music among the people of Stratford-on-Avon. The testatrix further gave the right to certain legatees to reside at Mason Croft. The testatrix died on Apr. 21, 1924, and the tenant for life on Nov. 20, 1941. The trustees then took out a summons to determine the validity of the dispositions of Mason Croft and of the residuary estate:—

HELD: the dominant motive of the gift was the establishment in perpetuity of a hostel for distinguished foreign visitors and this was not a valid charitable bequest. The trusts were, therefore, void for remoteness, and the directions as to the residence of the legatees in the house, being linked therewith, also failed.

[EDITORIAL NOTE.] This is a case of a gift for a number of purposes, some of which are charitable and some non-charitable. In deciding whether such a gift can be supported the court has construed the will in order to find the dominant motive of the gift. Having come to the conclusion that the dominant motive was to apply the gift to purposes which were clearly not charitable in law, it is held that the gift fails.

AS TO GIFTS FOR BENEFIT OF INDIVIDUALS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 128, 129, para. 170; and FOR CASES, see DIGEST, Vol. 8, pp. 264, 265, Nos. 258-267.]

Cases referred to:

- (1) *Re Ogden, Taylor v. Sharp* (1909), 25 T.L.R. 382; 8 Digest 297, 738.
- (2) *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633; 8 Digest 327, 1099; 52 L.J.Q.B. 193; 48 L.T. 239.
- * (3) *Houston v. Burns*, [1918] A.C. 337; 8 Digest 297, 739; 87 L.J.P.C. 99; 118 L.T. 462.
- * (4) *Re Spence, Barclays Bank, Ltd. v. Stockton-on-Tees Corpn.*, [1938] Ch. 96; [1937] 3 All E.R. 684; Digest Supp.; 107 L.J.Ch. 1.
- (5) *General Medical Council v. Inland Revenue Comrs.* (1928), 97 L.J.K.B. 578; Digest Supp.; 139 L.T. 225.

SUMMONS taken out by the trustees of the testatrix's will to determine the validity of certain gifts made therein. The facts are fully set out in the judgment.

W. F. Waite for the trustees of the testatrix's will.

H. O. Danckwerts for the Attorney-General.

C. L. Fawell for the Solicitor-General.

J. Pennycuik for other interested parties.

COHEN, J.: By her will dated June 5, 1922, Marie Corelli devised:

... everything of which I die possessed to my dear life-long friend Bertha Vyver unconditionally for her lifetime according to the terms mutually arrived at and agreed

upon by us both that no relative of the said Bertha Vyver shall ever participate in any of the said property or possession or inhabit Mason Croft at any time.

Then after appointing first executors and then trustees she made the following unusual provisions :

I place the residue of my estate and effects (not hereby otherwise disposed of) including my estate at Mason Croft in the care of my trustees upon trust that nothing whatsoever be sold or disposed of out of Mason Croft and that all books pictures furniture curios and household goods shall be kept intact and carefully preserved as they now are A
And upon trust after the decease of the said Bertha Vyver my trustees shall secure the sanction of the Board of Trade or other appropriate authority to the formation of a company (excluding objects of profit or gain) to be incorporated upon the lines of those of the Leighton House Assocn. London or alternatively to create by deed a trust in either case to provide for the ultimate preservation and use of my estate inclusive of Mason Croft the land adjoining known as the Paddock and the garden beyond it known as the Firs so that no portion of this freehold land shall be sold or built upon but be preserved intact and in good condition with all timber thereon special care to be taken B
of the ancient ilex tree at the bottom of the Paddock estimated to be the oldest tree in Stratford-upon-Avon and that all this freehold land shall be enclosed as a breathing space and air zone for the health of the town of Stratford-upon-Avon now endangered by the overcrowding of buildings entirely disadvantageous to the well-being of the population my intention being that the ultimate trusts of Mason Croft shall after the decease of all the beneficiaries specifically named by me be continued in perpetuity for the benefit and service of distinguished persons visiting Stratford-upon-Avon C
from far countries who shall be selected and recommended to my trustees by the Council of the Society of Authors and also as a meeting place as and when required by the President of the Royal Institution of Great Britain for the annual or provincial gatherings of scientists connected with that institution so that the house and grounds appertaining thereto as hereinbefore described shall be at the service of any such selected or distinguished person or persons whom my trustees shall approve visiting the town of Stratford-upon-Avon and who would otherwise seek their quarters in a hotel only out of this provision absolutely excluding actors actresses and all persons connected with D
the stage But in particular I declare that my trustees shall hold the income of my estate and the moneys obtained from any copyrights and the investments made in my property absolutely in trust for the upkeep and preservation of Mason Croft to be used on the lines and with the intention as manifested in the Leighton House Assocn. London for the promotion of science literature and music among the people of Stratford-upon-Avon the rules of the said association to apply in the same manner as at Leighton House and this intention to be carried out and maintained by my trustees upon the decease E
of my friend the said Bertha Vyver and I most strictly enjoin that no person or persons connected with Stratford-upon-Avon officially or otherwise shall be permitted to co-operate or be connected in the carrying out or maintenance of the said trust and association or be employed in any portion of the said trust or association whatsoever.

Then, after giving directions as to a portion of her property known as Trinity College, which are not material to the questions I have to determine, she gave certain legacies and devises, in each case free of legacy and succession duty, F
to be effective from the date of the decease of her friend Bertha Vyver. These legacies and devises are ten in number, but only Nos. 1, 2, 3 and 4 are relevant to the question now before me. These were given in the following terms :

1. To my faithful servant Alfred Bridges for life and after his decease to his son Eric Bridges his heirs and assigns the two houses in Church Street now tenanted one by Mrs. Quatremain and one by Mr. Marshall on condition that they shall not be demolished but kept in good condition as antique buildings and I give to the said Alfred Bridges G
the sum of £100 together with all articles of furniture and pictures now lent to him by me at his house Winton House and I request him to remain custodian of Mason Croft under the association rules organised by my trustees at a suitable salary in order that he and his wife and son may always have a home there. 2. To my maid Augusta Threadgold I give the Croft Cottage in the Paddock which she now occupies for her life the said cottage to be re-included in the Mason Croft estate after her decease. Also I give to her £100 and my diamond and aquamarine brooch. 3. To my second maid Bella Barber I give £100 and the choice of any of my jewelled ornaments also the right H
to remain in Mason Croft as her home with the hope that she will find use for her excellent services in the upkeep and preservation of the house And apart from these specified bequests I give to the said Augusta Threadgold and Bella Barber all my wardrobe linen and personal ornaments in jewellery or other objects in grateful acknowledgment of their affection and care for me and knowing that in the friendship they have for each other they will divide these gifts between them in loving memory of me. 4. To my cook Anne Dance the sum of £100 and the right to remain in Mason Croft as long as she wishes.

The testatrix died on Apr. 21, 1924, and probate of her will was granted on July 8th, 1924. Bertha Vyver, the tenant for life, died on Nov. 20, 1941, and the question has now arisen as to the validity of the dispositions of Mason Croft and the residuary estate after her death. There is a doubt as to whether the testatrix left any next of kin entitled under the statutes of distribution. If she did not, the Crown will be entitled in the event of an intestacy. Accordingly, as the Attorney-General is a necessary party to argue that the bequest of Mason Croft and the residuary estate is a valid charitable bequest, the Solicitor-General has been made a party to represent the Crown and argue that this gift is invalid. The defendants, Bridges and Barber, have been joined as defendants to support that part of the provisions expressed to be made in their favour which purport to give them a right to have a home in Mason Croft.

- A I will deal first with the question whether the dispositions of residue to take effect after Bertha Vyver's death are valid charitable bequests. Counsel for the Attorney-General argued, and I think rightly, that the directions as to keeping the contents of Mason Croft intact on the premises, as to the formation of a company or creation of a trust to carry out the testatrix's objects and as to the exclusion of all persons connected with Stratford-on-Avon from all part in the execution of the trusts, are mere machinery and throw no light on the question I have to decide. On this basis there appear to be three portions of the devise and bequest which have a bearing on the matter: (a) the direction to enclose all the freehold land as a breathing space and air zone for the health of the town of Stratford-on-Avon; (b) the expressed intention that the ultimate trusts of the premises shall, after the decease of all the specifically named beneficiaries, be continued in perpetuity for the benefit and service of distinguished visitors from over-seas to be selected or recommended by the Council of the Society of Authors and also as a meeting place as and when required by the President of the Royal Institution of Great Britain for the annual or provincial gatherings of scientists connected with that institution so that the premises should be at the service of any such selected or distinguished person or persons whom her trustees should approve and who would otherwise seek quarters in an hotel; and (c) the declaration as to the income of the estate and that it should be held for the upkeep of Mason Croft:

- E . . . to be used on the lines and with the intention as manifested in the Leighton House Assn. of London for the promotion of science literature and music among the people of Stratford-upon-Avon.

My attention was directed to a number of cases bearing on the point which I have to decide. These and other cases at which I have looked appear to settle the following points: (i). The fine arts are not in themselves regarded as objects of charity although they would be if the element of instruction is introduced.

- F That appears from *Re Ogden* (1). (ii). A trust for the benefit of the inhabitants of a particular place is charitable: *Goodman v. Mayor of Saltash* (2); but this principle will not apply if the objects by which the inhabitants are to be benefited are too uncertain: *Houston v. Burns* (3). If, however, they are sufficiently certain, a trust may be a valid charitable trust notwithstanding that, but for the association with the inhabitants of a particular place, the purposes might not have been charitable: see *Re Spence* (4), where LUXMOORE, J., commenting on *Houston v. Burns* (3), said, at pp. 103, 104 ([1937] 3 All E.R., at p. 689):

- G In that case the gift in question was to a number of individuals as trustees and was to be applied by them "for such public, benevolent or charitable purposes in connection with the parish of Lesmahagow or the neighbourhood in such sums and under such conditions as they in their discretion shall think proper." The House of Lords held that the gift was void for uncertainty notwithstanding the express limitation to the particular locality named. The ground of the decision was that if the clause was to be construed (as in fact it was construed by the House of Lords) as being for such public, or benevolent or charitable purposes connected with the locality as the trustees thought proper, it was bad because the purpose was too vague and the vagueness of the purpose was not cured by the specification of the locality to be benefited: see the judgment of LORD FINLAY, L.C.; but the learned Lord Chancellor pointed out in his speech that, in the case of a gift of this nature the addition of a local limit might well make a difference in favour of its validity if the gift "was in favour of institutions within a certain area, the particular institution to be selected by the trustee." LORD ATKINSON said in the course of his judgment: "It is the insufficiency of these words 'public purposes,' because of their vagueness and uncertainty, to identify and fix the limits of the class

of individuals or objects from which the trustees are to choose that renders void a bequest for 'public purposes.' That is their weakness, and that weakness is not cured by coupling them with a definition or description of the physical area within which the public purposes are to be comprised." But he went on to point out that the case under consideration had no resemblance to those in which property is vested in trustees to be applied for the support or benefit of such institutions of a particular class as may be in existence, or in the course of creation, in any given town or area at the time at which the will speaks. There is no vagueness or uncertainty in such cases at all." And LORD SHAW said: "Local limitations expressed by the words 'in connection with the parish of Lesmahagow or the neighbourhood' do not add any definiteness to the class of purposes or objects which it was in the mind of the testator to benefit or promote. The foundation of political clubs, schools of art, a zoological garden, or an astronomical observatory in Lesmahagow, along with a thousand other things in connection with that parish or its neighbourhood, might, in the trustees' opinion, be excellent, but the bequest is void by reason of the uncertainty as to which of them or which class of them the trustee meant to favour. This is exactly the reason which invalidates the bequest where there is no geographical reference. Local limitations do come into play and make the bequest effective if and when they provide the means of identifying the particular objects or institutions which the testator has meant to benefit."

(iii). A trust for the benefit of a particular profession is not a valid charitable gift, even though the benefit conferred on the profession may also enure to the benefit of the country as a whole: *General Medical Council v. Inland Revenue Comrs.* (5).

Applying these principles to the bequest I have to consider, it seems to me that, if I come to the conclusion that the dominant motive of the testatrix is to be found in the first and third of the three portions of the bequest to which I have referred above, or in either of them, the bequest will be a valid charitable bequest. Whether or not the establishment of "breathing spaces and air zones" or "the promotion of science, literature and music" are, apart from the association of these purposes with a particular locality, valid charitable objects I need not decide; for I feel no doubt but that, on the authority of the cases to which I have referred, I should be bound to hold that a bequest for the carrying out of those purposes in Stratford-on-Avon would be a valid charitable bequest.

The second portion, however, presents much greater difficulty. I do not think the establishment in perpetuity of a hotel for the entertainment of distinguished foreigners would be a valid charitable bequest and the fact that the premises were also to be available for the annual and provincial meetings of scientists connected with the Royal Institution would not suffice to save the bequest. If, therefore, I come to the conclusion that this portion expresses the dominant motive of the testatrix, I am bound to hold that the gift fails. This portion of the gift starts with the words "my intention being" and, having stated her intention, she goes on to express her objective as being "so that" the house and grounds should be at the service of selected and distinguished persons. *Prima facie*, therefore, the testatrix has herself indicated her dominant motive and I do not think I can properly regard this intention as being subservient to a more general intention to benefit the inhabitants of Stratford-on-Avon. The directions as to the open space and air zone are only casually introduced in connection with the directions as to the machinery to be employed in giving effect to the testatrix's bequest. The direction as to the promotion of science, literature and music appear to be ancillary to her direction that the income of her estate and copyrights shall be used for the upkeep and preservation of Mason Croft, her intention as to which she had already expressed in what I have called the second portion of the bequest.

In these circumstances, although the question is not without difficulty, I think I am bound to come to the conclusion that the dominant motive of the testatrix is to be found in the second portion of the bequest which begins with the words "my intention being." It therefore follows that, in my judgment, the trusts contained in the will of the testatrix with regard to Mason Croft and its contents and any property the income of which was directed thereby to be held in trust for the upkeep and preservation of Mason Croft are void for remoteness. In view of the uncertainty as to whether the testatrix left surviving any heir-at-law or next of kin, I must also direct the inquiry indicated in para. 3 of the summons.

I turn now to the fourth question which is whether the defendants Alfred

Bridges and Bella Barber are entitled to any right of residence in Mason Croft or have any other right or interest therein. So far as Alfred Bridges is concerned, it was admitted in argument that, if I came to the conclusion on the main question that the trusts as to Mason Croft failed for remoteness, he could have no right of residence in Mason Croft or other right or interest therein since his right (if any) is clearly made dependent on his becoming custodian of Mason Croft under the abortive trusts. The directions as to Bella Barber are not so directly linked with the abortive trusts, but I have reluctantly come to the conclusion that, upon the true construction of the will as a whole, the directions as to residence in Mason Croft were all linked with the trusts which have failed and, therefore, fail with them. Alfred Bridges was to be custodian; Bella Barber was to "remain in Mason Croft as her home with the hope that she would find use for her excellent services in the upkeep and preservation of the house." No duties were in terms imposed on the cook, Anne Dance; but I think that, as I have said, the testatrix made these provisions on the basis that Mason Croft would be maintained as a hostel for distinguished visitors and that Alfred Bridges, Bella Barber and Anne Dance would form the nucleus staff of the hostel.

In view of the conclusion to which I have come, it is unnecessary for me to consider whether the very vague language used by the testatrix would, in any event, have formed the basis for a claim for payment of some sum out of the proceeds of the sale which will have ultimately to be effected as the result of the conclusion to which I have come on the main point.

Declaration accordingly. Costs to paid out of the estate.

Solicitors: *Maffey & Brentnall* (for the trustees); *Treasury Solicitor* (for the Attorney-General and the Solicitor-General); *Field, Roscoe & Co.* (for the other interested parties).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

LEICESTER PERMANENT BUILDING SOCIETY v. BUTT.

[CHANCERY DIVISION (Bennett, J.), July 1st, 1943.]

E *Mortgage—Receiver—Duty to account—Account to mortgagee—Receiver agent of mortgagor—Statutory duty to account—Law of Property Act, 1925 (c. 20), s. 109.*

The plaintiffs as mortgagees of certain property appointed the defendant to be the receiver. The defendant failed to render any account of the rents and profits to the plaintiffs and this action was brought claiming an account. It was argued that the defendant, being the agent of the mortgagor, was not bound to account to the mortgagee:—

HELD: the Law of Property Act, 1925, s. 109, imposes a statutory duty on a receiver in the performance of which the mortgagee is interested and the mortgagee is, therefore, entitled to an account.

[EDITORIAL NOTE.]—Any one injured by the non-performance of a statutory duty being a person for whose benefit and protection the duty is imposed is generally entitled to bring an action in respect of the breach. The action will often be one for damages; but it may, as here, claim some form of specific relief. In the case of a receiver the appropriate relief is the granting of an order for an account and it is held that an account may be ordered at the instance of the mortgagee, although the receiver is the agent of the mortgagor and *prima facie* liable only to account to the mortgagor as his principal.

AS TO DUTY OF RECEIVER, see HALSBURY, Hailsham Edn., Vol. 23, pp. 449, 450, para. 660; and FOR CASES, see DIGEST, Vol. 35, pp. 530, 531, Nos. 2612-2615.]

H Cases referred to:

(1) *Groves v. Wimborne* (Lord), [1898] 2 Q.B. 402; 24 Digest 911, 80; 67 L.J.K.B. 862; 79 L.T. 284.

* (2) *Woods v. Winskill*, [1913] 2 Ch. 303; 10 Digest 793, 4982; 82 L.J.Ch. 447; 109 L.T. 399.

* (3) *Liverpool Corpn. v. Hope*, [1938] 1 K.B. 751; [1938] 1 All E.R. 492; Digest Supp.; 107 L.J.K.B. 694; 158 L.T. 215.

SUMMONS to determine whether a receiver appointed by mortgagees is under a duty to account to the mortgagees. The facts and arguments are fully stated in the judgment.

W. F. Waite for the plaintiffs.
The defendant did not appear.

BENNETT, J. : The plaintiffs were mortgagees under four separate mortgage deeds entered into by them with four separate mortgagors in respect of four separate properties. The short particulars of the mortgages appear from the indorsement on the writ of summons. All the mortgages were executed before Sept., 1939. After Sept., 1939, the plaintiffs were desirous of appointing a receiver of the rents and profits of the properties comprised in the mortgage deeds respectively, and before they could exercise the power which the mortgage deeds gave them, having regard to the Courts (Emergency Powers) Act, 1939, they had to obtain leave of the court. In the year 1940, in four separate proceedings to which the four mortgagors respectively were respondents, they obtained orders by which they were given liberty to proceed to exercise any remedies which might be available to them by the appointment of a receiver of any property comprised in the legal charge or mortgage to which the proceedings related. Having got those orders the plaintiffs, by four several writings under their hand, appointed the defendant to be the receiver of the rents, profits and income of the properties comprised in and subject to the four mortgage deeds. The deeds were exhibited and each deed contains a power to appoint a receiver if default be made by the mortgagor for a period of two months or upwards in payment of any one or more of the instalments and other payments thereby covenanted to be made on the respective days fixed for the payment of the instalments or any part thereof. The receiver has the powers conferred upon a receiver by the Law of Property Act, 1925, s. 109. A

It has been proved that, although the defendant was requested to account for his receipts as receiver, he has wholly failed to render to the plaintiffs any account. The action was begun by writ issued on Apr. 6, 1943, in which the relief claimed by the indorsement on the writ was, in respect of each of the four mortgages, an account of the rents, profits and income received by the defendant as the receiver appointed by the plaintiffs. The summons which was before COHEN, J., was a summons issued under the provisions of R.S.C., Ord. 15, r. 1 for an immediate order for the accounts claimed by the indorsement on the writ of summons issued in the action. D

The question, which is without authority, is whether the receiver, being the agent of the mortgagor, can be called to account by the mortgagee by whom he had been appointed. For the purpose of answering the question and determining whether he can be called to account, it is necessary to consider some of the provisions of the Law of Property Act, 1925, s. 109. The first subsection limits the rights of mortgagees to appoint a receiver under the power in that behalf conferred by the deed to a time after the time when he has become entitled to exercise the power of sale conferred by the Act. Subsect. (2) provides as follows : E

A receiver appointed under the powers conferred by this Act . . . shall be deemed to be the agent of the mortgagor ; and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides. F

There is no suggestion in the present case that the mortgage deeds do " otherwise provide." Subsects. 3, 4, 5, 6 and 7 need not be referred to. Subsect. 8 provides : G

Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows, namely : (i) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property ; and (ii) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver ; and (iii) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee ; and (iv) In payment of the interest accruing due in respect of any principal money due under the mortgage ; and (v) In or towards discharge of the principal money if so directed in writing by the mortgagee ; and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property. H

The plaintiffs allege that that subsection imposes a statutory duty upon the receiver in the performance of which the mortgagees, the plaintiffs, are interested, because after the receiver has made the payments which subsect. 8, by paras. 1, 2 and 3 thereof, require him to make, his next duty is to pay the plaintiffs' interest accruing due in respect of any principal money due under the mortgage.

The proposition of law upon which the action is based is that a person who is interested in the performance of a statutory duty may maintain an action against a person made liable by the statute to perform the duty for breach of it. The authority upon which that proposition is advanced is a passage from the judgment of VAUGHAN WILLIAMS, L.J., in *Groves v. Lord Wimborne* (1), at p. 415 in these terms :

... it cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *prima facie*, and, if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty.

That principle has been followed and applied. In particular it was applied by ASTBURY, J., in 1913 in *Woods v. Winkill* (2), against a receiver and manager appointed by debenture holders who had neglected to perform the statutory duty of paying preferential creditors.

Counsel for the plaintiffs called my attention to a decision of the Court of Appeal in *Liverpool Corpn. v. Hope* (3), where an action was brought by a local authority against a receiver to recover unpaid arrears of rates, and it was held by the Court of Appeal that an action would not lie. SLESSER, L.J., said on p. 755, ([1938] 1 All E.R. at pp. 494, 495) :

It is said that there is here a breach of statute. It has been decided in many authorities, of which the case of *Groves v. Lord Wimborne* (1) is perhaps the leading one, that, in appropriate cases where a person does suffer damage by reason of breach of a statutory duty by another he may recover those damages in an action ; but this principle is wholly inapplicable to the present case, for the very good reason that there is no statutory duty on Mr. Hope, the receiver here, the breach of which could in any conceivable circumstances give a right to damages to the local authority, the Liverpool Corporation.

That is to say, the Liverpool Corporation were not persons belonging to a class of those for whose benefit and protection the statute imposed the duty. That case seems to me to be wholly distinguishable from the present case where the plaintiffs, in my judgment, clearly are amongst the class of persons for whose benefit and protection the statutory duty was imposed by the Law of Property Act, 1925, s. 109.

For these reasons, in my judgment, it is open to the plaintiffs upon the facts proved to maintain an action against the defendant whom they appointed as receiver ; and, accordingly, I propose to make, upon the summons now before me, an order in accordance with its terms. The costs of the summons will be costs in the action.

Order accordingly.

Solicitors : *Field, Roscoe & Co.* (for the plaintiffs).

[Reported by HUBERT B. FIGG, ESQ., Barrister-at-Law.]

Re I. G. FARBENINDUSTRIE A.G. AGREEMENT.

[COURT OF APPEAL (Lord Greene, M.R., du Parcq, L.J. and Uthwatt, J.),
October 14, 15, 1943.]

Practice—Parties—Adding persons as parties—Person with only a commercial interest in subject-matter of proceedings—R.S.C., Ord. 16, r. 11.

The appellants took out an originating summons, *ex parte*, asking for a vesting order under the Trustee Act, 1925, s. 51, of certain patents registered in the name of a German company. They also asked for rectification of the Register of Patents. The basis of the application was that the German company were bare trustees for the appellants and that they were entitled to have the patents vested in them and the register rectified accordingly. The respondents to this appeal contended that they should be added as parties to the summons on the ground that they were holders

of a compulsory licence granted under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939 :—

HELD : as the respondents had only a commercial interest in the subject-matter of the summons, they were not entitled to be added as parties and the court had no jurisdiction to add them.

[EDITORIAL NOTE.] It is necessary for the proper determination of points of construction and administration of trusts to have all parties interested in the proceedings before the court. To be joined as a party a person must, however, have an interest in the subject-matter of the proceedings. That interest has been called a legal interest, not by way of contrast with an equitable interest but as being an interest which the law recognises. It is not sufficient that the person has a commercial interest and is likely to be affected in his pocket by a decision one way or the other. If such a person were entitled to be added as a party, it would make litigation well-nigh impracticable. Here, although the party desired to be added and the presence of counsel to represent opposition to the application would have been most helpful to the court, it is held that the court has no jurisdiction to join any party who has not the necessary legal interest in the subject-matter. A

AS TO JOINDER OF PARTIES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 19, 20, paras. 15-17; and FOR CASES, see DIGEST, Practice, pp. 429-431, Nos. 1243-1266. See also YEARLY PRACTICE OF THE SUPREME COURT pp., 220, 221.] B

Cases referred to :

(1) *Re Bayer Products, Ltd., Application* (1940), 58 R.P.C. 31.

* (2) *Moser v. Marsden*, [1892] 1 Ch. 487; Digest, Practice, 423, 1194; 61 L.J.Ch. 319; 66 L.T. 570. C

* (3) *The Leon Blum*, [1915] P. 90; Digest, Practice, 977, 5100.

APPEAL by the applicants Bayer Products, Ltd., A. Carpmael and W. W. Groves from an order of MORTON, J., dated July 7, 1943, adding a licensee under patents as a party to proceedings in which the applicants asked for a vesting order and for the rectification of the Register of Patents. D

Charles Harman, K.C., and *Gordon Brown* for the appellants.

Valentine Holmes for the respondents.

Harman, K.C. : A number of licences have been granted but there does not seem to be any reason why the respondent company should be added as a party any more than any other of the licensees. The judge had no power to add the respondent company as a party to the summons. *Moser v. Marsden* (2) covers the present case. The application of the respondent company was not warranted by the rules of court as they have only a commercial interest in the subject-matter of the proceedings. E

Holmes : This case is *sui generis*. The respondent company has not merely an ordinary and commercial interest. Their interest is difficult to define, but it is in a sense proprietary. A third person with a commercial interest cannot interfere, generally speaking, with litigation *inter partes*. The position in the present case, however, is different. Practice should not be allowed to have such weight that it would prevent a party from being joined if that practice, if followed, would cause him great damage. [Counsel referred to *The Leon Blum* (3).] F

LORD GREENE, M.R. : The appeal arises out of an originating summons taken out by the present appellants, Bayer Products, Ltd. (whom I will call Bayers), asking for a vesting order in respect of certain patents registered in the name of a well-known German company, whom I will call I.G. The summons asked for relief under two heads : first, a vesting order under the Trustee Act, 1925, s. 51 ; and, secondly, rectification of the Register of Patents under the appropriate section of the Patents and Designs Act. The basis of the application by Bayers is that the I.G. are bare trustees for them and that they are accordingly entitled, in the circumstances, to have the patents vested in them and the register rectified accordingly. G

That summons was in form an *ex parte* summons. I.G. were not made respondents to it, and we are told that in cases such as this, where a German individual or company is the person against whom relief of this kind is claimed, the form of summons which the Chancery Masters direct should be issued is the *ex parte* summons and not a summons *inter partes*. I express no opinion at all as to whether that is the right course or whether the summons should be a summons *inter partes* and an application should then be made under the new H

rule to dispense with service on the respondent. For present purposes it is quite immaterial and nobody so far seems to have suggested that the procedure adopted was in any way wrong in point of form. It is obvious that I.G. will not appear and argue, if they desire to do so, against the relief claimed by Bayers in these proceedings. Boots Pure Drug Co. (whom I will call Boots), were anxious to lend their assistance in preventing such an order being made, and they applied to be added as respondents to the summons. After considerable delay and the filing of a great deal of evidence, the matter came on for hearing before

- A MORTON, J., who made an order adding them as respondents to the summons. It appears that, on a previous summons of a similar nature in respect of other patents which I.G. had taken out, MORTON, J., in chambers, and apparently without any opposition in chambers, had added as respondents Imperial Chemical Industries, Ltd., whose position for all material purposes was precisely the same as that of Boots. When the substantive application came before
- B MORTON, J., in *Re Bayer Products, Ltd., Application* (1), objection was taken by counsel to the presence of Imperial Chemical Industries in the proceedings, but that objection was overruled and, in the result, the opposition of Imperial Chemical Industries was listened to, and in spite of that the order asked for by Bayer was made.

In the present case the making of an order adding Boots was strenuously opposed at the hearing of Boots' summons for that purpose. MORTON, J.,

C made the order adding them and Bayers appeal to this court.

- The position of Boots in relation to these patents is one derived from an order of the Comptroller made under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. The relevant section is sect. 2. Under subsect. (1), in the circumstances stated, the Comptroller is empowered to grant licences in respect of patents of which enemies were proprietors on Sept. 3, 1939, or at any time since. Under that section the licence granted is a compulsory
- D licence. Under subsect. (4), such a licence is to have the same effect as if it was embodied in a deed, and is to override the right of the proprietor of the patent and any other parties having an interest therein which would be inconsistent with the exercise of the licence. Subsect. (5) empowers a licensee under such a licence to institute proceedings for infringement in his own name. Under the licence itself there are only two matters I need mention. The first is that
- E the licence is to endure during the lifetime of the patent and, secondly, under cl. 4 of the licence the licensees, Boots, are under the ordinary obligation to keep and furnish accounts for the purpose of calculating royalties. I should also add a third matter, namely, that the royalties are to be paid and the accounts are to be rendered, according to the licence, to the Custodian of Enemy Property.

- It is argued by counsel for Boots that his clients' position under that licence, and having regard to the language of the Act of Parliament, is one which confers
- F upon him a legal interest in the subject-matter of the suit to which he seeks to be added as a party. He confessed himself unable to find any words which could appropriately describe the nature of that legal interest, and I share his difficulty. He pointed out that under the licence and the Act of Parliament he is entitled to bring proceedings in his own name; but that is also possible under the relevant sections, sects. 24 and 27, of the Patents Act. In the case
- G of compulsory licences granted under those sections, in certain circumstances the grantee of such a licence may bring an action for infringement in his own name. There is nothing new about this. It seems to me quite clear that such a right in a licensee has nothing to do with the subject-matter of these proceedings, which relate and relate solely to the legal title to these patents. Ought that title to be vested in Bayers or ought it to remain vested in I.G.? Which-
- H ever way that question is answered, the position of Boots cannot be affected in the least from the legal point of view. That, I think, is the main point out of which counsel endeavoured to extract a legal interest in the subject-matter of these proceedings. When I say "legal interest" I am not thinking of any distinction between legal and equitable, but of an interest which the law recognises.

It is to be observed that MORTON, J., certainly did not accept any argument addressed to him to the effect that Boots had a legal interest. He himself said that their interest was a commercial interest, and that they had a commercial interest is, I think, beyond dispute. Counsel for Boots pointed out, for instance

that they will now have to render accounts of their sales to a trade competitor—no doubt a consideration of great importance from the commercial point of view; but the risk that these patents, after the grant of the compulsory licence, would come into the hands of a trade competitor was a commercial risk which Boots took when they applied for and took the licence and made preparations to trade on the strength of it. The patents might have been sold altogether by the Custodian under a vesting order, and they might have come into the hands of a trade competitor in that way. That was a commercial risk, and, if Bayers are successful in their application, it may be that the commercial consequences to Boots may not be too fortunate; but the most that can be said for Boots, in my opinion, is that they have a commercial interest, be it important or not, in the result of these proceedings. A

The fact that a person has a commercial interest in litigation and nothing more, in my opinion, not merely gives him no right to demand to be added to proceedings by the result of which that commercial interest may be affected, but the court has no jurisdiction to add him any more than it has jurisdiction to add any man in the street. It is the practice of the court, and the court has power in proper cases, to add at his own request a party who claims to have a legal interest in the subject-matter of the suit. That is a thing that frequently happens in proceedings in the Chancery Division where creditors, debenture holders, beneficiaries and persons of that character, who have an interest in the proceedings, not merely a commercial interest, but a legal interest, can in proper circumstances apply for and obtain an order to be added as defendants in administration proceedings or whatever the proceedings may be. Where a person alleges nothing more than a commercial interest or alleges a legal interest which is shown on the face of it to be non-existent—I say that because counsel did allege a legal interest and he alleged one which, in my opinion, on the facts and in law is completely non-existent—and, therefore, comes before the court as a person claiming only a commercial interest in the suit, I have never heard of a case where the court has claimed to exercise jurisdiction to add him as a party. B D

The arguments which counsel for Boots would desire to put forward, were he successful in his application and successful on this appeal, would be arguments relating solely to the question of title as between Bayers and I.G. In that question Boots have no concern whatsoever in law. That being so, in my opinion, they have no *locus standi* whatever to be added, nor has the court any power to add them. E

The main argument upon which they would wish to rely in order to defeat Bayers' application for the vesting order is an argument that the contract, upon which Bayers' title to treat I.G. as bare trustees for them is based, is a contract which was abrogated at common law on the outbreak of war, I.G. being an enemy company. That argument affects the right of Bayers to claim a vesting order against I.G. I will assume that, if that argument be right, the beneficial title to the patent would not be vested in Bayers and they would have no right to call for a vesting order. There would be a title remaining in I.G. other than a title as bare trustees; that is a title which could be made the subject of a vesting order under the Trading with the Enemy Act, and, accordingly, there is a proper method of securing that that argument could be put before the court. F G

While accepting the view that Boots' interest is merely a commercial interest, MORTON, J., was very much impressed by the fact that it was desirable that the court should have before it somebody to argue that point. With all respect to him, that did not give him jurisdiction to call in somebody to argue it for him as a sort of *amicus curiae* and add as a party to the action somebody who has no legal interest in the result of it. It would be equally possible to call in the first person that one happened to meet in the street. Boots' interest from the point of view of this litigation is no higher than that. I appreciate very well the feeling of the judge in being not too content with the prospect of having to deal with that particular argument in the absence of somebody to present it; but, with all respect to him, he would not be without assistance if he took the appropriate steps. One step could be taken under the Patents Act by directing the Comptroller, under the court's powers in that behalf, to attend and appear. The Comptroller is the person who is concerned with the right conduct of the H

register, and he is, therefore, interested in seeing that no improper entry is made in the register. If the argument be correct, it would appear that Bayers would not be entitled to get upon the register, and it would be for the Comptroller to oppose their application. Another thing that could be done would be to see that the matter should be brought to the attention of the Board of Trade, and they could be invited either to appear as such or to make a vesting order under the Trading with the Enemy Act, so that the Custodian might appear and argue against the vesting order asked for by Bayers.

- A However that may be, those are matters for the judge to decide, and, even assuming that there was no such machinery for obtaining assistance for the court in dealing with the point, that does not give the court jurisdiction to call on somebody who has no interest in the subject-matter of the suit, making him a party to the action for the purpose of assisting the court in the decision of a point upon which the court would wish to hear argument. It often happens
- B that a court is left to decide a matter without the assistance of argument on one side. The court in those circumstances has to do its best with assistance from counsel on one side only who, according to the practice and traditions of the Bar, in such circumstances always gives the court such assistance as he properly can in view of the fact that he is an advocate on the other side. The difficulty of deciding matters of that kind is one with which the courts are confronted every day, and, if the principle upon which the judge acted was to be
- C followed, it would mean that in many cases persons would be getting themselves added to litigation in which they had no interest except a commercial interest and would establish a precedent which is not justified by any authority and, in my opinion, would be a very unfortunate one.

- In the present case, why should the matter stop at Boots? We are told that many licences have been granted in respect of these patents. Why should
- D Boots have the privilege alone of assisting the court in putting these matters forward? Why should not some other licensees come forward and say: We have another argument upon which we would like to assist the court; and, Boots having been let in, there would be no answer to applications by other licensees.

- In my opinion, MORTON, J., in his very understandable anxiety to get all assistance from a competent source upon a point which appeared to him to be
- E likely to turn out a difficult one, has taken a step which is not warranted by any rule of court or by any practice. While holding that he had a discretion independently of any rule of court, he relies specifically upon R.S.C., Ord. 16, r. 11. Counsel for Boots did not endeavour to base any argument upon that rule; in fact he said it had no application to a case of this kind. With all respect to MORTON, J., I do not find anything in the rules which entitles the court to add for its own convenience a party having a mere commercial interest
- F in the subject-matter of the suit, but no legal interest in it at all. MORTON, J., obviously spoke with some hesitation when he said that he thought the present case did come within that rule, and, in my opinion, with all respect to him, he has given to it a scope which its language will not bear and which would be quite inconsistent with the way in which the rule has always been regarded in the general practice of the courts. In those circumstances, the appeal must
- G be allowed with costs.

DU PARCQ, L.J.: I agree.

UTHWATT, J.: I agree.

Appeal allowed with costs.

- Solicitors: McKenna & Co. (for the appellants); Seaton Taylor & Co. (for the respondents).

- H [Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

HANNA EISSA KAWAS v. BISHARA ELIAS KAWAS AND OTHERS.

[PRIVY COUNCIL (Lord Macmillan, Lord Porter, Lord Clauson, Sir George Rankin and Sir Madhavan Nair), **June 24, 1943.**]

Privy Council—Palestine—Ecclesiastical Court of the Greek Orthodox Patriarchate, Jerusalem—Jurisdiction—Appointment of guardian for infants—Palestine Order in Council, 1922 (S.R. & O., 1922, No. 1282), art. 54 (ii).

The appellant and his two brothers entered into a business partnership. One of the brothers died and an agreement was entered into between the appellant and the deceased's widow in which she was described as the legal guardian of the deceased's two infant sons by virtue of a legal certificate of guardianship emanating from the Ecclesiastical Court of the Greek Orthodox Patriarchate, Jerusalem. Under the agreement the shares of the widow and the two sons in the partnership assets were quantified and the manner of payment specified. The widow and the two sons brought an action claiming an account of the transactions of the partnership business and for the deceased's share in the assets as ascertained from the accounts. The question arose whether the appointment of the widow was valid and consequently whether the agreement entered into by the widow as guardian was valid so far as the two sons were concerned. The appellant contended that the court in question had jurisdiction under the Palestine Order in Council, 1922, art. 54 (ii) to appoint guardians:—

HELD: for the exercise of the jurisdiction under the article the consent of all parties interested is required. The fact that minors cannot give an effective consent does not justify proceedings without their consent. Since no jurisdiction to appoint guardians is conferred on this particular court by any other provision of the Order in Council, the jurisdiction to do so is vested in the Supreme Court sitting as a High Court of Justice under art. 43.

[EDITORIAL NOTE.] The Palestine Order in Council confers jurisdiction on the courts of the Christian communities in Palestine in matters of personal status. In the case of marriage and divorce, alimony and confirmation of the wills of members of the community the jurisdiction is exclusive. In other matters of personal status the jurisdiction is conferred only where the parties consent. Where a person under age is a party, he cannot give a binding consent and, therefore, it is held that there is no jurisdiction in any such case where any party is an infant.

AS TO MATTERS OF PERSONAL STATUS IN PALESTINE, see HALSBURY, Hailsham Edn., Vol. 11, p. 247, para. 466; and FOR CASES, see DIGEST, Supp. Dependencies, 716f, 716g.]

APPEAL by the defendant partner to an action brought by the widow and two sons of a deceased partner claiming an account of the transactions of the partnership business and the deceased's share in the assets.

C. S. Rewcastle, K.C., and S. A. Kyffin for the appellant.

Phineas Quass for the respondents.

LORD MACMILLAN [delivering the judgment of the Board]: This is an appeal by the defendant in an action against him by the widow and two sons of his deceased brother in which they claim from the defendant an account of the transactions of a business carried on in Honduras by the defendant in partnership with the deceased and another brother, whose share was acquired by the defendant. Payment is also claimed of the deceased's share in the partnership assets as the same may be ascertained from the accounts.

The case was contested by the defendant on various grounds, but the only defence with which their Lordships are concerned is founded on an agreement dated Mar. 10, 1925, made between the appellant on the first part and one Shaheen and the deceased's widow of the second part, in which the second parties are described as the legal guardians of the deceased's two sons then in minority "by virtue of a legal certificate of guardianship emanating from the Ecclesiastical Orthodox Court of Jerusalem." By this document it was agreed that the share of the widow in the partnership assets amounted to £250 and that of the two minor children to £1,750. The agreement contained provisions relating to the manner of payment of these sums and the widow appears to have received certain sums in pursuance of it.

If this agreement is valid and binding, it affords a complete answer to the respondents' claim, for it quantifies and provides for the payment to them of the deceased's share in the partnership assets. But the courts in Palestine have held that the appointment of Shaheen and the deceased's widow as guardians of his two sons was invalid and consequently that the agreement which they made as such guardians with the appellant is of no avail to him as a defence except in so far as it concerns sums received by the widow on her own account.

A Having thus disposed of the obstacle interposed by the existence of the agreement of 1925 the courts below fixed the share of the deceased in the partnership on his death in 1922 at \$24,500, on which sum they allowed interest at 6 per cent. to the date in 1927 when the partnership was due to expire, and gave judgment for payment accordingly subject in the case of the widow to deduction of the sums admittedly received by her. The respondents accept the judgment of the courts below and have not cross-appealed.

B The only question argued before their Lordships and the only question which it is necessary for them to decide is whether the appointment of Shaheen and the deceased's widow as guardians of the two minor sons of the deceased was competently effected; if it was not, the agreement of 1925 is invalid and the judgment below must stand.

C The certificate whereby the deceased's widow was appointed guardian to the minor sons and Shaheen was appointed to assist her in performing her duties as guardian was granted in 1925 on her application by the Ecclesiastical Court of the Greek Orthodox Patriarchate, Jerusalem. The jurisdiction of this Ecclesiastical Court to make the appointment is challenged and the question has to be determined by examination and interpretation of the Palestine Order in Council of 1922.

Art. 54 of the Order in Council provides as follows :

D The courts of the several christian communities shall have :—

- (i) Exclusive jurisdiction in matters of marriage and divorce, alimony and confirmation of wills of members of their community other than foreigners as defined in art. 59.
- (ii) Jurisdiction in any other matters of personal status of such persons, where all the parties to the action consent to their jurisdiction.

"Matters of personal status" are defined in art. 51 of the Order to mean :

E . . . suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons.

F Now it will be observed that, in conferring jurisdiction in matters of personal status on the courts of the several christian communities (of which the Court of the Greek Orthodox Patriarchate is one), the Order in art. 54 discriminates between certain selected matters, enumerated in para. (i), with regard to which it confers exclusive jurisdiction on these courts and any other matters of personal status with regard to which in para. (ii) it confers jurisdiction only where all the parties to the "action" consent to their jurisdiction. Here the word "action" is used, presumably as a synonym for the word "suit" used in art. 51. Neither word is strictly appropriate to denote non-litigious proceedings.

G Their Lordships, however, are inclined to infer from the context that these terms are used in a wide and general sense as meaning any proceedings of a judicial character in which the powers of a court are invoked. Assuming without deciding this to be so, their Lordships are of opinion that all the proper parties to the application for the appointment of guardians to the two minors did not consent to the jurisdiction of the Ecclesiastical Court, for the minors themselves did not and could not consent. Where a consensual jurisdiction requires for its constitution the consent of all parties, this must mean the consent of all whose interests are concerned in the proceedings. If it be said that minors cannot give an effective consent, this does not justify proceedings without their consent. In the case of a consensual jurisdiction absence of consent, whether due to unwillingness to consent or inability to consent, is equally fatal.

H On the other hand, if an application for the appointment of guardians does not fall within art. 54 (ii), as not being a suit or action, then there is no provision in the Order conferring jurisdiction on this Ecclesiastical Court to entertain such an application. In that case, the application would require to be made to the

Supreme Court sitting as a High Court of Justice which by art. 43 has :

... jurisdiction to hear and determine such matters as are not causes or trials but petitions or applications not within the jurisdiction of any other court and necessary to be decided for the administration of justice.

Thus either way the appointment of guardians was invalid. It was made either by the wrong court or by a court for whose jurisdiction consent was essential but was wanting. Consequently, the agreement of 1925 to which the invalidly appointed guardians were parties is of no binding force, except to the limited extent indicated in the judgment under appeal. A

Their Lordships will humbly advise His Majesty that the appeal should be dismissed and the judgment of the Supreme Court of July 31, 1940, be affirmed. The appellant will pay the respondents' costs of the appeal.

Appeal dismissed with costs.

Solicitors : *T. L. Wilson & Co.* (for the appellant) ; *Windsor & Brown* (for the respondents). B

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

Re PLOWMAN deceased, WESTMINSTER BANK, LTD. *v.* PLOWMAN. C

[CHANCERY DIVISION (Cohen, J.), June 11, 1943.]

Will—Partial intestacy—Income of residue undisposed of during widow's life—No issue—Administration of Estates Act, 1925 (c. 23), ss. 33, 46, 49.

By his will, dated Aug. 31, 1942, the testator, after bequeathing a number of pecuniary legacies and annuities, directed that the remainder of his estate, after the death of his wife, was to be held on trust, subject to the payment of certain legacies, for charities to be named by his wife. The testator died on Sept. 4, 1942. On a summons taken out by his executor and trustee to determine a number of questions arising under the will, it was held that the income of the residuary estate during the life of the testator's widow was undisposed of and passed on as intestacy, and, as the only persons beneficially interested in any property of the testator which was undisposed of were his widow and his two sisters, the remaining question was whether the income was wholly payable to the widow, or whether each instalment should be apportioned between capital and income, and if so, on what principle :— D

Held : the Administration of Estates Act, 1925, s. 33, does not apply to an intestacy affecting a partial interest, such as a life interest, in the residuary estate. In the present case what was undisposed of was the income of the residuary estate of the testator which must be distributed under sect. 49 of the Act in accordance with the provisions in sect. 46, and was, therefore, payable to the widow. E

[EDITORIAL NOTE.] The provisions for the distribution of the estate of an intestate are primarily suited to the case of a total intestacy but are by the Administration of Estates Act, 1925, s. 49, to have effect as respects property not disposed of by will, i.e., on a partial intestacy. The application in the case of a partial intestacy is a matter of some difficulty and it was here sought to be said, that where there is an intestacy as to the income of the estate during the life of the widow, she was not entitled to the income, but only to the income that would be produced by the investment of that income. This suggestion is, however, rejected and the widow is, in the result, held to be entitled to the income. She is, according to the precise terms of the statute, entitled to a charge of £1,000 on the income, but as she is also entitled to the whole income during her life, it is not necessary to consider this charge. G

AS TO APPLICATION OF STATUTORY TRUSTS TO PARTIAL INTESTACY, see HALSBURY, Hailsham Edn., Vol. 14, p. 373, para. 699 ; and FOR CASES, see DIGEST Supp., Wills, Nos. 299a-299c] H

Cases referred to :

** (1) Re McKee, Public Trustee v. McKee*, [1931] 2 Ch. 145 ; Digest Supp. ; 100 L.J.Ch. 325 ; 145 L.T. 605.

(2) Howe v. Dartmouth (Earl), Howe v. Aylesbury (1802), 7 Ves. 137 ; 44 Digest 197, 265.

(3) Re Chesterfield's (Earl) Trusts (1883), 24 Ch.D. 643 ; 39 Digest 173, 632 ; 52 L.J.Ch. 958 ; 49 L.T. 261.

(4) *Re Thornber, Crabtree v. Thornber*, [1937] Ch. 29; [1936] 2 All E.R. 1594; Digest Supp.; 106 L.J.Ch. 7; 155 L.T. 223.

SUMMONS by the executor and trustees of the testator to determine the distribution of the testator's estate under a partial intestacy. The facts are fully set out in the judgment.

G. D. Johnston for the testator's executor.

A. P. Vanneck for the testator's widow.

J. A. Wolfe for Louisa Emily Plowman, a sister of the testator.

A *J. Pennyquick* for Rosetta Jane Latter, a sister of the testator.

H. O. Dankwerts for the Attorney-General.

COHEN, J.: This summons raises an interesting question under the will, dated Aug. 31, 1942, of Walter William Plowman, who died on Sept. 4, 1942. By his will the testator appointed the Westminster Bank to be his executor and trustee and, after bequeathing a number of pecuniary legacies and two annuities of which one was an annuity of £500 per annum to his widow, the testator gave directions as to the residue of his estate in the following terms:

B The remainder of my estate to be held in trust and upon the death of my wife I should like paid to my nephew now somewhere in Rhodesia £1,000 to Gordon Latter and £1,000 to Reginald Latter and the remainder in parts to charities that my wife will hand to the bank.

Probate of this will was granted to the Westminster Bank on Nov. 24, 1942.

C This will gave rise to a number of questions. I have already dealt with all save one which arises for decision by reason of my holding that the income of the residuary estate is undisposed of and passes as on an intestacy.

The remaining question is stated in para. 3 (b) of the summons in the following terms:

Whether if the said income passes as on an intestacy the same is wholly payable to the defendant Elizabeth Jane Plowman or whether each instalment should be apportioned between capital and income and if so on what principle.

D I should here mention that the testator left no issue or ancestor him surviving and had no brother who or any issue of whom survived him and had no sister who predeceased him leaving issue who survived him, so that the only persons beneficially interested in any property of the testator undisposed of by his will are his widow, the defendant Elizabeth Jane Plowman and his sisters the defendants Louisa Emily Plowman and Rosetta Jane Latter.

E The answer to the question which I have to decide depends upon the construction of certain sections of the Administration of Estates Act, 1925. The sections which are or may be relevant are sects. 33, 46 and 49. Sect. 33 (1), which appears in Part III of the Act, deals with administration of assets, and is, so far as relevant, in the following terms:

F On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives (a) as to the real estate upon trust to sell the same; and (b) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money, with power to postpone such sale and conversion for such a period as the personal representatives, without being liable to account may think proper, and so that any reversionary interest be not sold until it falls into possession, unless the personal representatives see special reason for sale, and so also that, unless required for purposes of administration owing to want of other assets,

G personal chattels be not sold except for special reason.

Other subsections go on to provide for the payment of funeral, testamentary and administration expenses, define residuary estate of the intestate, and declare that the income of the residuary estate however invested shall be treated as income, while the final subsections provide that when the deceased leaves a will, sect. 33 is to take effect subject to the provisions therein contained.

H I pass to Part IV of the Act, which deals with the distribution of residuary estate. Sect. 46 deals with the distribution of the residuary estate of the intestate and provides, as far as material, as follows:

(1) The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely: (i) If the intestate leaves a husband or wife (with or without issue) the surviving husband or wife shall take the personal chattels absolutely, and in addition the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a net sum of £1,000, free of death duties and costs, to the surviving husband or wife with interest thereon from the date of the death at the rate of 5 per cent. per annum until paid or appropriated,

and, subject to providing for that sum and the interest thereon, the residuary estate (other than the personal chattels) shall be held: (a) if the intestate leaves no issue, upon trust for the surviving husband or wife during his or her life . . . (v) if the intestate leaves no issue or parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the following persons living at the death of the intestate, and in the following order and manner, namely: First, on the statutory trusts for the brothers and sisters of the whole blood of the intestate . . .

This section, by itself, does not cover the case of a partial intestacy but is made applicable by sect. 49, which provides: A

Where any person dies leaving a will effectively disposing of part of his property, this Part of this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will and subject to the following modifications . . . (b) the personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Part of this Act in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially. B

But for the decision in *Re McKee* (1) it might have been argued that the undisposed of income falls to be dealt with under sect. 33 and is, therefore, subject to a trust for sale, that it should be sold and that the widow would be entitled only to the income arising from the proceeds of sale. However, the decision in that case, in my opinion, makes it impossible for me so to hold and indeed counsel who represented the next of kin did not argue to the contrary, I think. The headnote in *Re McKee* (1) is in the following terms: C

By his will a testator, who died in 1928, after making certain bequests, devised and bequeathed all his real and personal estate not otherwise disposed of to his trustee upon trust for sale and conversion, and after paying his funeral and testamentary expenses, debts and legacies, to invest the net residue, and to stand possessed of the net residue and the investments thereof upon trust to pay the income to his wife for life, and after her death to divide the same between his surviving brothers and sisters. The last of the brothers and sisters died in 1930. The widow was still living. On the construction of the will surviving brothers and sisters was held to mean brothers and sisters surviving the widow, and there was therefore an intestacy as to the reversionary interest in the testator's residuary estate expectant on the widow's death:—Held (affirming the decision of MAUGHAM, J.): (i) that the reversionary interest ought not to be forthwith sold; (ii) that the funeral and testamentary expenses and debts were not payable out of the proceeds of the reversionary interest as property undisposed of by the will but out of the estate before the residue was ascertained; (iii) that the widow was not entitled to any immediate payment in respect of the property undisposed of under the Administration of Estates Act, 1925, ss. 46 and 49, but that by virtue of these sections her personal representatives would on her death be entitled to receive thereout £1,000 with interest at 5 per cent. per annum from the testator's death but nothing further. D

It will be observed from what I have read that that case differed from the present case not only in the subject-matter of the intestacy, which was a reversionary interest in the residuary estate instead of a life interest therein, but also in two other respects. First, the will in that case contained a trust for conversion, whereas there is no such trust to be found in the present will. Second, it was impossible in that case to decide at the date of the testator's death whether or not the will did effectively dispose of the whole property, whereas in the present case the existence of the intestacy could be established as soon as the testator died. The last two differences which I have pointed out undoubtedly form a large part of the ground of the decision of MAUGHAM, J., in the court of first instance. I would refer to two passages from his judgment, first at p. 148, where he says: E

It is, therefore, I think, impossible to hold that Part IV of the Act—which is headed "Distribution of Residuary Estate," does not apply to items of property as to which it may be determined many years after the death that they devolve as on intestacy; for the old law no longer applies. On the other hand, it does not follow that Part III, which relates to "Administration of Assets," applies to the case of a testator as to whom it cannot be asserted at the date of his death that he is partially intestate. F

Then I go to p. 150, where MAUGHAM, J., says: G

. . . I have come to the conclusion that a trust in the usual form for sale and conversion of the residue of the real and personal estate of a testator contained in his will altogether precludes the operation of the statutory trust for sale under sect. 33 (1). The testator has by his will created the trust for sale and conversion of his estate, H

and has stated how the residue after payment of debts, etc., is to be applied, at any rate for a period. It is not, I think, consistent with this provision that the reversion, so to speak, in a fund or residue so created is itself to be sold, for this reversion never was in an accurate sense a part of the estate of the testator at the time of his death.

In the Court of Appeal, however, the decision was based on wider grounds. It will be sufficient for my purposes to refer to the judgment of LAWRENCE, L.J., at p. 160, and ROMER, L.J., at pp. 165 and 166. LAWRENCE, L.J., said :

A In my judgment the fundamental error underlying this contention consists in treating the reversionary interest in question as if it were an item of the personal estate belonging to the testator at the date of his death, which fell to be converted into money by the trustee either under the trust for sale in the will or under the statutory trust for sale contained in the Administration of Estates Act, 1925, s. 33, or under the rule in *Howe v. Lord Dartmouth* (2). It is plain to my mind that it is nothing of the kind, but is a beneficial reversionary interest in the testator's residuary estate, which first came
B into existence on the testator's death by the joint operation of his will and the statute and vested in and now belongs to the persons in whose favour it was created ; the trustee has no power of disposition over it. If I am right in this view it follows that when the period of distribution arrives on the death of the widow, she is not entitled to have the residue apportioned between herself and the remaindermen on the principle laid down in *Re Lord Chesterfield's Trusts* (3).

Then, at pp. 165, 166, ROMER, L.J., says :

C Now, in connection with this matter, our attention was called to the provisions of sect. 33 of the Act dealing with the case of a person dying intestate as to any real or personal estate. If that section applied to the present case, it would no doubt create much difficulty. In my opinion, however, the section is confined to the case of a person dying intestate as to some one or more specific items of his real or personal estate, and does not extend to a case like the present, where there is a will which deals with every item of the testator's estate, but omits to dispose of every interest in that estate. There is no provision in the Act that the words " real and personal estate "
D include any interest in real or personal estate. It is not therefore permissible to read sect. 33 as referring to a person dying intestate as to any interest in his real or personal estate. Nor are the provisions of the section at all applicable to such a case. By way of illustration, let me take the case of a testator who has given the whole of his personal estate to his executors and trustees upon the usual trusts for conversion, payment of debts, funeral and testamentary expenses and legacies, and then to stand possessed of the residue upon trust for two persons in equal shares, of whom one predeceases the testator. If the one-half of the testator's net residue is to be treated as personal estate of his, as to which he has died intestate, then that half is to be held upon the trusts specified in sect. 33 (1) and (2) of the Act. But the sale of the testator's personal estate will already have been effected, in order to produce the very residuary estate of one-half of which the testator has failed effectually to dispose. The section seems therefore quite inapplicable to such a case. Sect. 49 on the other hand appears to be expressly designed to meet it. The language is now changed. Instead of referring
E to " any real or personal estate " as to which a person may die intestate, the latter section refers to part of a testator's " property," a change which seems to be deliberate and attributable to the definition of property to which I have already referred. It is moreover to be observed that this construction of the two sections avoids the necessity of treating sect. 49 as being almost entirely superfluous. For if sect. 33 applies to such a case as I have mentioned, the one-half of the testator's residue must constitute the " residuary estate of the intestate " within the meaning of subsect. (4) of the section, and it did not require sect. 49 to make Part IV of the Act applicable to it, or to provide
G that Part IV should apply to it " subject to the provisions contained in the will." Part IV would have applied to it even if sect. 49 had not been in the Act, because it was residuary estate of the intestate ; and it would have applied " subject to the provisions of the will " because of sect. 33 (7). For these reasons I cannot regard sect. 33 as throwing any light upon the question of what has to be done with the reversionary interest of which the testator has failed to dispose. The trusts upon which it is to be held are, as I think, to be found in Part IV of the Act, and nowhere else.
H From these passages it is clear that in their Lordships' view sect. 33 applies only to cases of intestacy affecting the whole interest in the estate or some part thereof and not to an intestacy as to a partial interest in the residuary estate such as a life interest in the case now before me. In my opinion, therefore, sect. 33 does not apply.

It was, however, contended that as and when each instalment of undisposed of income is received by the trustee it must be treated as part of the residuary estate and must, therefore, under sect. 46, subject to payment to the widow of her £1,000 plus interest at 5 per cent., be invested, only the interest of such

investment being payable to the widow. On the other hand, counsel for the widow argued that what is undisposed of is income of the residuary estate and that, although the facts of this case are in a sense the converse of those in *Re McKee* (1), the principle laid down there applies and, accordingly, the balance of the income of the residuary estate is payable to the widow. I have come to the conclusion that this contention is well-founded. The property undisposed of in the present case is income of the residuary estate of the testator. That residuary estate arises in the present case not from the operation of sect. 33 but from the performance by the executor of the duties imposed on him by virtue of his appointment in the will. None the less, it is income of the residuary trust fund and as the testator left no issue I think I am bound to hold that, subject to the charge in favour of his widow to secure payment of a net sum of £1,000 with interest at 5 per cent. per annum, until paid, the undisposed of income is held in trust for the widow of the testator. A

In this case I derive assistance from the decision in *Re Thorner, Crabtree v. Thorner* (4). In that case the headnote states the facts as follows: B

A testator, after bequeathing an annuity to his mother, directed his trustees out of the annual income of his residuary estate to pay an annuity to his wife, and he further directed that the surplus income of his residuary trust fund should be accumulated during the life of his wife or for 21 years from his death (whichever period was the shorter); and he directed that at the expiration of the period of accumulation his residuary trust fund should be held upon trust, as to both capital and income and the accumulations of such income, for his children. - The testator died without issue, and his widow claimed that she was entitled to call on the trustees to stop the accumulation of any surplus income of the residuary estate and deal with any such surplus income as upon an intestacy. The testator's mother claimed that the accumulations ought to be continued:—Held, that the testator having died without issue there was no effective disposal by his will within the meaning of the Administration of Estates Act, 1925, s. 49, of the residuary estate, and that the direction to accumulate the income was not a direction to which the property not effectively disposed of by the will was subject. Held: therefore, that, subject to making provision in due course of administration for the annuity given to the testator's mother, the trustees ought not to accumulate the surplus income, but that it ought to be dealt with as income from the residuary estate undisposed of by the testator. C

It will be sufficient for my purpose to refer in the judgments of the Court of Appeal to one passage in the judgment of ROMER, L.J., at p. 36 ([1936] 2 All E.R. at p. 1599), where he said: D

Now, as I have said, the first thing to be ascertained is what interest in the testator's property has been undisposed of by his will. I will not read the will again; it has been already read by the Master of the Rolls. It is sufficiently plain that, subject to the annuity to the mother and, of course, other legacies and so forth, and subject to the annuity to the widow, the testator's residuary estate is undisposed of and that the accumulation directed by the will is an accumulation directed solely for the purposes of his ultimate residuary gift to his children and fails with that gift. SIR GERALD HURST, K.C., in the course of his argument agreed when I asked him whether before the Act the next of kin could not have insisted upon receiving the surplus income from year to year after the two annuities had been disposed of, and, of course, he had to agree that that was the case; the next of kin would have been entitled to claim that income as being income undisposed of by the will. It follows that under sect. 49 the income in the *corpus* of the estate will now be held upon the trusts set out in sect. 46 and that the trust for accumulation has no application whatsoever. E

As there is nothing but income in question the widow would receive the whole of the undisposed of property even if there were no charge and it will be sufficient if I make the declaration indicated in the first alternative in para. 3 (d) of the summons and declare that the income which passes on the intestacy is wholly payable to the defendant Elizabeth Jane Plowman. F

Declaration accordingly. Costs to be paid out of estate and to be recouped out of undisposed of income. G

Solicitors: *M. Greenwood* (for the testator's executor and trustee); *Carter & Barber* (for the widow and sisters of the testator); *Treasury Solicitor* (for the Attorney-General). H

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

*Re ARMSTRONG'S WILL TRUSTS, GRAHAM v. ARMSTRONG
AND OTHERS.*

[CHANCERY DIVISION (Cohen, J.), **July 29, 1943.**]

Wills—Construction—Life interest to wife—Option to son to purchase after tenant for life's death—Sale by tenant for life—Whether son entitled to proceeds of sale on tenant for life's death.

A By his will the testator gave certain lands to his wife for life and he directed that, after her death, the lands should fall into the residue of his estate. In his will the testator also gave his son an option, exercisable only within 12 months of the death of the widow, to purchase the lands at a fixed price. During her lifetime the widow, as tenant for life, sold parts of the lands, and, on her death, the son having duly exercised his option, the question arose whether the son was entitled to the proceeds of the sales or whether they should fall into residue :—

B HELD : upon the true construction of the will, the testator intended that, subject to the life interest of the widow, any benefit which might accrue from the lands above the fixed option price should enure to the son if he exercised the option. Further, the proceeds were capital moneys within the meaning of the Settled Land Act, 1925, and under sect. 75 (5) of the Act were to be treated as land, and the option was exercisable upon them as it would have been on the land if unsold.

C [EDITORIAL NOTE. The important part of this decision is that an option to purchase land given in respect of settled land may be exercised although that land has been sold by the tenant for life under the statutory powers. The option in such a case is exercisable in respect of the capital money representing the land.

D AS TO OPTIONS TO PURCHASE CREATED BY WILLS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 34-36, para. 29 ; and FOR CASES, see DIGEST, Vol. 44, pp. 211, 212, Nos. 383-393.]

Cases referred to :

- * (1) *Re Flint, Flint v. Flint*, [1927] 1 Ch. 570 ; 40 Digest 783, 3140 ; 96 L.J.Ch. 248 ; 137 L.T. 178.
* (2) *Re Cant's Estate* (1859), 4 De G. & J. 503 ; 44 Digest 212, 392 ; 28 L.J.Ch. 641 ; 33 L.T.O.S. 280.
E (3) *Re Kerry*, [1889] W.N. 3 ; 5 T.L.R. 178 ; 44 Digest 212, 393.
(4) *London & South Western Ry. Co. v. Gomm* (1882), 20 Ch.D. 562 ; 40 Digest 305, 2617 ; 51 L.J.Ch. 530 ; 46 L.T. 449.

SUMMONS by a trustee of the testator to determine whether a legatee with an option to purchase settled land on the death of a life tenant was entitled to the proceeds of sales effected by the life tenant. The facts are fully stated in the judgment.

F *C. V. Rawlence* for the plaintiff, one of the testator's trustees.
A. de W. Mulligan for the defendant with option to purchase.
A. J. Belsham for other parties interested in residue.

G COHEN, J. : By his will dated Dec. 12, 1899, Robert Armstrong appointed his wife and his son Robert to be executors and trustees thereof and, after divers pecuniary and other bequests and devises, by cl. 7 the testator gave his farm and lands situate at Steetley in the county of Derby to his wife Ellen during her life and after her death he directed that the same should fall into the residue of his real and personal estate. By cl. 8 he gave his real and personal estate not otherwise disposed of to his trustees upon trust for sale and conversion as therein mentioned, and directed that his residuary trust funds should be held in trust for all his children who being sons should attain the age of 21 years, or being daughters should attain that age or marry, in equal shares.
H He then proceeded to direct that two-thirds of the share of each daughter should be retained by the trustees upon the trust therein specified. By cl. 11 he gave his son Robert an option exercisable within 12 months of his death over a farm called Burnt Leys. Then by cl. 12, which gives rise to the present application, he gave an option to his son Harold exercisable only in the 12 months following the death of his wife over the land and farm at Steetley, in which, by cl. 7, his wife had been given a life interest. Cll. 12 and 13 are in the following terms :

12. Provided always and I further declare that if my said son Harold shall within 12 calendar months after the death of my said wife (or if he shall be under the age of 21

years at her death then within 12 calendar months after he shall attain that age) by a notice in writing given to my trustees or one of them signify his desire to purchase my said farm and lands at Steetley hereinbefore given by me to my said wife during her life at the sum of £5,000 then and in such case my trustees shall sell the same to him (after the decease of my said wife) at that price And I declare that upon any sale made by my trustees after the expiration of the said 12 calendar months the statement in writing of my trustees that no notice of intention to purchase had been given by my said son Harold shall be conclusive evidence to the purchaser of the fact so stated.

13. Provided always that no purchaser of the said hereditaments mentioned in the two last preceding clauses of this my will or any part or parts thereof under the trust for sale hereinbefore contained shall be bound or concerned to inquire whether my said sons Robert or Harold as the case may be shall have made any such offer to purchase as aforesaid nor be affected by notice that any such offer has been made.

The testator died on June 24, 1900, and his will was proved on Aug. 17, 1900, by the executors therein named. His wife survived him with six children, four daughters and two sons, Robert, who was an original executor, and the defendant Harold Armstrong. Robert died on Jan. 12, 1917, and on Oct. 5, 1920, the plaintiff and the defendant Harold Armstrong were appointed trustees of the will jointly with the widow. One daughter died on Mar. 2, 1940. The widow died on Aug. 28, 1942. The persons now interested in the testator's residuary trust funds are the defendants to this summons.

On Aug. 31, 1942, three days after the death of the widow, the defendant Harold Armstrong exercised or purported to exercise the option given him by cl. 12 of the will. I say "or purported to exercise" because of certain dealings with the land at Steetley which have raised doubts as to whether the option remained exercisable, and, if it did, as to what was comprised in it. The dealings in question are as follows. The land in question, which was known as Steetley Farm, at the death of the testator comprised about 200 acres of land upon or under which were valuable deposits of limestone which were capable of being worked by open quarrying, but none of which had actually been worked in the lifetime of the testator.

The widow who was clearly tenant for life of the farm, in exercise of her powers as such, made a number of dispositions, first, of the limestone deposits or part thereof, and, finally, of the freehold of parts of the farm the limestone on, in, or under, which had already been sold and worked. As a result of these dealings 60 acres out of the 200 acres of land comprised in the farm have been sold and a further 47 acres is under contract for sale. On the other hand, a total amount of £19,431 12s. 8d. has been or will be received in respect of these dealings and sales. Neither the widow nor her legal representatives claim any part of this sum, and the question now arises whether the defendant Harold Armstrong is entitled to such sums or the investments representing the same by virtue of his purported exercise of the option conferred by cl. 12 of the testator's will, or whether they should now be held by the trustees upon the trusts applicable to the residuary trust funds.

Counsel for the persons interested in residue argued that the question was really determined in his favour by the decision of ASTBURY, J., in *Re Flint* (1). The facts in that case are sufficiently set out in the headnote:

A testator who died in 1920 gave his property to trustees, and settled the entirety upon trust for various beneficiaries in undivided shares. He empowered the trustees at any time to sell any part of his estate, subject to a right of pre-emption thereby given to his son Alfred over property A at a price to be fixed by the trustees' valuer before sale. On Jan. 1, 1926, the land vested in the trustees on the statutory trusts for sale, etc., under the Law of Property Act, 1925, Sched. I, Pt. 4, para. 1 (3). Held, on the construction of the will, that the right of pre-emption was only intended to attach to an exercise of the power of sale under the will, and not to a sale under the statutory trusts or any other extraneous powers. Held, also, that, even if the right of pre-emption was intended to attach to any sale whatever by the trustees, it was not enforceable against the statutory trusts of sect. 35 either as an "equitable interest or power" within sect. 3 and sect. 205 (1) (ix); or as an "additional or larger power" conferred by the will on the trustees within sect. 28 (1), as amended by the Law of Property (Amendment) Act, 1926, Schedule; or as an "incumbrance" within Sched. I, Pt. 4, para. 1 (9). Held, therefore, that the trustees on executing the statutory trusts could disregard the right of pre-emption.

That case seems to me, however, to be distinguishable for two reasons. In the first place, Alfred was not given any option to buy at a fixed price; the testator

merely directed that he should receive the first offer at a price to be fixed by a valuer at the time when the trustees decided to sell. The valuer would fix a proper price as between willing buyer and willing seller and it is impossible, therefore, to argue that the intention of the testator by fixing a price was to confer bounty on Alfred. In the second place, the question what right, if any, Alfred might have in the proceeds of sale was not considered at all. I cannot, therefore, derive assistance in the present case from the decision in *Re Flint* (1).

- A Counsel for the persons interested in residue then said, and correctly, that the question was one of construction, that upon the true construction of the testator's will he only intended the option to extend to the land in its original form and that he must be taken to have had in mind the powers which would be exercisable by the tenant for life, and to have deliberately exposed Harold to the risk that the option might be defeated by the exercise by the tenant for life of her power to sell the land or any part thereof. In my judgment, this argument is not well
- B founded. In the first place, I think that, as a matter of construction, the testator intended that, subject to the life interest of his widow, any benefit which might accrue from the farm at Steetley over and above the sum of £5,000, should enure to Harold if he exercised his option, and that Harold, having exercised the option, is entitled to the proceeds of sale. This view is supported by the two cases to which counsel for the defendant directed my attention, namely, *Re Cant's Estate* (2), and *Re Kerry* (3). In the former case, the marginal note
- C is as follows :

Land was devised in trust for the testator's widow for life, and after her death for sale and division of the proceeds among his children equally, with a direction that the trustees should offer the land to the testator's son, at a specified price, upon the death of the widow. The land was purchased by a railway company, under the powers given by their Act, for more than twice the specified sum . . .

- D It will be observed that the facts were very similar to those in the present case, except that the sale was effected, not under a statutory power in a tenant for life, but under a power conferred on a railway company by a private Act to take the land for the purpose of an extension of their railway. The price paid by the railway company was £1,250 as against the sum of £450 at which the testator's son would have been entitled to purchase it under the terms of the will. The son exercised his option on Feb. 5, 1859, six years after the sale to the
- E railway company, and the court held that he was entitled to the £1,250. KNIGHT BRUCE, L.J., said at p. 507 :

I conceive that this right remains not affected by the Act, and that the son is entitled to take the purchase money, whether amounting to hundreds or thousands, on paying the sum which the testator has specified in his will, just as he would have been entitled to the land itself if it had not been taken by the railway company.

At p. 507 TURNER, L.J., said :

- F The whole argument of the respondents rests on this, that the testator only intended to benefit his son Charles, in the event of his continuing to be a gardener. The true test of this argument is, whether, if he had ceased to be a gardener in his father's lifetime he would still have been entitled to the land. This question admits of no doubt, and the only consideration then is, whether, if the right remained at the death of the testator, the Act of Parliament subsequently passed can affect it. I am of opinion that it cannot.
- G In *Re Kerry* (3) options over different parcels of land were given to a son and a daughter. The options could not be exercised over the land itself, as it was sold to other parties in a creditors' administration action, but NORTH, J., said that *Re Cant's Estate* (2) was an analogous case, though not a direct authority. Effect ought to be given so far as was possible to the provisions of the will. The intention of the testator was that, if the son and daughter exercised the
- H option to purchase, the other persons entitled under the will should not receive more than £1,500 and £350 from the two properties respectively. The option was intended to be a benefit ; the excess in value above the price fixed was intended to go to the person to whom the option was given. The sale in the creditor's action was not made under the trusts of the will, and, before the persons interested in the residue could take any benefit, the excess above the option prices must be paid to the son and daughter respectively.

Secondly, I think the argument addressed to me by counsel for those interested in residue is inconsistent with the provisions of the Settled Land Act. The sales

and other dealings with the land were effected by the widow in exercise of her powers as tenant for life and, accordingly, the proceeds are capital moneys within the meaning of the Act. Sect. 75 (5), therefore, applies. That section provides as follows :

Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made shall for all purposes of disposition, transmission and devolution be treated as land, and shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

The investments and moneys now in question have, therefore, to be held for and go to the same persons successively in the same manner and for and on the same interests and trusts as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the testator's will. Now Harold's right to purchase the land is, I think, in accordance with the decision in *L. & S.W. Ry. v. Gomm* (4), an interest in land. In that case by a deed under which the plaintiffs had sold certain land to G.P., G.P. covenanted that he would at any time thereafter, whenever the land might be required for the railway or works of the company, re-convey it to the company on 6 months' notice and upon payment of £100, and it was held by the Court of Appeal that the effect of this covenant was to give to the company an executory interest in the land. I see no reason in principle why that interest should not be an interest within the meaning of sect. 75 (5), and, in any event, under that subsection the trustees are bound to hold the capital moneys on the same trusts as the land wherefrom the moneys arose. This means that they hold the capital moneys and the investments representing the same upon trust for sale and conversion, but upon trust to sell the same to Harold if within 12 months after the death of the testator's widow he signifies his desire to purchase them. It may be that that right could be overridden under the Act, but I see no reason why Harold's right should not be preserved in the proceeds of sale. Harold's right to take the land itself was no doubt overridden by the exercise of the powers of the tenant for life, but I see no reason why this exercise of those powers should prevent his right attaching to the proceeds of sale arising from the exercise of her power as tenant for life ; indeed, I think I am bound by the provisions of the Act to hold that they did so attach.

Declaration accordingly. Costs of all parties to be paid out of residue.

Solicitors : *Cunliffe & Airy*, agents for *Alderson, Son & Dust*, Sheffield (for the plaintiff and the defendant with option to purchase) ; *F. B. Brook*, agent for *A. P. Williamson*, Retford (for others interested).

[*Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.*]

CLARKE (OTHERWISE TALBOTT) v. CLARKE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pilcher, J.), **November 30, 1942.**]

Divorce—Nullity—Birth of a child—Fecundation ab extra—Approbation—Sincerity.

The parties were married in 1926 and co-habited until 1940. In 1930, the wife gave birth to a son, of whom, it was admitted, the husband was the father. In 1942, the wife petitioned for a decree of judicial separation on the ground of the husband's adultery. The husband, in his answer, alleged that, for physical reasons, the marriage had never been consummated and petitioned for a decree of nullity :—

Held : on the facts and on the medical evidence the birth of the child was due to fecundation *ab extra* and the marriage had never been consummated owing to the wife's incapacity and a decree of nullity would, therefore, be granted to the husband.

[**EDITORIAL NOTE.** This case deals with the rare occurrence of *fecundatio ab extra* and shows that a decree of nullity may in some circumstances be obtained despite the birth of a child of which the husband is admittedly the father.

As to NULLITY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 639-645, paras. 934-945 ; and FOR CASES, see DIGEST, Vol. 27, pp. 350-352, Nos. 3338-3357.]

Case referred to:

G. v. M. (1885), 10 App. Cas. 171; 27 Digest 351, 3339; 53 L.T. 398.

PETITION by wife for judicial separation on the ground of the husband's adultery. The husband in his answer asked for a decree of nullity on the ground of non-consummation of the marriage. The facts are fully set out in the judgment.

H. W. Barnard, K.C., and R. T. Barnard for the wife.

A *Gilbert H. Beyfus, K.C., and E. Holroyd Pearce* for the husband.

PILCHER, J.: The parties went through a religious ceremony of marriage at the Parish Church, Taplow, on May 24, 1926, the husband being then aged 26 and the wife 24.

B On May 31, 1930, after about four years of marriage, the wife gave birth to a son, who is now a boy of 12 years old. There is no doubt that the husband is the father of this child. Another matter which is not in dispute is that, at various dates after the beginning of 1940 the husband has had intercourse with the lady referred to in the wife's petition. Alleging, however, as he does, that his marriage with his wife was never consummated, Mr. Clarke denies that his admitted intercourse with this lady constitutes the matrimonial offence of adultery.

C The only issue of fact in this case is whether the husband is right in saying that, notwithstanding that, after four years of married life his wife has borne a child of which he is admittedly the father, and notwithstanding that the parties thereafter cohabited for some ten years, the marriage has never in fact been consummated. It is clear that a petitioner who is faced at the outset of a case of this sort with these two admitted facts has an uphill task.

D The question whether this marriage was ever consummated during the fourteen years of cohabitation is entirely one of fact. In cases of this kind there is always a presumption that the marriage has in fact been consummated, and when, as here, the wife has borne the husband a child, such presumption is, of course, strong. The onus of satisfying the court that the marriage has not been consummated lies heavily upon the husband.

E The most important evidence on the topic was, of necessity, that given by the husband and wife respectively; but certain medical evidence was also called by the husband, and both parties were examined on June 11, 1942, by two medical inspectors appointed by the court. It was common ground between the parties that the fact that a child had been borne did not in itself establish that the marriage had been consummated. Dr. Burns, a gynaecological specialist, who was called by the husband, explained that it was well-known in the medical profession that conception could take place without penetration of the woman's vagina by the male organ. It is unnecessary to deal further with this matter, as cases of this type have already been considered by the courts, and that fecundation *ab extra* is possible, although very unusual, is well established as a medical fact. The mere fact that a child was born in May, 1930, does not, therefore, in itself, establish that the marriage has been consummated.

F Mr. Clarke's evidence can be summarised as follows. He met the future Mrs. Clarke some six years before their marriage. They got to know each other very well. Before the wedding took place, they discussed the question of children. G His future wife, according to him, made no secret of the fact that she was not fond of children, and said she did not want children but would be prepared to have one or two for his sake. After marriage his first attempt to have intercourse was unsuccessful. His wife was submissive but did not respond, and there was no penetration. His wife appeared to regard the sexual act as a disagreeable necessity. The husband was not himself desirous of having a child H until he and his wife had settled down into married life. He consequently used a sheath from the beginning of his married life. During the first months after marriage he failed to effect any penetration, and after a period he suggested giving up the use of the sheath. His wife, however, said that she dreaded having a baby, and was not prepared to contemplate having one. He accordingly continued to use the sheath. Things continued in this way for some three years. The wife's dread of having a baby seemed to increase, and after the first few months of married life she no longer permitted the husband to attempt intercourse as frequently as he had done before. When attempts were permitted,

a sheath was always used, and no penetration was achieved. Mr. Clarke, being unable to effect penetration, urged his wife to see a doctor. She refused, and retaliated by saying that he was unreasonable in his demands, and that the difficulties experienced were due to the husband's abnormal physical development. Mrs. Clarke said that, if Mr. Clarke brought a doctor to the house, she would lock herself up. Things continued in this fashion until August, 1929. During this month, on an occasion when the husband was attempting to have intercourse, he used such pressure that the sheath broke. No importance was apparently attached by either party to this incident, but soon afterwards the wife became aware that she was pregnant. Dr. Dunlop, a general practitioner, was accordingly called in. He examined Mrs. Clarke, and the results of his examination will be dealt with later. On May 30, 1930, a son was born after a protracted and difficult labour.

The child having been born at the end of May, 1930, Mr. Clarke made no demands upon his wife until September of the same year, by which time he considered that his wife had got over the effects of having her baby. Mrs. Clarke, however, would not agree to intercourse, and persisted in her refusal until about June, 1931. At about this time Mr. Clarke became insistent, further recriminations took place and, according to Mr. Clarke, his wife said: "If you want that sort of thing, you had better go to a prostitute," or words to that effect. Soon after June, 1931, Mrs. Clarke relented and thereafter permitted her husband to attempt intercourse on some occasions. Mr. Clarke says that his efforts to effect any penetration were just as unsuccessful as they had been before the birth of the child. Some time in the year 1932 Mrs. Clarke, for the first time, consented to the disuse of a sheath.

The husband attempted intercourse, sometimes with and sometimes without a sheath, on increasingly rare occasions during the ensuing seven years until the outbreak of war, but on no occasion did he succeed in effecting any penetration. Mr. Clarke had not unnaturally expected that after the birth of the child the difficulty which he had experienced in the past would no longer present itself. He is emphatic that the situation remained precisely the same after this event as it had been before. His wife was, according to him, terrified of having another baby. She refused on very many occasions to allow him to attempt intercourse, and, on the occasions when she permitted the attempt to be made, she remained passive and clearly regarded the whole proceedings with repugnance and distaste.

It is necessary to deal shortly with another branch of Mr. Clarke's evidence. He says that, in about the year 1929, having failed to have normal sexual relations with his wife, he mentioned to her that he thought he had, as he expressed it, "a remedy in law." Being, however, fond of his wife, he was loath to seek any legal remedy, and shortly afterwards his wife became pregnant, his son was born, and he hoped that things would go better. When he found that the situation was unchanged in so far as intercourse was concerned, he did not further consider the possibility of having his marriage annulled, as he thought, perhaps not unnaturally, that, his wife having borne him a child, nullity proceedings were out of the question. According to him, it was not until July, 1941, when he consulted his solicitor in connection with the negotiations for a separation deed, that he became aware for the first time that, if his account of his sexual relations with his wife was accurate, he was still entitled to a decree on the ground of nullity, notwithstanding the birth of the child.

Mrs. Clarke's evidence can be dealt with more shortly. She says that she was much in love with her husband at the time of their marriage. She remembers no conversation on the subject of children either before or after marriage. She did not at any time insist on the use of a sheath. She cannot remember any conversation on this topic, though she thinks that some conversation probably took place. She had no objection to having a child. She thought her husband inexperienced, rough and clumsy. She does not remember the occasion in August, 1929, when the sheath broke, but she does remember that, at about this time, they had an "accident." She was quite unable to explain satisfactorily what she meant by the word "accident." She says that, on this and other occasions, some penetration was achieved. She says that her husband made excessive demands upon her. She agreed in evidence that sexual relations were "difficult" up to the birth of the child. At first she admitted that sexual relations were just as difficult after the birth of the child as they had been

before. She later qualified this statement by saying that she thought intercourse was easier after the birth of the child. Making every allowance for any natural reluctance on her part to deal with the very intimate matters which had to be gone into, I did not consider Mrs. Clarke a satisfactory witness. She affected to have no recollection of a number of matters which she cannot possibly have forgotten. Many of her answers on other matters were evasive and indeterminate, and I formed the view that she was not being entirely candid.

A I think Mrs. Clarke remembered a good deal more than she was inclined to admit. I accept the evidence of Mr. Clarke that his wife always showed repugnance to the sexual act. I do not think that she cared for children as a whole or that she wanted a child of her own. I think Mr. Clarke's account of the circumstances in which the child was conceived is accurate, and I think that, on this occasion, there was fecundation *ab extra*. When attempted intercourse was resumed after the birth of the child, I think Mr. Clarke is right in saying that his wife was "terrified" that she might conceive again. This was perhaps not unnatural, in view of all she had had to go through in her first very difficult confinement.

B To sum the matter up, Mrs. Clarke was, in my view, a woman who was devoid of the ordinary sexual instinct: she did not want children, and regarded the sexual act with repugnance. At the same time, she recognised that her husband was entitled to exercise his marital rights and was prepared, at any rate during the first years of her married life, to submit, in so far as she was physically able to do so, to the exercise by her husband of such rights. Inasmuch as any attempt by her husband to have intercourse was repugnant to her, she did not, in my view, even during the first years after marriage, permit her husband to attempt intercourse so frequently as would have been the case if she had a more normal outlook in such matters.

C Preferring, as I do, the evidence of Mr. Clarke to that of his wife, I should have had little hesitation in accepting his evidence on the crucial issue of consummation, if the circumstances of the case had not been so very unusual. It was not contended that Mrs. Clarke suffered from any physical malformation which would prevent consummation, although it was suggested that, before the birth of the child, difficulty might perhaps have been experienced in effecting penetration owing to the fact that the vaginal orifice was small. This condition could, it is said, have been remedied by a small operation. It was, however, common ground that, after the birth of the child, any difficulty in consummating the marriage due to this cause would necessarily have disappeared. I am quite satisfied that Mr. Clarke was at all material times himself perfectly capable of consummating the marriage, and I am satisfied that he made every effort to do so. Accepting Mr. Clarke's evidence as a whole, as I do, I should be prepared to find that he never did succeed in consummating the marriage, unless the medical evidence is of such a nature as to preclude me from so finding.

D This branch of the evidence can be summarised as follows. There was no evidence that Mrs. Clarke had ever been subjected to any examination until September, 1929. In this month, when husband and wife first became aware that Mrs. Clarke appeared to be pregnant, Dr. Dunlop, a general medical practitioner, was called in. Entries in Dr. Dunlop's diary show that he paid Mrs. Clarke further visits in October, 1929, and in March and April, 1930. He was also in attendance during her confinement at the end of May. I am satisfied that Dr. Dunlop in fact conducted a digital vaginal examination in September, 1929. He was unable to say from his examination whether the marriage had or had not been consummated. Mrs. Clarke had a protracted and difficult confinement, ending after labour of 72 hours in an instrumental delivery under a general anaesthetic. According to Dr. Dunlop, the position and size of the baby made labour difficult. He said that during her labour E Mrs. Clarke experienced muscular spasms which resisted the progress of the baby, and he added that he had come across the same kind of thing with "frigid" women whose sex life had been abnormal.

H In addition to Dr. Dunlop, a Mr. William George Burns was called. Mr. Burns is a gynaecological specialist practising in Harley Street. He had not examined Mrs. Clarke but was present in court during the proceedings and gave evidence after he had heard Mr. Clarke examined and cross-examined. He expressed the view that Mrs. Clarke, from her husband's description, appeared to be suffering from "sexual anaesthesia," or, as it is more commonly known,

"frigidity." This state was, he said, characterised by an aversion to the sexual act. He said that, clinically this condition was often accompanied by resistance to the male, and added that, in some cases, it was accompanied by a desire for personal adornment and material possessions. Dr. Burns dealt also with the possibility that the admitted difficulties of intercourse in this case may have been due to the fact that Mrs. Clarke was suffering from "vaginismus." This is a psychological condition characterised by an involuntary muscular spasm which contracts the vaginal orifice and canal on the approach of the male organ. The fact that a woman had borne a child would diminish vaginismus but not necessarily get rid of it. Mr. Burns further stated, in answer to me, that, if a woman desired to appear willing to perform the sexual act she could, by the exercise of a voluntary contraction of the sphincter muscle, effectively defeat penetration. "Such an attitude of mind would," he said, "be expressed physically by a voluntary contraction of the muscles in the same way as the state of vaginismus is expressed by an involuntary contraction of the muscles." A B

On June 15, 1942, Dr. W. A. Milligan and Dr. D. A. Chamberlain, medical inspectors appointed by the court, examined both Mr. and Mrs. Clarke. They found Mr. Clarke "apparently capable of performing the act of generation." As to Mrs. Clarke, they found, in their report dated June 15, 1942: "She is not a virgin and there is no impediment on her part to the consummation of the marriage." The medical inspectors were requested to amplify this report, and they did so on Aug. 28, 1942, in the following terms as to Mrs. Clarke: C
 "The hymen was completely absent, the parts are dilated and easily dilatable. She was quite placid on examination." As to Mr. Clarke, they said: "John Henry Clarke had all the appearances of normal genital organs."

Dr. Milligan was called before me and confirmed his reports. He stated that his examination of Mrs. Clarke had been digital and visual. The examination was easy, as she had had a baby. He agreed with Mr. Burns that vaginismus was cured "to a large extent" by labour. He also stated that the condition of "frigidity" would be unaffected by child-bearing. In re-examination he said that vaginismus would be more likely to persist after the birth of a child if the woman had experienced a very difficult labour. D

From the summary of the evidence set out above it will be seen at once why I say that this is a very unusual case. There is no question as to Mr. Clarke's capacity and desire to consummate the marriage. Mrs. Clarke has no physical malformation. Dr. Dunlop's evidence points to the fact that she may have had a somewhat narrow vaginal orifice, but, if Mr. Clarke's evidence is accepted, it seems certain that she was still a virgin when Dr. Dunlop carried out his digital examination in September, 1929. On all the evidence I have no doubt that Mrs. Clarke was suffering at all times from "frigidity." I am satisfied that she regarded the sexual act with the greatest repugnance. In addition to having this aversion to the act itself, I think that Mr. Clarke is right that she did not wish to become a mother. Medical opinion shows that women affected with frigidity often refuse to permit any attempt at intercourse to be made, and one of the difficulties in this case arises from the fact that Mrs. Clarke, in spite of her instinctive distaste for the sexual act, at all times recognised her husband's marital rights and subordinated her own feelings to the extent of permitting him to attempt intercourse. Whether or not Mrs. Clarke was also suffering from vaginismus is not perhaps material. Both "frigidity" and "vaginismus" are characterised physically by a contraction of the muscles of the vaginal orifice and canal on the approach of the male. In the case of vaginismus the contraction is spasmodic and involuntary, whereas in the case of frigidity the contraction, although perhaps not strictly speaking involuntary in the ordinary sense of the word, is the result of an instinctive repugnance to the sexual act. Up to the time of the birth of the child there is, therefore, nothing in the medical evidence which precludes me from accepting Mr. Clarke's evidence that no penetration was effected by him up to this time. I accept his evidence and accordingly find that the marriage was not consummated prior to the birth of the child. E F G H

It is further established by the medical evidence that the condition of frigidity is not affected by labour. Mr. Burns was quite clear that the mere fact that a woman had had a child would not prevent her from so contracting the appropriate sphincter muscle as to make penetration very difficult, if not impossible.

Such contraction of these muscles could, of course, take place by a conscious effort of will or owing to an instinctive repugnance to the act itself. There is nothing in the medical evidence which precludes me from finding that Mr. Clarke is telling the truth when he says that matters were no easier after the birth of the child than they were before. I accordingly find that, even after the birth of the child, no such penetration ever took place as to constitute consummation of the marriage. I have the less hesitation in arriving at this conclusion because

A of the unsatisfactory evidence given by Mrs. Clarke on this particular point as to whether things were or were not easier after the birth of the child.

It follows from the above findings that, in my view, this marriage was never consummated. It was not consummated because Mrs. Clarke had a repugnance to the sexual act which she was quite unable to overcome. She was able to bring herself to permit attempts by her husband, but her muscular reactions were such that her husband was never able to achieve any real penetration.

B Whether the muscular reactions to which I have referred were involuntary or the result of conscious effort does not seem to me to matter. It has been suggested that, if the marriage was not consummated owing to any conscious effort by Mrs. Clarke to defeat consummation, then non-consummation was due to the wilful refusal of Mrs. Clarke to consummate the marriage and not to her incapacity. Mrs. Clarke's muscular reactions which prevented consummation were, in my view, at all times due to her invincible repugnance to the sexual act.

C If her repugnance was invincible then the physical manifestation of this repugnance, namely, the contraction of the appropriate muscle was psychologically, if not physically, invincible. It cannot, therefore, in my view, be regarded as such a deliberate act on her part as would amount to wilful refusal to consummate.

As I pointed out earlier, the very unusual circumstances of this case imposed

D a heavy burden upon the respondent. In my view, he has discharged this burden. It was contended by counsel for the wife that the so-called doctrine of "approbation" or "want of sincerity" should be invoked in his favour. There is some ground for saying that, if this point is to be raised, it should be pleaded, which it has not been in this case. I gather that the contention on this point in this case amounts to little more than this, that Mr. Clarke, having approved the marriage for 15 years and had the advantage of his wife's consortium, should not now be permitted to reprobate it, or alternatively, that the fact that the parties have lived together for 15 years in itself shows that Mr. Clarke is not telling the truth when he says that the marriage was not consummated, and that his present prayer is motivated solely by his desire to marry another lady.

The so-called doctrine of "approbation" was fully dealt with, explained, and to some extent exploded, by LORD SELBORNE in *G. v. M.* (1). In the

F present case I am fully satisfied with Mr. Clarke's explanation as to why he had not taken proceedings earlier, and, finding as I do upon all the evidence, including the matters which are said to indicate want of sincerity, that the marriage has never been consummated owing to Mrs. Clarke's incapacity, the fact that Mr. Clarke has, in his desire to marry again, an ulterior motive, seems to me to be irrelevant. The result, therefore, is that the wife's prayer for a decree of judicial separation will be rejected, and a decree of nullity will be granted to the husband

G on the prayer in his answer.

Decree granted.

Solicitors : *Kenneth Brown, Baker, Baker* (for the husband) ; *Kimbers, Williams, Sweetland & Stinson* (for the wife).

[Reported by D. ARMSTEAD FAIRWEATHER, Esq., Barrister-at-Law.]

POINT OF AYR COLLIERIES, LTD. v. LLOYD-GEORGE.

[COURT OF APPEAL (Lord Greene, M.R., Goddard and du Parcq, L.JJ.),
October 8, 11, 1943.]

*Emergency Legislation—Control of undertaking—Construction of regulation—
“Appear to the competent authority that in the interests of public safety . . .”—
Bona fide decision within authority delegated to the Minister cannot be questioned
in courts—Defence (General) Regulations, reg. 55 (4).*

Control of the appellants' undertaking was taken by the Ministry of Fuel and Power by an Order made under the Defence (General) Regulations, 1939, reg. 55 (4). The appellants contended that there were no adequate grounds upon which the Minister could find as he stated he had found, namely, that it was necessary to take control in the interests of the defence of the realm and the efficient prosecution of the war and for maintaining supplies and services essential to the community :—

HELD : there was no jurisdiction to interfere with what was an admittedly *bona fide* decision of the Minister within his delegated authority. The exercise of executive power under such a regulation cannot be questioned in the courts and can be questioned only in Parliament.

[EDITORIAL NOTE. It was settled in the House of Lords in *Liversidge v. Anderson*, [1941] 3 All E.R. 338, and *Greene v. Home Secretary*, [1941] 3 All E.R. 388, that the courts have no jurisdiction to review a *bona fide* decision of the Minister as to the necessity to detain a person under reg. 18B. It might have been thought that matters of an importance not quite so urgent and so likely to cause danger to the State, such as taking control of businesses and the requisition of property, would have come under a different rule. It is found, however, that the orders have been cast in much the same language and the Court of Appeal have decided that, in such cases, if it is clear upon the language of the statutory provision and the regulation that Parliament intended the executive to be answerable only to Parliament, then the courts cannot question the *bona fide* action of the Minister and further will not require the Minister to tender evidence that he considered the matter and formed a *bona fide* opinion that action was necessary in the interests of the State. The action taken must, of course, be clearly within the powers given by the relevant statute or order.

FOR THE DEFENCE (GENERAL) REGULATIONS, REG. 55 (4), see BUTTERWORTH'S EMERGENCY LEGISLATION [13], p. 225; and HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 34, p. 722.

APPEAL from a judgment of SINGLETON, J., dated Mar. 30, 1943. The material facts are set out in the judgment of LORD GREENE, M.R.

H. B. Vaisey, K.C., and *Robert Fortune* for the appellants.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.) and *Valentine Holmes* for the respondent.

LORD GREENE, M.R. : The object of the action out of which this appeal arises was to impugn the validity of an Order made on Feb. 5, 1943, entitled : “The Point of Ayr Collieries Limited Control Order 1943.” That Order was made by the Minister of Fuel and Power under the Defence (General) Regulations, reg. 55 (4). That paragraph, the relevant parts of which I will quote, is as follows :

If it appears to a competent authority that in the interests of the public safety, the defence of the realm, or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, it is necessary to take control on behalf of His Majesty of the whole or any part of an existing undertaking, and that, for the purpose of exercising such control, it is expedient that the undertaking or part should be carried on in pursuance of an order made under this paragraph, the competent authority may by order authorise any person (hereinafter referred to as an “authorised controller”) to exercise, with respect to the undertaking or any part thereof specified in the order, such functions of control on behalf of His Majesty as may be provided by the order . . .

Then it goes on to specify how the authorised controller is to exercise his functions and that the undertaking is to be carried on in accordance with his directions.

The Order in question is signed by Sir Frank Tribe, Secretary to the Ministry of Fuel and Power. It is entitled with its own title, and the reference to the regulation, and then it recites as follows :

Whereas it appears to the Minister of Fuel and Power that in the interests of the defence of the realm and the efficient prosecution of the war and for maintaining supplies

and services essential to the life of the community it is necessary to take control on behalf of His Majesty of the whole of the existing undertaking hereinafter mentioned, and that for the purposes of exercising such control it is expedient that that undertaking should be carried on in pursuance of an order made under reg. 55 (4) and that this order should be made . . .

A Then it proceeds to order certain matters. It appoints Mr. Gordon MacDonald as the controller, and sets out the functions of control which he is to have power to exercise. The Order was to come into force on Feb. 6, 1943. It is accepted that the Minister of Fuel and Power himself did direct his mind to the making of this Order and that it was signed by Sir Frank Tribe as Secretary of the Ministry in accordance with the Minister's own decision. It is a settled principle, in dealing with documents of this kind, that the rule of *omnia rite esse acta* is to be applied and, therefore, when it is stated by the Ministry in the proper way that it appears to the Minister of Fuel and Power that certain things are so, B it is to be taken that that is an accurate statement unless and until the contrary is proved.

C In the present case the appellants have led a quantity of evidence, the details of which I do not propose to canvass. The effect of it is said to be to show that there were no adequate grounds upon which it could appear to the Minister, as required by the regulation; that the case speaks for itself; and that either the Minister was misled by inaccurate information or that he failed to make the inquiries which he ought to have made or that the evidence on the face of it was insufficient, or that the Order was made because somebody on the staff of the Minister had been frightened by an unsubstantial bogey, and that the Minister had made the Order in a state of some sort of panic in the Ministry. That is the substance of what the evidence is said to disclose. It may be summed up D by saying that the appellants' case is that there were no adequate grounds upon which the Minister could find as he says he found, namely, that it appeared to him that it was necessary to take control.

If one thing is settled beyond the possibility of dispute, it is that, in construing regulations of this character expressed in this particular form of language, it is for the competent authority, whatever Ministry that may be, to decide as to whether or not a case for the exercise of the powers has arisen. It is for the competent authority to judge of the adequacy of the evidence before it. E It is for the competent authority to judge of the credibility of that evidence. It is for the competent authority to judge whether or not it is desirable or necessary to make further investigations before taking action. It is for the competent authority to decide whether the situation requires an immediate step, or whether some delay may be allowed for further investigation and perhaps negotiation. All those matters are placed by Parliament in the hands F of the Minister in the belief that the Minister will exercise his powers properly, and in the knowledge that, if he does not do so, he is liable to the criticism of Parliament. One thing is certain, and that is that those matters are not within the competence of this court. It is the competent authority that is selected by Parliament to come to the decision, and, if that decision is come to in good faith, this court has no power to interfere, provided, of course, that the action is one which is within the four corners of the authority delegated to the Minister.

G In the present case let me assume that every statement in the appellants' evidence is correct, and that there is nothing to be said on the other side, in other words, that there are no additional facts outside those set out in the appellants' evidence. In my opinion, the appellants' evidence does not establish any circumstances which gives this court power to interfere with what is admittedly the *bona fide* decision of the Minister. We cannot investigate the adequacy of his reasons. We cannot investigate the rapidity or the lack of H investigation, if it existed, with which he acted. We cannot investigate any of those things because Parliament in its decision has withdrawn those matters from the courts and has entrusted them to the Ministers concerned, the constitutional safeguard being, as I have said, the supervision of Ministers exercised by Parliament. That being so, that is an end of the case. The Minister put in no evidence. He was not bound to put in any evidence, because his case rested on the basis that, even accepting the evidence put in by the appellants, there was no case for him to answer. In my opinion, that view was perfectly correct. He was, therefore, not under any obligation to put in any evidence at all. That

being so, this court, of course, has heard only one side of the case. We do not know what facts there may have been which actuated the Minister in what he did. There was no necessity for him to disclose them because he had a perfectly unanswerable case even on the appellants' own evidence:

I hope that nothing I have said, in assuming for the purpose of my judgment the correctness and completeness of the appellants' evidence, will be construed as suggesting for one moment any word of criticism against the action taken by the Minister in this case. We do not know the facts, we do not know what matters may have impressed him and what matters of public interest may have made it very desirable to do what he did. In those circumstances I think it very undesirable that any comment should fall from the Bench which might be construed in any way as a criticism of the action of a Minister who has not thought it necessary or right to come and tell the court, quite unnecessarily, the facts known to him. There may or may not have been facts of great importance of which the appellants do not know. I do not know; we are not told. There was no need for us to be told. In those circumstances it is, in my opinion, going outside the functions of the court to express any view on the merits of the case whatsoever, at least anything which could be construed as in any way a criticism of the Minister's action.

That disposes of the case, but there is one matter which I think it would be useful to mention because I am not quite sure whether there may not be some misapprehension. When this matter was originally before this court on an interlocutory appeal some comment fell from the court (I think I was myself partly responsible) based on the fact that the Control Order was not signed by the Minister. I do not suppose that anyone imagined from anything that was then said that this court held the view that the signature by the Minister of such an order was necessary for its validity. The most that I certainly intended to suggest was that, in a case of such importance as this, signature by the Minister himself might appear to be more appropriate than signature by someone on the staff of the Ministry, however highly placed. That was no more than a suggestion and, perhaps, was going outside the functions of this court, but it is certainly not to be taken as suggesting for one moment that orders such as these require for their validity the signature of the Minister himself. I am not speaking of other regulations, such as 18B, as to which different considerations may apply. The obvious advantage of having matters of this high importance signed by the Minister is to take away any possibility of suggesting that he personally has not given attention to the case. That was all that was meant, and it was not a ruling of any kind.

In the result the appeal fails with costs.

GODDARD, L.J. : I agree.

DU PARCQ, L.J. : I agree.

Appeal dismissed with costs.

Solicitors: *George Thatcher & Co.*, agents for *J. Kerfoot-Roberts & Son*, Holywell, Flintshire (for the appellants); *Solicitor to the Ministry of Fuel and Power* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

LOMAS v. M. JONES & SON.

[COURT OF APPEAL (Lord Greene, M.R., Goddard and du Parcq, L.JJ.),
October 1, 4, 18, 1943.]

Master and Servant Liability of master for negligence—Volunteer—Consignee injured while assisting master's servant—Duty of carriers to avoid injury to person properly upon premises where goods are delivered apart from any implied contract of employment.

The appellants were carriers and their servant, in the course of his employment, was engaged in delivering a heifer to the respondent at his farm. For this purpose a motor lorry was employed. The respondent assisted the driver to unload the heifer and he then proceeded to assist the driver

to close the doors of the lorry. The first door had been closed but the driver failed to shoot the bolt properly. While the second door was being closed, the first door fell upon and seriously injured the respondent. The appellants contended that the trial judge erred in holding them responsible in that there was no evidence that the assistance given to their driver by the respondent was given with the consent, express or implied, of the appellants or that their driver acted within the scope of his employment in accepting that assistance :—

A

HELD : the appellants' servant was guilty of negligence in not shooting the bolt of the door properly and that was the effective cause of the accident. There was, therefore, negligence for which the appellants were liable irrespective of whether assistance was given by the respondent to the appellants with their express or implied consent.

B

[EDITORIAL NOTE. There are, in ordinary experience, many cases where the driver of a lorry has to deliver goods which he cannot unload from the lorry without assistance and it is a common practice for that assistance to be given by the consignee or his servants. *DU PARCQ, L.J.*, in dealing with this aspect of the case, has stated that, in the absence of evidence of an express prohibition by the carriers that their driver shall receive such assistance, it is implied that such assistance is given with their consent. *LORD GREENE, M.R.*, and *GODDARD, L.J.*, however, point out that, after the unloading was ended, there was no necessity for help in closing the doors and in considering an injury arising from a defective closing of the doors, no question arises as to implied consent. The liability in this case has to be decided upon the ordinary rules of negligence and the effective cause of the injury being the negligent shooting of the bolt of the door, the carriers were liable for the injury. The fact that the injured person was helping to close the doors is immaterial, and need not be considered in ascertaining the effective cause of the injury, provided that he was lawfully in the particular place where the accident happened.

C

D

AS TO VOLUNTARY ASSISTANCE, see *HALSBURY, Hailsham Edn.*, Vol. 22, p. 194, para. 328; and FOR CASES, see *DIGEST*, Vol. 34, pp. 215-217, No. 1782-1789.]

Cases referred to :—

E

F

* (1) *Wright v. London & North Western Ry. Co.* (1876), 1 Q.B.D. 252; 34 Digest 216, 1785; 45 L.J.Q.B. 570; 33 L.T. 830.

* (2) *Holmes v. North Eastern Ry. Co.* (1871), L.R. 6 Exch. 123; 36 Digest 38, 219; 20 L.T. 616.

(3) *Degg v. Midland Ry. Co.* (1857), 1 H. & N. 773; 34 Digest 215, 1782; 26 L.J.Q.B. 171; 28 L.T.O.S. 357.

(4) *Houghton v. Pilkington*, [1912] 3 K.B. 308; 34 Digest 143, 1130; 82 L.J.K.B. 79; 107 L.T. 235.

(5) *Hayward v. Drury Lane Theatre, Ltd.*, [1917] 2 K.B. 899; 34 Digest 216, 1787; 87 L.J.K.B. 18; 117 L.T. 523.

(6) *Holdman v. Hamlyn*, [1943] 2 All E.R. 137; Digest Supp.

(7) *O'Sullivan v. O'Connor & Son* (1887), 22 L.R.Ir. 467; 36 Digest 111, 732 *xliv*.

(8) *Potter v. Faulkner* (1861), 1 B. & S. 800; 34 Digest 216, 1783; 31 L.J.Q.B. 30; 5 L.T. 455.

APPEAL by the defendants from a judgment of *STABLE, J.*, at Lancaster Assizes, dated Apr. 27, 1943.

G

H

The appellants were common carriers and the respondent was a farmer. On July 20, 1941, the date of the accident, the appellants had been engaged by the respondent to carry for him two cows from his farm to another farm and to bring back from that farm to his farm a heifer. For this purpose the appellants' driver was using a cattle motor lorry. At the time of the accident, the lorry was standing in the respondent's farmyard after the heifer had been taken from it. The appellant assisted the driver to close the doors of the lorry. The driver failed to bolt the first door securely and when they were proceeding to fasten the second door, the first door fell upon the respondent and severely injured him. The appellants' driver was the person who handled the bolt which gave way. *STABLE, J.*, awarded the respondent £1,200 damages in respect of the injuries received.

Neville Laski, K.C., and *H. I. Nelson* for the appellants.

G. J. Lynskey, K.C., and *Rose Heilbron* for the respondent.

Laski, K.C. : Although a master is ordinarily liable for the negligent act of his servant, there are certain well-recognised exceptions. For example, there is the somewhat distasteful doctrine of common employment. There is also

the exception that a master is not liable to a person who without his consent intermeddles with the duties of the servant. Such consent may be express or implied. *Degg v. Midland Ry. Co.* (3) is authority for saying that unless a servant has authority, express or implied, an injured person has no remedy against the employer. *Houghton v. Pilkington* (4) is a stronger case than the present and the court there held that even in a state of emergency a master is not liable. The doctrine of agency of necessity is of limited application in English law. In *Wright v. London & North Western Ry. Co.* (1) there was evidence of a practice and of an assent and, therefore, that case differs from the present one. [Counsel referred to *Hayward v. Drury Lane Theatre, Ltd.* (5), *Holdman v. Hamlyn* (6) and *O'Sullivan v. O'Connor & Son* (7).]

Nelson followed on the same side.

Lynskey, K.C. : In the present case there is no authority directly in point. The respondent was on his own premises receiving goods and he needed no justification for being there. The driver was acting in the course of his employment. The driver was an invitee and the appellants owed a duty to the farmer and to all who were lawfully present. Before the appellants can succeed they must bring the case within one of the exceptions to the vicarious liability of the employer. The doctrine of exception from vicarious liability was based upon the doctrine of common employment. By reason of the decision in *Hayward v. Drury Lane Theatre, Ltd.* (5) that position has been modified. In the present case the respondent was lawfully upon his own premises. The appellants' driver was under a duty not to be negligent towards him. The respondent was injured owing to the negligence of the driver. The act of negligence was unconnected with anything that the respondent had done and there was no fault on his part. In cases of apparent authority to accept assistance the onus is upon the employer to show that the apparent authority has been limited. There was, in the present case, apparent authority to accept assistance in the loading and in the unloading of the lorry. The authority must extend to the completed operation. The trial judge was entitled to infer that the driver had authority to accept the respondent's services.

Heilbron followed on the same side.

Laski, in reply, referred to *Potter v. Faulkner* (8).

LORD GREENE, M.R. : I have read the judgments which my brethren are about to deliver. I prefer to express no opinion as to the correctness of the ground upon which STABLE, J., decided this case in favour of the plaintiff. While appreciating the force of what is said by DU PARCQ., L.J., there is, I think, much to be said for the view that whatever implied authority the defendants' driver may have had to ask for help in unloading the heifer, that operation had been completed ; and there was no evidence that help in closing the doors of the van was necessary or would normally be invited by the driver. However this may be, and assuming that there was no implied authority to ask for help from the plaintiff, I agree with the reasons given by GODDARD, L.J., for dismissing the appeal. This case is free from the complications which arise, or appear to arise, where the plaintiff is a trespasser or a bare licensee or a licensee with an interest or an invitee on the defendants' premises and is there injured by the negligence of the defendants' servant while taking part with that servant in some operation at the unauthorised or authorised request of that servant or without any request at all. Here the first question is as to the duty owed by the defendants to the plaintiff during such time as the defendants' van was present on the plaintiff's premises. This duty, in my opinion, clearly included the duty to see that the van was not put or left in such a condition as to be dangerous to the plaintiff lawfully present on his own premises. *Prima facie* this duty was broken when it is found that a door of the van fell on and injured the plaintiff owing to the negligence of the driver in failing to shoot the bolt. The fact that the plaintiff with or without the implied authority of the defendants had himself taken part in closing that particular door is quite irrelevant. It was not due to any negligence of his in so doing that the door fell upon him. It seems to me equally irrelevant to say that the plaintiff was helping the driver to close the second door when the first door fell upon him. The fact that he was so helping no doubt explains how it came about that the plaintiff was in the position where he was when the accident happened. But

this is quite different from saying that the accident was due to the fact that he was so helping. I can find nothing in the facts of this case to displace the *prima facie* liability of the defendants for the negligence of their servant.

The appeal is dismissed with costs.

- A GODDARD, L.J. : STABLE, J., drew the inference in this case that the defendants' servant had implied or apparent authority to accept assistance in the unloading of the heifer, and, as I gather from his judgment, that assistance in unloading extended to help in closing the doors of the van. While I think there is a great deal to be said for this view, I am assuming without deciding, that the evidence did not justify such an inference. It follows, therefore, that the plaintiff had no right to assist the driver, and no excuse for so doing, and must be regarded as a trespasser so far as the van was concerned. I do not, however, propose to examine the numerous authorities on the position of those who sustain injuries while rendering voluntary assistance in operations, because
- B I do not think any are in point on the facts of this case. The accident happened in the plaintiff's farmyard. The defendants were invitees, and as such were bound to take reasonable care, both by themselves and their servants, that the van was not a source of danger to the invitor or other persons lawfully on the premises. Although the plaintiff had assisted in closing the door, which afterwards fell on him, he in no way contributed to that which caused it to fall ; it fell solely because the defendants' servant failed to shoot the bolt securely.
- C When it fell the plaintiff was where he had a right to be : true, he was then engaged in doing something which he had not a legal right to be doing, but he was injured because he was where he was and not by reason of anything that he was doing. He was injured because a door, which ought to have been safe, fell on him, and the reason why it fell was a default of the defendants' servant in the course of his duty. If it is objected that the only reason why he was in the particular position was because he was assisting to close the door, the answer
- D I think, is that this was no more than a *causa sine qua non*. The effective cause of the accident was that the defendants' servant failed to shoot the bolt properly. Had the plaintiff been standing where he was but merely looking on while the defendants' servant was raising the door, he would none the less have been injured. The accident happened, in my opinion, solely because the defendants' servant failed to exercise care in making the door safe, and as there was a duty
- E owed to the plaintiff to take care in that respect, the defendants are liable. Accordingly it is unnecessary to decide whether the evidence justified the inference that the driver had implied or apparent authority either to seek assistance or to accept it if offered.

In my opinion the appeal fails and should be dismissed.

- F DU PARCQ, L.J. : STABLE, J., has held that the facts of this case bring it within the principle which was affirmed by this court in *Wright v. London & North Western Ry. Co.* (1), on the authority of the decision of the Exchequer Chamber in *Holmes v. North Eastern Ry. Co.* (2). It was contended on behalf of the defendants that STABLE, J., erred in so holding, in that there was no evidence that the assistance given to the defendants' servant by the plaintiff was given with the consent of the defendants, or that the defendants' servant
- G acted within the scope of his employment in accepting that assistance. The quotation of a few lines from the judgment will show sufficiently clearly the view which STABLE, J., took of the facts. He said :

Here what was happening was this, that Greenway was unloading a cow in the plaintiff's own farm, an operation with regard to which it must be obvious to anybody who gives it a moment's thought help would be either invited or necessary, or, what is much more probable, offered without invitation.

- H If that view of the facts be right, it follows, in my opinion, that in the absence of evidence that the defendants had forbidden the acceptance of the plaintiff's help, STABLE, J., was entitled to hold that the defendants' consent to its acceptance could be implied. The argument of counsel for the defendants has not satisfied me that the view of STABLE, J., was wrong. The defendants' servant Greenway was delivering a heifer to the plaintiff who is a farmer. The construction of the wagon, photographs of which were in evidence, is such as to indicate to my mind that Greenway's task would have been a difficult one if he had been compelled to perform unaided the whole operation of opening

the wagon, letting down the doors and releasing and stabling the heifer. It is not in dispute that the assistance tendered and accepted was efficient. At the least it may be said, in my opinion, that in all the circumstances any reasonable employer in the defendants' position must have expected that the farmer or his servants, who would be fully competent to help, would in fact lend a helping hand to the man in charge of the wagon, and that such help, even if not essential, would certainly be desirable. This being so, it follows, in my judgment, that their consent to its acceptance by Greenway and their authority to him to accept it is to be implied. In my view, therefore, the judgment of STABLE, J., is right, for the reasons which he gave. It was suggested that it was incumbent on the plaintiff to prove an express consent by the defendants, or an express authority to his servant to give consent. I cannot accept this contention. In the ordinary affairs of life such consent and authority are frequently to be implied. If, for instance, a firm of carriers send only one of their servants to deliver to a warehouse a crate which is so heavy and cumbersome that it is physically impossible, or difficult and dangerous, for him to lift it unaided, that servant must be taken to have authority to obtain assistance, which is most likely to be forthcoming from the consignee or his servants. The facts here, though they may not be as strong as in that hypothetical case, do, in my opinion, justify the inference drawn by STABLE, J. On this view of the case it is unnecessary to consider what the position would have been on the assumption that Greenway had no authority to accept the plaintiff's help. I will add, however, that on that assumption I am satisfied that the defendants could still rightly be held liable, for the reasons given by GODDARD, L.J., whose judgment I have had an opportunity of considering. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Theodore Goddard & Co.*, agents for *Rutherfords*, Liverpool (for the appellants); *Gregory, Rowcliffe & Co.*, agents for *Linaker & Linaker*, Runcorn (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

MITCHELL COTTS & CO. (MIDDLE EAST), LTD. v. HAIRCO, LTD.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.JJ.), **October 13, 1943.**]

Emergency Legislation—Prohibition against import without licence—Buyer's duty to obtain licence—Customs (Consolidation) Act, 1876 (c. 36), s. 284—Import, Export and Customs Powers (Defence) Act, 1939 (c. 69), ss. 1 (1), 3 (1), 9 (2)—Anthrax Order, 1935 (S.R. & O., 1935, No. 164)—Import of Goods (Control) Order, 1940 (S.R. & O., 1940, No. 873).

Sale of Goods—Approval of sample condition precedent to payment—Not operative where condition cannot be fulfilled owing to buyer's default.

The defendants agreed to buy a quantity of goat hair from the plaintiffs' branch in Sudan at an agreed price c.i.f. the buyers to pay cash after the approval of the goods at the port of arrival. No mention was made as to who was to obtain an import licence under the Import of Goods (Control) Order, 1940, and each party was under the impression that it was the duty

of the other. When the goods arrived the buyers had already accepted the shipping documents and, as there was no licence to import the goods, they were seized by the customs and forfeited. The sellers claimed the price of the goods from the buyers. The buyers contended that the duty to obtain the licence was on the sellers and that approval of the goods was a condition precedent to the obligation to pay :—

A HELD : (i) the property in the goods passed to the buyers at the latest when they received the shipping documents. Both under the contract and under the legislation affecting the matter the buyers were the importers and the duty to obtain the licence was upon them.

(ii) the defence that approval of sample was a condition precedent to the obligation to pay was not available to the buyers as the condition could not be fulfilled owing to their default.

B [EDITORIAL NOTE. The question here is the short one whether the duty to obtain the import licence was upon the sellers or the buyers. Upon the construction of the relevant regulations, it is held to lay with the buyers.

FOR THE IMPORT OF GOODS (CONTROL) ORDER, 1940, see BUTTERWORTH'S EMERGENCY LEGISLATION [9], p. 40h.]

Cases referred to :

- C * (1) *Re Anglo-Russian Merchant Traders & Batt (John) & Co., Ltd.*, [1917] 2 K.B. 679; 12 Digest 397, 3223; 86 L.J.K.B. 1360; 116 L.T. 805.
 (2) *Brandt (H. O.) & Co. v. Morris (H. N.) & Co., Ltd.*, [1917] 2 K.B. 784; 1 Digest 631, 2542; 87 L.J.K.B. 101; 117 L.T. 196.
 (3) *Dupont v. British South Africa Co.* (1901), 18 T.L.R. 24; 39 Digest 517, 1335.
 (4) *Biddell Bros. v. E. Clemens Horst Co.*, [1911] 1 K.B. 214; 17 Digest 44, 497; 80 L.J.K.B. 584; 104 L.T. 577.

D APPEAL by the defendants from a decision of ATKINSON, J., dated Feb. 8, 1943. The facts are fully set out in the judgment of SCOTT, L.J.

B. J. M. MacKenna for the appellants.

J. B. Herbert for the respondents.

E SCOTT, L.J. : The defendant is a one-man company carrying on business as, *inter alia*, a merchant in hair. The contract in question was for goat hair coming from the Sudan, and the defendant company was the importer of that hair into this country.

F I should like to start my judgment by expressing sympathy for the defendant company who had their two places of business destroyed by enemy action and lost all their documents at an earlier period, the destruction taking place before the contract in this case was made. There had been a previous contract made between the defendant company and the plaintiff company in 1939, the plaintiff company having an office or place of business at Port Sudan in the Red Sea. The terms of the present contract, it is common ground, though not expressed in detail in the correspondence, were the same as those of the contract of Dec. 6, 1939, of which we have a copy in the correspondence. The contract was in these terms :

G About two tons of goat hair at 8d. per lb. in net weight, c.i.f. this country, war risks to be covered by buyer, net cash after approval of the goods at the port of arrival, prompt shipment from Sudan to this country.

H Nothing turns upon the port of destination; the contract in question was for shipment to the United Kingdom, and the goods were in fact shipped to Manchester. The question in the case is whether the buyer came under obligation to pay the price, and that question turns upon the provision in the contract for "payment of net cash after approval of the goods at the port of arrival," i.e., Manchester.

Goat hair has been the subject of legislation, both Parliamentary and delegated. The Anthrax Prevention Act, 1919, authorised the making of Orders in Council, and the Anthrax Order, 1935, made provision for disinfection and regulated the importation of goat hair. Para. 1 of the Order says :

The importation into Great Britain of such goat hair as aforesaid and all goods mixed therewith is hereby prohibited, except subject to the conditions hereinafter specified.

The important condition is para. 2 (b) (ii) :

All packages containing such hair or goods shall when landed be placed together and shall not be mixed with any other goods and shall if imported at the Port of Liverpool be delivered to the director of the Government Wool Disinfecting Station (Home Office) at Liverpool or any agent of His Majesty's Principal Secretary of State for Home Affairs duly appointed to receive and to remove them to such station, or if imported at any other port shall as soon as practicable be removed and delivered to the director of such station and the importer shall if so demanded by the proper officer of customs and excise give such security by bond or otherwise for the due removal thereof to the station as he may require.

The contract of 1939 came within the provisions of that order.

In 1939 another statute was passed affecting the case, the Import, Export and Customs Powers (Defence) Act, 1939, which was an Act to provide general control, *inter alia*, over the importation of goods. Sect. 1 (1) provided :

The Board of Trade may by order make such provisions as the Board think expedient for prohibiting or regulating, in all cases or any specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order, the importation into . . . the United Kingdom . . . of . . . goods of any specified description.

It also gave power to deal with exportation from the United Kingdom of carriage coastwise within the United Kingdom and of shipment of ships' stores. Sect. 3 (1) made provision for each of the four classes of act brought within the Act by sect. 1 :

If any goods (a) are imported, exported, carried coastwise or shipped as ships' stores . . . those goods shall be deemed to be prohibited goods and shall be forfeited . . .

Sect. 9 (2) of the Act provided that the Act is to be construed as one with the Customs (Consolidation) Act, 1876. That Act provided, *inter alia*, for forfeiture of goods—I need not trouble with that, as there is no dispute about the power of forfeiture—but sect. 284, on the interpretation of terms, says :

“Importer” shall mean, include, and apply to any owner or other person for the time being possessed of or beneficially interested in any goods at and from the time of the importation thereof until the same are duly delivered out of the charge of the officers of customs.

Under that group of legislative provisions the defendant company came in respect of their contract in this case, which was made in the early part of 1941. It is clear, therefore, that the statutory surrounding, so to speak, of the contract was one in which the legislature, directly or by delegated legislation, had put upon the importer the duty of obtaining a licence, if a licence was necessary ; and in this case it was necessary. Under the Import of Goods (Control) Order, 1940, dated June 4 of that year, the Board of Trade made an order under the Act of 1939, that I have cited, as follows :

(1) The importation into the United Kingdom of all goods except live quadruped animals is, subject to the provisions of this order, prohibited. (2) Nothing in the preceding article of this order shall be taken to prohibit the importation of any goods under the authority of a licence granted by the Board of Trade, provided that all conditions attaching to the licence are complied with.

It was proved in evidence and it appears from the correspondence that, on the arrival of these goods in Manchester they were put into an emergency customs warehouse in bond ; and it was further proved that it was impossible for the owner of goods who had imported them to get a sample of goods in bond. Therefore, once in bond, the buyers here were not in a position to obtain the right to inspect the goods and take samples, so as to express their approval or disapproval within the meaning of the contract : although it was in evidence that, when goods were taken ultimately to the disinfecting station at Liverpool, a sample could be obtained there from the authority in charge of the station, on condition that the sample or samples, after inspection, were returned to the station, or destroyed with the consent of the director of the station. On the arrival of the ship, these goods were put into bond, as I say, at Manchester and there they stayed. In the contract there is nothing expressed as to whose duty it was to obtain the licence to import goat hair, but, in my view, the contract must be treated as made upon the assumption that the statutory law

applicable, whether original or delegated, should be observed by the parties to the contract. There can be no question at all that the appellants here, the buying company, were the importers. The duty was, by statute, placed upon the importers to obtain the licence, and that duty, I think, was an absolute duty. But even if it be treated as only a duty to take all reasonable steps to obtain the licence, the result would, in my view, be the same. The property in the goods had at the very latest passed to the buyers at the time when they received the shipping documents, and it is quite clear, therefore, that, before the ship arrived, they had become the owners of the goods, and under the contract, as owners and as importers—under both heads—it was their contractual duty to the sellers to obtain the licence or take all reasonable steps so to do. They did not take any steps at all; on the contrary they wrote to the sellers on Nov. 10 this letter:

- A
- B We have today received the following letter from the Liverpool Warehousing Co., Ltd., of 51, Barton Arcade, Manchester. "The H.M. Customs in Manchester are requesting production of licence for the above shipment per return . . ." We have asked this firm to clear the 11 bales through the customs and we would therefore be pleased if you would kindly send the import licence either to us direct or to the Liverpool Warehousing Company, Limited, Manchester, informing them that you have sent same upon our request. Thanking you in anticipation for your prompt attention, we are, yours faithfully, Hairco, Ltd.
- C The plaintiffs replied to that letter, which was evidently sent to them by hand in London, both firms having offices in London at the time:

- D We thank you for your letter of even date and confirm our subsequent conversations. As we advised you, we do a considerable amount of business in produce on c.i.f. terms, but in no case do we ourselves attend to the obtaining of import licences, as we consider that this is a matter for the buyers. We regret there has been a misunderstanding in the present case since you apparently thought that we should be applying for a licence, but we explained the circumstances to the Import Permit Department and trust that you will be successful in securing the licence for which we understand you are now applying.

- E I need not read any more of the correspondence. There was obviously a perfectly genuine misunderstanding, but I think the defendants, as buyers, unfortunately for them, were not justified in thinking what they did. It was clearly their duty to obtain a licence; they were the importers and not the plaintiff company. The argument for them below and before us was that the plaintiff company were the importers, because they had a branch at Port Sudan and, as the correspondence shows, had asked the permission of their branch to sell the goods, and in fact left it to their branch to decide whether there should be a sale or not; but that was a purely domestic matter between them and their branch. They were not the importers into this country. They did not have the shipping documents at the time of the arrival of the ship; it was the buyers, the defendants, who had the documents and who were the importers, and it was their duty, and their duty only, to obtain the licence.
- F

- G In my view, that disposes of the appeal, but I will just add this as to my reasons. I assume that the clause in the contract, "net cash after approval of the goods at the port of arrival," is a condition precedent to the buyers' obligation to pay, altering the normal term of c.i.f. contracts, which is cash against documents; but the buyer could not avail himself of that condition precedent to his obligation to pay unless he could show that he was not in default in respect of his failure to express approval or disapproval. It is out of the power of a seller, once the documents have been handed over to a buyer, to take any steps; it becomes the buyer's duty to take whatever steps are necessary to obtain from the proper authority the right of making the inspection of the goods upon which his expression of approval or disapproval depends. It is quite clear on the evidence here that, whether it was an absolute duty or only a modified duty to take reasonable steps, the buyer took no steps at all until after the goods had arrived, with the result that those goods were imported in contravention of the Order of 1940 and were, therefore, prohibited goods within the meaning of the Customs (Consolidation) Act, 1876. As a result, as appears from the correspondence, the customs in fact seized and forfeited the goods. In those circumstances, the buyers are not entitled to rely upon the condition precedent, and the sellers are entitled to the price of the goods in accordance with the contract.
- H

We were referred to one or two cases in argument : I do not think they touch the question here, but I refer to one of them, and one only, *Re an Arbitration between the Anglo-Russian Merchant Traders Limited and John Batt & Co. (London), Limited*, (1). There the court held that the sellers were under a duty to take reasonable steps to obtain a licence. The arbitrator had held that the sellers in that case—it was a contract for sale c. i. f. to Vladivostok—were liable in damages ; the judge of first instance took the same view, but the Court of Appeal reversed the decision. VISCOUNT READING, L.C.J., presiding, expressed the view that there the duty under the provisions of that contract was only to take reasonable steps ; and SCRUTTON, L.J., said that he thought the obligation could not be put higher than a duty “ to use reasonable diligence ” to get a licence.

For the reasons I have given, even if we treat that decision as applicable here and hold on those lines that the duty of the buyers here was only to take reasonable steps or to use due diligence to obtain a licence, the fact is that they took no steps at all. The real truth is that they failed to take steps because they wrongly supposed it to be the duty of the sellers, and deliberately took no action. I do not think it necessary to discuss that case any further for that reason.

The appeal must be dismissed with costs.

MACKINNON, L.J. : I agree, and I do not think I need add anything.

GODDARD, L.J. : I agree. I only want to add a few words with regard to the *Anglo-Russian Merchant Traders, Ltd.* case (1), upon which counsel for the defendants relied. In this case I think there can be no doubt whatever, with all respect to his argument, that this contract was an ordinary c.i.f. contract, although the time for payment was postponed and made to depend upon a future event, and that the property in the goods passed to the buyers when the bill of lading was indorsed over to them and they accepted the documents. Thereupon the goods became theirs, and that fact, I think, distinguishes this case from the case cited. It is unnecessary to consider what would have been the result in that case if the contract had remained in force, but in the *Anglo-Russian Merchant Traders* case (1) the facts were that the sellers had sold aluminium which was to be shipped to Vladivostok and no aluminium was ever shipped, there being at that time, as was known both to sellers and buyers, a prohibition upon the export of aluminium from this country except on licence granted by the Government, and the Court of Appeal held that on the true construction of the contract there was not an absolute obligation to ship, but there was an obligation to obtain, or use reasonable steps to obtain, a licence to enable the parties to ship. I do not think that case can have any bearing on the present one because here the defendants, knowing of this legislation and knowing the necessity to obtain a licence, chose to acquire the ownership in the goods by accepting the documents which were tendered to them. The goods thereupon became theirs, and it seems to me from that moment it was for the defendants to obtain a licence to enable them to import their own goods. As they did not obtain a licence, I do not think they can rely upon a condition which was put into the contract for their benefit, and in consequence, they cannot claim here that they are not liable to pay the price because they had not an opportunity to examine the goods. The fact that they had not an opportunity to examine the goods was due to the circumstance that they had not obtained a licence to import their own goods.

Appeal dismissed with costs.

Solicitors : *Dehn & Lauderdale* (for the appellants) ; *Linklaters & Paines* (for the respondents).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

Re HART'S WILL TRUSTS, HART v. HART.

[CHANCERY DIVISION (Bennett, J.), October 14, 1943.]

Wills—Construction—Investment clause—Power of beneficiary to direct investments whether authorised or not—Whether beneficiary may direct trustees to purchase shares from himself.

A By her will and codicil thereto the testatrix directed the sale and conversion of the residue of her real and personal estate, and provided that a sum of £2,000 and a share in the residue, hereafter called the trust fund, should be held upon trust for E.S.H. for life, the trustees to invest the capital of the trust fund in such investments as E.S.H. should from time to time direct whether they were authorised investments or not. The trustees took out a summons to determine the extent of the power to direct the investments, and, in particular, whether, if E.S.H. so directed, they were to purchase shares from E.S.H. as vendor; and whether the power only applied to capital moneys in hand or extended to the realisation of sufficient investments then held in order to provide the purchase money:—

B HELD: (i) on the true construction of the direction, the trustees were required, if practicable, to consult E.S.H. both as to investments and sales, and, if he refused or failed to act, they were free to act themselves.

C (ii) Provided he acted in good faith, E.S.H. might direct the purchase of shares from himself, and his power to direct was not confined to the investment of uninvested funds in the trustees' hands but extended to the conversion of existing investments of the trust funds. The trustees must be satisfied that a reasonable and proper price was paid for the shares.

D [EDITORIAL NOTE. While it was formerly usual to restrict the range of investments in which trustees might invest trust funds, the modern tendency is to enlarge the range so that a fair income may be ensured for the beneficiaries taking life interests. The construction of investment clauses has for this reason become of more importance and this case deals with a power, now quite often included, intended to enable trustees to invest trust funds in a family business.

AS TO INVESTMENT OF TRUST FUNDS, see HALSBURY, Hailsham Edn., Vol. 33, pp. 232-235, paras. 415-418; and FOR CASES, see DIGEST, Vol. 43, pp. 926-930, Nos. 3640-3682.]

E SUMMONS by the trustees of the will of the testatrix to determine the extent of a power given to the beneficiary of a settlement created by the will and codicil to direct the investment of the trust funds. The facts are fully set out in the judgment.

Wilfrid M. Hunt for the trustees.

C. L. Fawell for the defendant with power to direct investments.

A. C. Nesbitt for others interested in residue.

F BENNETT, J.: This summons raises a question as to the power of the first defendant to give directions to the plaintiffs as trustees of the will of the testatrix with regard to the sale and purchase of investments held by the plaintiffs upon trust for the first defendant under the will and codicil of the testatrix.

G The will of the testatrix gave the first defendant a legacy of £2,000 free of duty, the legacy being given by cl. 5 of her will. By cl. 7 she directs the sale and conversion of the residue of her real and personal estate, and by cl. 8 she directs her trustees to stand possessed of her residuary trust estate in trust "to divide the same between the following of my children," and one of the children is the first defendant, Edward Samuel Hart. The division is between such of them as shall be living at the testatrix's decease and is to be in equal shares absolutely and beneficially.

H By the codicil the testatrix recites that she has given to her son Edward Samuel Hart the sum of £2,000 and also a share in her residuary estate, and in that codicil the testatrix directs:

That the said sum of £2,000 and the said share in my residuary estate hereinafter called the said trust fund shall not be paid to my said son but that my trustees shall hold the same subject to the trusts hereinafter declared that is to say my trustees shall invest the capital of the said trust fund in such investments in their names or under their control as my said son may from time to time direct whether the same be investments authorised by law for the investment of trust funds or not and shall pay the income arising from such investment to my said son during his life.

Then there are trusts to which I need not refer at length which are to take effect after the death of the son or his having become bankrupt.

The question is: what are the powers of the son with regard to the direction to the trustees of the investment of the capital of the trust fund? Before making any change of investment it is the duty of the trustees, in my judgment, upon the construction of this particular power to consult Hart if they are reasonably able to consult him and to act in accordance with his directions if he gives them. If he refuses or fails to give them, then they must be free to act. At the moment the investments are specified in an affidavit of one of the plaintiffs, and there are a number of investments. Hart has in mind the giving of directions to the trustees to realise some of those investments and to invest the proceeds in the purchase of ordinary shares in a public company. The ordinary shares in that company are not dealt with on the Stock Exchange, but there are preference shares in the company which are publicly dealt with. One of the questions to which the trustees desire to know the answer is whether, if the first defendant Edward Samuel Hart so directs, they are to realise some of the investments they now hold and to invest the proceeds of sale in the purchase of ordinary shares in the company, and whether they may buy those shares from Edward Samuel Hart himself. The summons directs a number of questions, and I think the answers to them ought to be prefaced by the statement that Hart may do what he likes provided he acts in good faith.

The first question is whether, with reference to the provision in the codicil which I have read, the power of the first defendant to give directions extends to the purchase of investments from himself as vendor, limiting the investments to ordinary shares in the stated company. The answer, in my judgment, should be in the affirmative.

The next question is whether the power applies only to capital moneys then in hand or extends to requiring the trustees to realise sufficient of the investments then held to provide the purchase money. The answer to that, in my judgment, is "Yes"; and that, I think, depends exclusively upon the true construction of the power. The power is to direct the trustees to "invest the capital of the said trust fund." "The capital of the said trust fund" means not merely cash in the hands of the trustees, but extends to and includes the investments in which the original cash is from time to time invested. The power is to direct the investment of the capital in such investments as the testatrix's son may from time to time direct. Upon the language of the power as a whole, in my judgment, provided he acts in good faith, Edward Samuel Hart is entitled to give directions to the trustees to realise any investments constituting the trust fund which they from time to time may hold. In my judgment, upon the language of the clause, the trustees are bound to comply with those directions save that they are to satisfy themselves, the shares not being shares in which there is a free and open market, that the price which they pay for them is a reasonable and proper price at the time they make the purchase.

Declarations accordingly. Costs of all parties to be paid out of the share of the beneficiary with power to direct the investments.

Solicitors: *Routh, Stacey, Hancock & Willis* (for all parties)

[Reported by R. L. ZIAR, Esq., Barrister at Law.]

WARE v. GARSTON HAULAGE CO. LTD.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.J.J.), **October 13, 1943.**]

Nuisance—Untightened motor vehicle left on road in darkness

A motor lorry and trailer on the highway broke down and it was said to have been left by the men in charge with the rear lamp on the trailer alight. It was, however, found as a fact that this lamp was not alight when, shortly after those in charge had gone to obtain hurricane lamps, the plaintiff drove his motor cycle into it and suffered injury.

Held:—the question of the negligence of those in charge of the lorry and trailer was immaterial because the untightened coach was a nuisance to law-abiding motorists.

EDITORIAL NOTE. The argument here was that the men in charge of the lorry had done everything reasonably possible, but the Court of Appeal have held that an unlighted vehicle on the road after dark is an obstruction of the highway and a nuisance so that the owner is liable in damages quite apart from any question of negligence.

AS TO NUISANCE ON THE HIGHWAY, see HALSBURY, Halsham Edn., Vol. 16, pp. 354-363, paras. 483, 484; and FOR CASES see DIGEST, Vol. 26, p. 437, Nos. 1545, 1546.]

APPEAL by the defendants from a decision of LEWIS, J., given on Feb. 27, 1943. The facts are sufficiently stated in the judgment of SCOTT, L.J.

W. H. Cartwright Sharp, K.C. and *A. Karmel* for the appellants

J. P. Eddy, K.C. and *Lloyd Jones* for the respondents.

SCOTT, L.J.: A man was killed in Nov. 1941 on the road between Nottingham and Derby by running at night, in the black-out, into a trailer which was attached to a lorry that had broken down on the road early in the morning and had remained broken down because it was impossible to get repairs done to the hub of the wheel that had gone wrong before night fell. In the daylight, and also apparently after dark, the men on the lorry had tried the lights and found that they were all working. Some time between 7 o'clock and the time of the accident, which occurred between 7.20 and 7.30, the men had gone to see if the police could let them have some hurricane lamps to put on the road. The trailer's rear light having worked all right before they went away, they assumed that it was in good order; but counsel for the appellants does not challenge the judge's finding that, at the time this unfortunate man on his motor bicycle ran into the trailer, its rear light was not burning. The judge held that the defendants were guilty of negligence because they ought to have made sure that the trailer's rear light was burning and would continue to burn, for he was not satisfied that they really believed in the efficiency of the light. Counsel for the appellants has said that no allegation was made in the pleadings to suggest that the men realised that it was defective, and that no question to suggest that was put to them in cross-examination. He therefore asks this court to reverse the judgment of the judge on the ground that there was no evidence of negligence.

Counsel for the appellants was asked by GODDARD, L.J., whether, if the lorry was there with the trailer in fact unlighted so that it could not be seen, it was a dangerous obstruction in the road, which would be a nuisance. If that were so and the light had gone out, it was the misfortune of those responsible for seeing that the trailer was lighted, but not a reason for saying that the plaintiff was not entitled to recover damages. I agree with that view entirely. If anything is left on the road which is likely to cause an accident through being an obstruction to those who are using the road upon their lawful occasions, such as an unlighted vehicle standing there at night, and an accident results, there is an actionable nuisance; and, even if the judge were wrong, as counsel suggests, in thinking that he was entitled to decide this case on the ground of the negligence of the two men and giving judgment for the plaintiff on that footing, the latter is entitled to hold his judgment on the ground that the facts as proved show a nuisance. There was an obstruction, and a very dangerous one, in the road, and, if that was so, there was an absolute duty to light it in order to prevent accidents. Having regard to the extreme danger of such an obstruction, it is no answer to say that the light unfortunately had gone out. For those reasons, without discussing the question in any detail as to whether the judge was justified on the facts of the case in drawing the inference of negligence that he did, I think the appeal must be dismissed.

I should like to add this. It is not possible for this court to disagree with the learned judge's finding that the men had at least a suspicion that the lighting arrangements were not very effective, without going very carefully into the evidence, and I do not think that is necessary.

MACKINNON, L.J.: I agree.

GODDARD, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Vizard, Oldham, Crowder & Cash* (for the appellants); *Borall & Borall* (for the respondent).

Reported by S. J. NICHOLSON, Esq., Barrister at Law.

CARLTONA, LTD. v. COMMISSIONERS OF WORKS AND
OTHERS.

[COURT OF APPEAL (Lord Greene, M.R., Goddard and du Parcq, L.JJ.),
October 5, 6, 1943.]

Emergency Legislation—Requisitioning of premises—Discretion of competent authority—No jurisdiction of court to interfere with bona fide exercise of discretion—Defence (General) Regulations, reg. 51 (1).

The appellants were manufacturers of food products and on Nov. 4, 1942, their factory was requisitioned by the Commissioners of Works under the provisions of the Defence (General) Regulations, 1939, reg. 51 (1). On Nov. 9, 1942, the appellants commenced proceedings against the Commissioners, and they claimed a declaration that the Commissioners were not entitled to take possession on the ground that the notice was invalid. The Minister of Food, who had stopped the supply of raw materials, and the Minister of Labour and National Service, who had withdrawn labour from the factory, were also made defendants, but the claim against them was not proceeded with and it was not suggested before the Court of Appeal that any action would lie against them. The sole question before the court related to the validity of the order of the Commissioners of Works in requisitioning the premises. The appellants contended (a) that the notice of Nov. 4, 1942, was bad because it gave a reason not mentioned in the regulation and (b) quite apart from the notice, the requisitioning authority never brought their minds to bear upon the question, and (c) that the circumstances were such that, if the requisitioning authority had brought their minds to bear upon the matter, they could not have possibly come to the conclusion to which they in fact came :—

HELD : Parliament has committed to the executive the discretion of deciding when an order for the requisition of premises should be made under the regulation and with that discretion, if bona fide exercised, no court could interfere.

[EDITORIAL NOTE.] The decision in this case and that in the *Point of Ayr Collieries* case (p. 546 ante) are based upon the same principle, but it has been thought necessary to include this case as the power to requisition premises has been given to a much larger number of authorities than other similar powers.

FOR THE DEFENCE (GENERAL) REGULATIONS, REG. 51 (1), see BUTTERWORTH'S EMERGENCY LEGISLATION [13], p. 214, and HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 34, p. 711.]

APPEAL of the plaintiffs from a judgment of HILBERY, J., dated Feb. 3, 1943. The facts are fully set out in the judgment of LORD GREENE, M.R.

H. B. Vaisey, K.C., and Robert Fortune for the appellants.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), and Colin Pearson for the Commissioners of Works and the Minister of Food.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), and W. Arthian Davies for the Minister of Labour and National Service.

LORD GREENE, M.R. : In the early part of the year 1942 the Government was confronted with a shortage both of accommodation and of labour. During the first half of that year discussions took place between the relevant departments and a particular industrial body with a view to seeing whether a certain industry could be concentrated in such a way as to set free accommodation and labour. The industry with which we are concerned in this appeal relates to the manufacture of certain food products described by the managing director of the appellants as "farinaceous and allied food products."

It was decided as the result of discussions to close the factory at Willesden belonging to the appellants, thus setting free the accommodation which the factory was capable of giving and the labour which the factory was employing. That decision, which was finally come to, as appears in the correspondence and the affidavit of Mr. Roberts, some time in August, 1942, was made with the approval of the Ministry of Food. That approval was obviously necessary as a practical matter, because it would be an impossible position for the Board of Trade interested in accommodation and the Ministry of Labour interested in labour to take the steps necessary to put a factory out of action when that

factory was manufacturing products in which the Ministry of Food was interested. Therefore, according to normal practice, the Ministry of Food was a party to these discussions and they decided that they could dispense with the appellants' factory.

The decision having been taken and communicated to the appellants that their factory had been scheduled for closing, the Ministry of Food and the Ministry of Labour and National Service took steps, at some time which is not material, to carry that decision into effect so far as the Ministry of Food was concerned by withholding supplies of raw material and so far as the Ministry of Labour was concerned by withdrawing labour from the factory. Whether these processes had been completed or not seems to me to be quite irrelevant.

It so happened that the Commissioners of Works required storage space and it was suggested to them in August that they might consider the suitability of the plaintiffs' premises for such storage. This, of course, had become possible owing to the fact that the decision to close down the plaintiffs' factory was, if not formally taken at that stage, at any rate quite certain to be taken; and, not unnaturally, the department of the Board of Trade concerned with the control of factory and storage premises put forward these particular premises as being available for the Commissioners of Works for their storage purposes.

That being the position the writ in this action was issued on Nov. 9. Before it was issued a notice dated Nov. 4, signed on behalf of the Commissioners of Works, had been sent to the appellants stating that the Commissioners were taking possession of their premises. I will refer later to the form of that notice and the significance of it. The writ issued against the Commissioners of Works, the Minister of Food and the Minister of Labour and National Service claimed a declaration, putting it shortly, that the Commissioners of Works were not entitled to take possession and that the notice was invalid and, secondly, an injunction restraining the defendants and all of them from acting upon the said notice "or from directly or indirectly taking any steps calculated to enforce the same by in any way interfering with the plaintiffs' possession of the said factory or the plaintiffs' supply of raw materials or labour therefor, or otherwise."

The complaint against the Minister of Food on the face of that writ appears to be connected with the withholding of raw materials, and the complaint against the Minister of Labour appears to be concerned with the withholding or diversion of labour from the plaintiffs' factory. (The complaint against the Commissioners of Works is a complaint against their action in requisitioning the plaintiffs' factory.) It does not appear that the complaints against the Minister of Food and the Minister of Labour and National Service were persisted in before **HILBERY, J.** In this court it has not been suggested that any claim will lie against either of those Ministers in respect of their actions, and the sole matter which has been presented for our consideration relates to the validity of the action of the Commissioners of Works in requisitioning the premises.

The regulation under which their action was taken is reg. 51 (1) of the Defence (General) Regulations. It is in these terms:

A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land.

The notice of Nov. 4 is signed by a Mr. Morse for and on behalf of the Commissioners of Works. It is on the headed letter-paper of the Ministry of Works and Planning, whose connection with the Commissioners of Works arises in a way which I will indicate in a moment. The letter says:

I have to inform you that the department have come to the conclusion that it is essential, in the national interest, to take possession of the above premises occupied by you.

Then the appellants are asked to take the letter as formal notice, and they are directed to arrange for the removal of such chattels as are not requisitioned.

It is necessary to say a word about the position of the Commissioners of Works. First of all, the phrase "a competent authority" in the regulation which I have read includes among other departments of State the Commissioners

of Works. As is well-known, the Commissioners of Works are a body that never meets. By statute, namely, the Crown Lands Acts, 1851 and 1852, the functions and powers of Commissioners of Works are exercised by the First Commissioner, and the First Commissioner of Works holds a ministerial appointment and is the head of what is commonly called the Office of Works. In the year 1942 a statute was passed called the Minister of Works and Planning Act, 1942, which empowered His Majesty to appoint a Minister of the Crown by the name of the Minister of Works and Planning, and the Act provided for transfer to the Minister of functions exerciseable under any enactment by the Commissioners of Works. It also provided in sect. 1 (2) that, until the office of the First Commissioner of Works should cease to exist under an Order in Council that has not happened or, at any rate, it had not happened at the relevant date—any person appointed to hold office as Minister of Works and Planning should by virtue of that office also hold office as First Commissioner of Works. Therefore, the Minister of Works and Planning holds the dual office of that Ministry and First Commissioner, and accordingly the competent authority for the purpose of this regulation, to take possession of the Crown Lands of Works, is the Minister of Works and Planning. In this case, I find that Commissioner Constitutionally the decision remains the decision of the Commissioners of Works, and the letter is quite properly signed on behalf of the Commissioners of Works.

The action was dismissed by HILBERY, J. on the ground that it was not competent to him to inquire into the merits of the case so far as regards the desirability or the policy of requisitioning the plaintiffs' premises.

The points that were taken before us were three, and I will deal with them in order. First of all, it was said that the notice was a bad notice because it gave a reason which was not mentioned in the regulation. That argument means that the regulation refers to the public safety, the defence of the realm, and so forth, whereas the notice says that the department had come to the conclusion that it was essential in the national interest to take possession. It is said, therefore, that the notice is bad.

It is to be observed that, in order to exercise the requisitioning powers conferred by the regulation no notice is necessary at all and, therefore, the question of the goodness or badness of a notice does not in truth arise. The giving of notice is not a pre-requisite to the exercise of the powers and, accordingly, the notice must be regarded as nothing more than a notification, which the Commissioners were not bound to give, that they are exercising those powers. The notice is no doubt for what it is worth, evidence of the state of mind of the writer and those by whose authority he wrote, and it is perfectly legitimate to argue that this notice suggests, on the face of it, that those who were directing their minds to this question were directing them to the question whether the action proposed was in the national interest and not to the specific matters mentioned in reg. 51. But the notice is no more than evidence of that, and when an assistant secretary in the Ministry of Works gave evidence it was perfectly clear that he was using that phrase—and this letter was written on his instructions—as a sort of shorthand comprising the various matters in reg. 51 upon which the requisition would have been justified. The mere use of the phrase "in the national interest" in this letter appears to me to lead the plaintiffs nowhere when the fact appears, as it appears as clearly as anything can be, that the assistant secretary was acting with regard to this regulation itself and was using the phrase "in the national interest" as a comprehensive phrase to cover all the grounds which are mentioned in the regulation. That point appears to me to have no substance at all.

The next point which was taken was that the requisition itself was bad quite apart from the notice because the persons constituting the requisitioning authority never brought their minds to bear on the question. That argument is based, as it seems to me—and I say this without the slightest disrespect to the argument—upon a complete misapprehension as to the facts. It appears to have been thought at the time of the trial that the proper persons to take into consideration the question of exercising the power under this regulation were the Commissioners of Works themselves, a body which, as I have said, never meets. If that idea ever was put forward, and I am not quite sure whether it was or not, a moment's consideration will show that the argument cannot be supported for the very simple reasons, first, that the person who has the

statutory power to act for the Commissioners of Works is the First Commissioner, and, secondly, that the person acting for the First Commissioner in this matter was the assistant secretary.) There is no point in the argument at all that the Commissioners of Works as such did not take the matter into consideration, nor is there, in my opinion, any substance in the argument that, at any rate, the First Commissioner did not personally direct his mind to the matter. —

A In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. (It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority) and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them.

B In the present case the (assistant secretary) a high official of the Ministry, was the person entrusted with the work of looking after this particular matter and the question, therefore, is, relating those facts to the argument with which I am dealing, did he direct his mind to the matters to which he was bound to direct it in order to act properly under the regulation? —

The argument on that view of it amounts to this: it is said that the assistant secretary never directed his mind to any one of the various heads mentioned in reg. 51. It is pointed out that, in reg. 51, those heads are put as alternatives:

E . . . in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community . . .

F It was said that it was the duty of the person acting in the capacity of "a competent authority" to examine the facts of the case and consider under which, if any, of those various heads the matter came, and it is said that the assistant secretary did nothing of the kind. It is to be observed that those heads are not mutually exclusive heads at all. They overlap at every point and many matters will fall under two or more of them, or under all four. I read the evidence as meaning that the assistant secretary, seeing quite clearly that the case with which he was dealing and the need that he wished to satisfy was one which came under the regulation, did not solemnly sit down and ask himself whether it was for the efficient prosecution of the war that this storage was

G required for maintaining supplies and services essential to the life of the community. He took the view that it was required either for all those purposes, or, at any rate, for some of them, and I must confess it seems to me that it would have been a waste of time on the facts of this case for anyone seriously to sit down and ask himself under which particular head the case fell. He regarded it, as I interpret his evidence, as falling under all the heads, and that may very well be having regard to the fact that these heads overlap in the way that I have mentioned. It seems to me, therefore, that there is no substance in that

H point, and his evidence makes it quite clear that he did bring his mind to bear on the question whether it appeared to him to be necessary or expedient to requisition this property for the purposes named, or some of them.

— The last point that was taken was to this effect, that the circumstances were such that, if the requisitioning authorities had brought their minds to bear on the matter, they could not possibly have come to the conclusion to which they did come. (That argument is one which, in the absence of an allegation of bad faith—and I may say that there is no such allegation here—is not open in this

court. It has been decided as clearly as anything can be decided that, where a regulation of this kind commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith.) If it were not so it would mean that the courts would be made responsible for carrying on the executive government of this country on these important matters. Parliament, which authorises this regulation, commits to the executive the discretion to decide and with that discretion if *bona fide* exercised no court can interfere. All that the court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction.

The appeal must be dismissed with costs.

GODDARD, L.J. : I agree, and I do not think that I can usefully add anything to what the Master of the Rolls has said.

DU PARCQ, L.J. : I also agree.

Appeal dismissed with costs.

Solicitors : *E. M. Tringham* (for the appellants) ; *Treasury Solicitor* (for the Commissioners of Works and the Minister of Food) ; *Solicitor to the Minister of Labour and National Service* (for the Minister of Labour).

[Reported by W. K. SCRIVENER, Esq., *Barrister-at-Law*.]

Re DONN'S WILL TRUSTS, DONN AND OTHERS v. MOSES AND OTHERS.

[CHANCERY DIVISION (Uthwatt, J.), **October 19, 1943.**]

Wills—Conditions—Forfeiture—Uncertainty—“Jewish faith.”

By his will the testator directed that his residuary estate should be held upon trust for his children in equal shares for life. By cl. 17 of the will he further provided that, if any of his children should intermarry with anyone not of the Jewish faith, or, if any child of his should intermarry with anyone whose parents were not of the Jewish faith at the time of the birth of the person so intermarrying with any child of his, or, if any such last-mentioned person should at any time previous to such marriage have been of any faith other than the Jewish faith, then in such case during the life of such child one-half of the income of his or her share should follow the trusts then and thereafter subsisting of the income of the shares of residue of his other children in equal shares. The trustees took out a summons to determine whether this forfeiture clause was wholly or partly invalid for uncertainty or otherwise :—

HELD : it was not possible to extract what the testator meant by the words “Jewish faith.” The condition was, therefore, void for uncertainty.

[EDITORIAL NOTE. The decision in the House of Lords in *Clayton v. Ramsden* (4) did not disturb the decision in *Re Blaiberg* (3). In fact, the majority of their Lordships expressed views which supported that decision, but a minority seemed to think that the “faith” of a person might well be determined as any other question of fact has to be determined in a court of law. In this state of the law, the courts must now follow *Re Blaiberg* and hold that a condition which requires that a person shall be of a particular faith is too uncertain to be enforced.

AS TO CONDITIONS OF FORFEITURE, see HALSBURY, *Hailsham Edn.*, Vol. 34, pp. 105-109, paras. 141-143 ; and FOR CASES, see DIGEST, Vol. 44, p. 462, No. 2825.]

Cases referred to :

(1) *Re Sandbrook*, *Noel v. Sandbrook*, [1912] 2 Ch. 471 ; 44 Digest 444, 2686 ; 81 L.J.Ch. 800 ; 107 L.T. 148.

* (2) *Clavering v. Ellison* (1859), 7 H.L. Cas. 707 ; 44 Digest 440, 2667 ; 29 L.J.Ch. 761.

* (3) *Re Blaiberg*, *Blaiberg & Public Trustee v. De Audia Yrarrzaval & Blaiberg*, [1940] 1 Ch. 385 ; [1940] 1 All E.R. 632 ; Digest Supp. ; 109 L.J.Ch. 166 ; 162 L.T. 418.

* (4) *Clayton v. Ramsden*, [1943] A.C. 320 ; [1943] 1 All E.R. 16.

SUMMONS by the trustees to determine whether a forfeiture clause in the testator's will was wholly or partly invalid for uncertainty or otherwise. By his will the testator directed that his residuary estate should be held upon trust for his children in equal shares for life. By cl. 17 of the will he further provided that, if any of his children should intermarry with anyone not of the Jewish faith, or, if any child of his should intermarry with anyone whose parents were not of the Jewish faith at the time of the birth of the person so intermarrying with any child of his, or, if any such last-mentioned person should at any time previous to such marriage have been of any faith other than the Jewish faith, then in such case during the life of such child one-half of the income of his or her share should follow the trusts then and thereafter subsisting of the income of the shares of residue of his other children in equal shares. Two of the testator's children, Jonas Donn and Marcus Donn, married persons who it was not denied were not of the Jewish faith.

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B
G. D. Johnston for the trustees.
J. A. Reid for Jonas Donn, a child of the testator.
H. A. Rose for Marcus Donn, a child of the testator.
Michael Bowles for the testator's other children.
Hector Hillaby for two of the testator's grandchildren, J.F. and M.F.
C. W. Turner for the wife and children of Jonas Donn.

- C
UTHWATT, J. : The question I have to consider in this case is as to the effect of a provision contained in cl. 17 of the will of the testator which, if operative, by means of a condition subsequent, divests a previous vested interest. The point at issue is whether the provision is void for uncertainty.

The test to be applied is stated by PARKER, J., (as he then was) in *Re Sandbrook* (1). He said, at p. 477 :

- D
... as has been laid down by the House of Lords in the case of *Clavering v. Ellison* (2), conditions subsequent, in order to defeat vested estates, or cause a forfeiture, must be such that from the moment of their creation the court can say with reasonable certainty in what events the forfeiture will occur.

That is to say, there must be reasonable certainty with regard to all the possible events in which a forfeiture can take place. The condition in this case follows on a gift to children of life estates in several parts of the residue and it runs :

- E
If any child of mine shall intermarry with any one not of the Jewish faith or if any child of mine shall intermarry with any one whose parents were not of the Jewish faith at the time of the birth of the person so intermarrying with any child of mine or if such last-mentioned person shall at any time previous to such marriage have been of any faith other than the Jewish faith then and in any and every such case during the life of such child one half part of the income . . .
to which that child is entitled shall be dealt with in a certain way.

- F
The question of the validity of conditions relating to Jewish faith came up for decision in *Re Blaiberg* (3) before MORTON, J. There it was decided that the provision in a codicil to the effect "should any child or grandchild of mine" (that is the testator) "marry any person not of the Jewish faith, such child or grandchild shall forfeit," etc., was void for uncertainty. Much the same point came up for decision in *Clayton v. Ramsden* (4), where the House of Lords had to consider the question of a condition of forfeiture depending upon marriage with a person not of Jewish parentage and of the Jewish faith. That condition was held to be void for uncertainty. All their Lordships who took part in the decision of that case were agreed that the condition relating to "Jewish parentage" was void for uncertainty and by way of *dictum* there are to be found certain expressions of the views of their Lordships on a condition which dealt with "Jewish faith." LORD ATKIN and LORD THANKERTON agreed with the view expressed by LORD ROMER. LORD RUSSELL gave his view in these words,
H
at p. 328 ([1943] 1 All E.R., at p. 19) :

In these circumstances it is unnecessary to express an opinion on the certainty of the words "of the Jewish faith," but, had it been necessary, I should have felt a difficulty in holding that their meaning was clear or certain. It seems to me that (apart from the difficulty which arises from the existence of the three varieties of Judaism referred to by the Master of the Rolls) the testator has given no indication of the degree of attachment or adherence to the faith which he requires on the part of his daughter's husband. The requirement that a person shall be of Jewish faith seems to me too vague to enable it to be said with certainty that a particular individual complies with

the requirement. The decision of MORTON, J., in *Re Blairberg* (3), though seemingly based on the difficulty of ascertaining the state of a man's mind, may well stand on the ground of the uncertainty of the words there in question.

I do not think there is any doubt as to the view which LORD RUSSELL entertained as to the certainty of those words. LORD WRIGHT in his judgment, said that, having regard to the conclusion at which he had arrived upon the words "Jewish parentage," it was unnecessary to express a final opinion on the words "of the Jewish faith." He goes on, at p. 331 ([1943] 1 All E.R., at p. 20):

As at present advised, I do not think they are of insufficient clearness and distinctness. I am not impressed by the contention that they refer to a state of mind or of religious conviction which is incapable of proof. States of mind are capable of proof like other matters of fact. Courts of law and equity have to decide questions of fraudulent intent or the like. I do not understand that the rule in *Clavering v. Ellison* (2) deals with questions of proof, but solely with the clearness and distinctness of the language used in the clause, that is, its capability of defining precisely a specific state of fact. I do not see why "Jewish faith" should not connote a specific fact equally with "Christian faith." The latter is an all-embracing term which includes many possible varieties—Roman Catholic, Anglican, Presbyterian, Lutheran and others. There are many mansions, but they are all included in one house. I should not be disposed to regard "Christian faith" as a phrase lacking in clearness and distinctness, and I see no reason in principle why "Jewish faith" is not sufficiently clear and distinct to identify a specific set of facts to which it may be applied. But I do not pursue these questionings. The view I have expressed on the words "Jewish parentage" is sufficient to decide the appeal, with the result that, in my judgment, the whole condition is void.

Clearly LORD WRIGHT had no doubt in his mind of the certainty of the expression "Jewish faith." LORD ROMER was equally clear the other way. He said, at p. 334 ([1943] 1 All E.R., at p. 23):

Even if the clause could be read as though it merely provided for a forfeiture in the event of the daughter being married to a man not of the Jewish faith, I am of opinion that it would still be void for uncertainty. For how is it to be ascertained whether a man is of the Jewish faith? The Court of Appeal answered this question by saying that whether a man was or was not of the Jewish faith was a mere question of fact to be determined on evidence, and that the assertion by the man that he was of that faith was well nigh conclusive. I should agree entirely with the Court of Appeal as to this if only I knew what was the meaning of the words "of the Jewish faith." Until I know that I do not know to what the evidence is to be directed. There are, of course, an enormous number of people who accept every tenet of, and observe every rule of practice and conduct prescribed by, the Jewish religion. As to them there can be no doubt that they are of the Jewish faith, but there must obviously be others who do not accept all those tenets and are lax in the observance of some of those rules of practice and of conduct, and the extent to which the tenets are accepted and the rules are observed will vary in different individuals. I do not doubt that each of these last mentioned individuals, if questioned, would say, and say in all honesty, that he was of the Jewish faith. On the other hand, I do not doubt that one who accepted all the tenets and observed all the rules would assert that some of the individuals I have mentioned were certainly not of the Jewish faith. It would surely depend on the extent to which the particular individual accepted the tenets and observed the rules. I cannot avoid the conclusion that the question whether a man is of the Jewish faith is a question of degree. The testator has, however, failed to give any indication what degree of faith in the daughter's husband will avoid, and what degree will bring about, a forfeiture of her interest in his estate. In these circumstances the condition requiring that a husband shall be of the Jewish faith would, even if standing alone, be void for uncertainty. I would allow this appeal.

The statements in the House of Lords in that case are *dicta* and as such not binding, but I am bound to pay all respect to them. For myself, I see no reason for not adopting the view expressed by LORD ROMER in his speech.

Taking this will, it does not, in my opinion, in any material respect differ from the will which MORTON, J., had to consider in *Re Blairberg* (3). It was suggested and argued very strenuously by Mr. Michael Bowles and Mr. Hillaby that you can get from this will an expression of the testator's idea of what he means by being "of the Jewish faith." They are obviously directing their argument to the expression used by LORD ROMER in his speech in which he argued the matter out on the ground that the testator there had not given any indication of what degree of faith the daughter's husband should have in order to bring about the position in which she would not have an interest in the estate. The point of Lord Romer's observation is that you cannot tell from the

will itself what the man meant by "Jewish faith." In this case it appears to me that there is no room for doubt about the matter at all in the sense that you do not get any indication of the degree of faith or degree of acceptance of the Jewish faith which the testator had done. The first condition is "if any child of mine shall intermarry with anyone not of the Jewish faith." They are plain words. There is no reason there for finding in that phrase any means of ascertaining what particular tenet a person must hold in order to be of the Jewish faith. Then "or if any child of mine shall intermarry with anyone whose parents were not of the Jewish faith at the time of the birth of the person so intermarrying"—the same remark applies there. Then you get the third condition "or if such last-mentioned person"—that means the person referred to, the bride as I will call her, under condition 2—"shall at any time previous to such marriage have been of any faith other than the Jewish then and in any and every such case," and so on. That is, in other words, "shall at any time have been of non-Jewish faith." Faith in something is required—"shall be of non-Jewish faith." Despite the able argument of Mr. Bowles and Mr. Hillaby, I cannot get from that clause any reason for thinking that a test of the degree of adherence to the Jewish faith has been supplied by the testator in his will. If that be so, on the footing of the decision in *Re Blaiberg* (3) and my acceptance of the *dicta* of the majority of the House of Lords in *Clayton's* case (4), I think this condition is void for uncertainty and I so declare.

Declaration accordingly. Costs of all parties to be paid out of the estate.

Solicitors: *Brown & Woolnough* (for the trustees and defendants): *Zeffer*.
Heard & Morley Lawson (for the infant defendants, J.F. and M.F.).

[Reported by R. L. ZIAR, Esq., Barrister-at-Law.]

THE SECOND CONSOLIDATED TRUST, LTD. v. CEYLON AMALGAMATED TEA & RUBBER ESTATES, LTD. AND OTHERS.

[CHANCERY DIVISION (Uthwatt J.), July 21, 1943.]

*Companies—Meetings—Quorum—Poll—No quorum without counting in proxies
 Proxies against resolution—Whether chairman should demand poll.*

The defendant company wished to alter the conditions under which its debenture stock was held, pursuant to the provisions of the trust deed securing that stock. In order to do so it was necessary to pass an extraordinary resolution which was a resolution which had to be passed by a three-quarters majority at a duly convened meeting at which the holders of a clear majority in value of the stock were present in person or by proxy. The trust deed further stated that on a show of hands a stockholder present only by proxy should have no vote. The meeting was duly convened and with the notice thereof was sent a form of proxy to all the stockholders whereby they could indicate the specific manner in which they wished their votes to be used. At the meeting the fourteen persons present in person were unanimously in favour of the resolution, but they did not constitute a quorum unless the proxies were counted in. The proxies were such that, if a poll was demanded and the proxies used for the purpose of the vote, the resolution could not be passed. The resolution was passed by the stockholders present in person; the chairman, aware of all the facts and acting *bona fide*, did not demand a poll. The plaintiff stockholders contended that the meeting was not duly constituted, and, alternatively, that the proceedings were irregularly conducted and that the resolution was invalidly passed.

Held: upon the true construction of the trust deed the power of the chairman to demand a poll was not a personal right to be exercised according to his wishes. He was under a legal duty so to exercise that right that effect was given to the real sense of the meeting and, in the circumstances of this case, particularly in view of the fact that the persons present did not form a quorum, the chairman ought to have demanded a poll and used the proxies.

EDITORIAL NOTE. The duties of a chairman at a meeting are not too clearly defined by reported decisions and the matter is of considerable importance because by

the very nature of meetings in connection with companies—particularly small companies—the chairman is seldom a person in a neutral position but generally one highly interested in the result of the voting.

AS TO PROCEEDINGS AT MEETINGS, see HALSBURY, *Hailsham Edn.*, Vol. 5, pp. 358-365, paras. 586-592; and FOR CASES, see DIGEST, Vol. 9, pp. 569-577, Nos. 3773-3847.]

APPLICATION by stockholders for a declaration that a meeting convened for the purposes of passing an extraordinary resolution was invalid, alternatively, that the resolution was invalid. The facts are fully set out in the judgment.

Harold Christie, K.C., and *W. Gordon Brown* for the plaintiff stockholders.

H. Wynn Parry, K.C., and *Cecil Turner* for the defendant company.

J. A. Reid for stockholders who supported the resolution.

M. Gravenor Hewins (for *Raymond Walton*, on war service) for other stockholders who supported the resolution.

UTHWATT, J.: In these proceedings the plaintiffs, who are some stockholders in the Ceylon Amalgamated Tea and Rubber Estates, Ltd., claim a declaration that a meeting of stockholders purported to be held on Mar. 22, 1943, was not duly constituted or alternatively that the proceedings thereat were irregularly conducted and that, by reason thereof, the resolution purported to be passed thereat as an extraordinary resolution was and is invalid and not binding on the holders of such stock.

The defendants to the action, in addition to the company, are the trustees of the debenture stock which the plaintiffs held and also certain stockholders who are in favour of the resolution which purported to be passed.

There is no dispute as to the facts of the case. The Ceylon Amalgamated Tea and Rubber Estates, Ltd., was desirous of having the conditions under which its debenture stock was held altered, pursuant to the provisions contained in the trust deed securing that stock. In order to enable that alteration to be carried through it was necessary that all the stockholders should be found, and to secure that end it was proposed to act in accordance with the provisions contained in the trust deed which enable the meeting of stockholders by extraordinary resolution to alter the relevant provisions which were then under consideration.

What happened was this: the date for the meeting was fixed; the notice convening the meeting was sent out; with it there was sent out a form of proxy to all the stockholders, which named two gentlemen, Butler Fidler, who was the chairman of the company, or failing him Miles, who was a director of the company, to act as their proxy. The proxy form contains specific directions as to the way in which the vote was to be used. Obviously, as far as the person giving the proxy was concerned, it was contemplated that the vote so authorised to be given was in fact to be used and would be used in the way in which it was required by him to be used. That form was sent out to all the stockholders. A few days later, in compliance with a request made by the company, the trustees appointed Fidler, who, as I say, was the chairman of the company, to be the chairman of the meeting. I assume that the proxy forms were duly lodged with the company. There were present at the meeting some 14 stockholders all of whom were in favour of the resolution and one other person to whom I will refer in a moment. Those present in person did not constitute a quorum. The proxies in the hands of the chairman were such that, if they were used, a quorum was obtained but by reason of the directions contained in them the resolution could not be carried by the requisite majority, and the real question that I have to decide is whether, upon the facts of this particular case, this was a meeting which was duly convened and held in the sense that the resolution at that meeting was duly passed. At the meeting everybody who was present was in favour of it and a vote taken on a show of hands was unanimously in favour of the resolution. There was one gentleman there, a Colonel Parker, who was not a stockholder, but who signed himself as representing the British and Foreign General Securities and Investment Trust, Ltd., who were stockholders of £2,000 of stock, and that company had lodged with the chairman a proxy against the scheme.

The question is whether in the circumstances of this case one can say that the meeting was duly held. So far as the provisions of the trust deed are concerned I need only refer to them shortly. It is provided that:

Every question submitted to a meeting of the stockholders shall be decided in the first instance by a show of hands and in case of an equality of votes the chairman (even if he be not a holder of stock) shall both on a show of hands and at a poll have a casting vote in addition to the vote or votes (if any) to which he may be entitled as a stockholder. On a show of hands a stockholder present only by proxy shall have no vote but a proxy for a company may vote on a show of hands though not himself a stockholder.

Cl. 7 provides that :

A At any general meeting of the stockholders unless a poll is demanded by the chairman or in writing by at least two stockholders a declaration by the chairman that a resolution has been carried or carried by a particular majority or lost or not carried by a particular majority shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution.

Then there follow provisions as to proxies. In cl. 16 there is a definition of

B "Extraordinary Resolution" :

The expression "Extraordinary Resolution" when used in this schedule means a resolution passed at a meeting of the stockholders duly convened and held in accordance with the provisions herein contained and at which the holders of a clear majority in value of the whole of the stock for the time being outstanding are present in person or by proxy by a majority consisting of not less than three-fourths of the persons voting thereat upon a show of hands and if a poll be duly demanded then by a majority consisting of not less than three-fourths in value of the votes given on such poll.

C To sum it up, unless you counted in the proxies you did not have a quorum present for the purpose of passing an extraordinary resolution. If a poll were demanded and the proxies were, in fact, used, the resolution could not have been passed. On the resolution being passed, the chairman did not demand a poll. I need hardly say that no one questions the honesty or good faith of the chairman in taking the course that he did take. He consulted the other members of the board present upon the platform with him ; he consulted the members of the stockholders committee who were present, which had been set up some few years ago ; he asked the solicitor what the position was and on that he was advised by the company's solicitor that he was under no obligation himself to demand a poll, and that, if a poll was not demanded, he was bound to declare the resolution carried. That is the advice in accordance with which he acted. He says that he exercised his mind about the matter, and having all these views

E before him and that advice before him, he decided not to demand a poll.

The duty of a chairman of a meeting is to ascertain the sense of the meeting upon any resolution properly coming before the meeting. Then comes the question as to his position in regard to his right to demand a poll. Upon a fair construction of this deed, I do not regard that as a personal right to be exercised according to the fancy of the chairman ; in other words, I do not think he has an unlimited discretion as to the manner in which he may exercise that power. It appears to me that the power to demand a poll is a power possessed by the chairman which is to be exercised or not to be exercised according to his decision whether it is necessary to exercise the power in order to ascertain the sense of the meeting upon the matter before them ; in other words, it is a power directed towards enabling him to carry on the meeting for the purpose for which it is convened.

G In this particular case, the first thing the chairman knew was this, that, in order to have a quorum at the meeting at all he must count in, at any rate, some of the proxies which he held. The second thing he knew and which is not denied is that, if a poll were demanded and he used his proxies, the resolution could not be carried.

In those circumstances, it seems to me that the chairman in this particular case in deciding not to demand a poll never had his mind directed to the real point which he should have considered before coming to a decision. That point was how best to ascertain the sense of the meeting. The position was : "I have these proxies in my possession ; they have been sent to everybody. Everybody has had a chance of expressing their views. Some are present ; others are not. Unless I count in some at least of the proxies, I have not got a quorum. How then shall I get the sense of this meeting ?" I do not think he ever directed his mind to that point, and, not having directed his mind to that point, which is a matter which he ought to have taken into consideration, it seems to me that he failed in this particular case in his duty as

chairman, and, having so failed in his duty as chairman, the resolution was not properly carried.

I would just like to add this, that, in addition to having this duty to demand a poll or exercise his power to demand a poll, I think—and I think Fidler as a business man must take the same course. There would be under a duty in law to exercise all the proxies which he held as chairman in accordance with the instructions which they contained.

Declaration accordingly. Cost of all parties to be paid by the company.

Solicitors: *Linklaters & Paines* (for the plaintiffs); *Mago, Fidler & Co.* (for the first defendants); *Stibbard, Gibson & Co.* (for the second defendants); *Slaughter & May* (for the third defendants).

[Reported by HUBERT B. FIDG, Esq., Barrister-at-Law.]

KEREN KAYEMETH LEISRAEL LTD. v. MEMBERS OF THE ARAB MAZARKEB TRIBE AND THE VILLAGE ELDERS OF MA'LOUL

[PRIVY COUNCIL (Lord Macmillan, Lord Porter, Lord Clauson, Sir George Rankin and Sir Madhavan Nair), **June 24, 1943.**]

Privy Council—Palestine. Grazing rights claimed by fluctuating body of persons. Members of tribe and village. "Person"—Interpretation Ordinance (Palestine), 1929 (No. 34), s. 3—Cultivators (Protection) Ordinance (Palestine), 1933 (No. 37), ss. 18 (1), 19 (1).

The appellants were the registered and beneficial owners of a tract of land near Nazareth over which the respondents claimed to have established grazing interests under the Cultivators (Protection) Ordinance, 1933, ss. 18 (1) and 19 (1). The appellants contended that such rights could not be exercised by fluctuating bodies such as the respondents and that the word "person" in the ordinance was not governed by the definition of that word in the Interpretation Ordinance, 1929, s. 3:—

Held: on the true construction of the Cultivators (Protection) Ordinance, 1933, ss. 18 (1) and 19 (1), the word "person" had the meaning defined by the Interpretation Ordinance, 1929, s. 3, and could, therefore, in the circumstances of this case, apply to a fluctuating body such as the respondents.

EDITORIAL NOTE. The law in general requires certainty, especially in the parties affected by and entitled to rights. As JESSEL, M.R., said, "the notion of law means a certain rule of some kind." Thus it is generally the rule that a right cannot be claimed in respect of a fluctuating body. There are certain exceptions to this rule, the most common being rights claimed by the inhabitants of a defined district. The present case is a further exception to the rule, the construction of a local ordinance being governed by the peculiar local social conditions.

AS TO THE LAW IN PALESTINE, see HALSBURY, Hailsham Edn., Vol. 11, p. 247, para. 466; and FOR CASES, see DIGEST, Supp., Dependencies, Nos. 716 f, 716 g.]

APPEAL by registered owners of land against a decision of the Supreme Court of Palestine, given on Feb. 15, 1940, which held that the respondents had acquired grazing rights over the appellants' land. The facts are fully set out in the judgment of the Board delivered by LORD CLAUSEN.

H. J. Wallington, K.C., and Leonard Stein for the appellants.

LORD CLAUSEN: The appellants in this matter are the Jewish National Fund under their registered name of Keren Kayemeth Leisrael, Ltd. The respondents are: first, the members of the Arab Mazareeb Tribe appearing by their mukhtar or headman, and, secondly, the inhabitants of the village of Ma'loul appearing by their mukhtar or headman and certain village elders. The appellants are registered and beneficial owners of a tract of land near Nazareth delineated on a plan which is before the Board; the respondents claim to have established a practice of the tribe and of the inhabitants of the village of grazing over this tract of land. The tribe also claimed to have established a practice of beneficial occupation of the tract by-pitching tents and otherwise inhabiting it. This latter claim of the tribe has been repelled by the Supreme Court of Palestine and no appeal has been taken against this part of the court's order. The question in dispute before their Lordships is accordingly confined to the matter of grazing.

By the Cultivators (Protection) Ordinance, 1933, the legislative authority of Palestine made provision for protecting from eviction under circumstances

set out in the ordinance . . . statutory tenants . . . an expression defined as meaning :
 . . . any person, family or tribe occupying and cultivating a holding otherwise than as the owner thereof.

With the general provisions of this ordinance their Lordships are not concerned, save, of course, in so far as the wording of those provisions may throw light on the construction of the particular provision upon which the present appeal turns. That provision appears in sects. 18 and 19 of the Ordinance, of which the material words are as follows :

Seet. 18 (1). No court or judge or execution officer shall make an order for the eviction of a person who has exercised by himself or his agent habitually at the appropriate seasons for not less than five consecutive years within a period of not more than seven years prior to the date when application is made for any such order a practice of grazing or watering animals or the cutting of wood or reeds or other beneficial occupation of similar character on the land whether by right, custom, usage or sufferance, unless the landlord satisfies the court or judge or execution officer that the High Commissioner is satisfied that provision of equal value has been secured towards the livelihood of such person.

Seet. 19 (1). Any dispute . . . (d) as to whether any person has exercised continuously any practice of grazing or watering animals or cutting wood or reeds or other beneficial occupation of a similar character by right, custom, usage or sufferance, shall be referred to a special commission to be appointed by the High Commissioner.

(2). The decision of any such commission . . . shall be final and no appeal shall lie therefrom. . . . Provided that an appeal therefrom on a point of law shall lie to the Land Court by leave of that court by case stated. . . .

(3). Where in any proceedings between any parties before any court it appears that any question material in such proceedings has been decided as between such parties under the provisions of this section, such questions shall be deemed to be *res judicata*. . . .

It should be added that the Interpretation Ordinance, 1929, provides by sect. 3 that :

In every ordinance, unless the context otherwise requires, "person" includes any company or association or body of persons corporate or unincorporate.

In Feb., 1937, the tribe and village gave notice to the Assistant District Commissioner for the locality that they respectively claimed grazing and watering interests and on Mar. 2, 1937, a special commission sat to decide the dispute thus raised. A considerable body of evidence was taken on that day and on Mar. 19 following. On Mar. 23, 1937, the commission made their findings, the material parts of which are as follows :

The claim of Arab Mazareeb and Ma'loulis for grazing rights. . . . This claim is disputed by the Jewish National Fund. . . . The Commission are not concerned with legal rights but with facts. On the facts which have been proved to the satisfaction of the Commission there is no doubt that both Arab Mazareeb and Ma'loul people have been in the habit of grazing their animals in the disputed area (as shown on the map and as known as the King George V Jubilee Forest) since 1921 and possibly before. . . . The Commission therefore find that the inhabitants of Ma'loul and Arab Mazareeb have exercised continuously for a period of more than five consecutive years within a period of seven years prior to the date of the submission of their present claims a practice of grazing by custom and usage within the land known as the Jubilee Forest, Nazareth sub-district.

The present appellants, on July 10, 1937, obtained an order from the Land Court at Nablus requiring the special commission to state a special case. In obedience to that order a special case was stated and came on for hearing before the Land Court of Haifa (appellate capacity). That court, on Jan. 19, 1939, made an order for the return of the special case to the special commission for amendment. From this decision of the Court of Haifa appeal was brought to the Supreme Court of Palestine by the present appellants, and in the course of the appeal certain points of law were submitted to the court on behalf of the appellants. It is now necessary to quote the first only of those points. It was as follows :

Whether it was competent for the Special Commission to hear and determine in favour of the respondents claims made under the Cultivators (Protection) Ordinance, ss. 18 (1), 19 (1) (d), by and in the name of indefinite and fluctuating bodies of persons, viz. a tribe and inhabitants of a village.

On Mar. 30, 1939, the Supreme Court set aside the judgment of the Court of Haifa and returned the case to that court to dispose of the points of law raised by the present appellants. The matter was accordingly brought before the

Court of Haifa which, on Nov. 30, 1939, dismissed the appeal. In regard to the point of law quoted above, the observations of the judges (SHERWELL and EVANS, JJ.) are as follows :

The appellant then objects that such practices (i.e. grazing) cannot be said to be exercised by a fluctuating body of persons such as the inhabitants of Ma'l ul, or the members of the Arab Mazareeb tribe. The fact that the number of persons interested fluctuates seems to us immaterial. The same might be said of the shareholders of a company ; provided the individuals form a legal person or what has locally been regarded as a legal entity and are ascertainable, we think the claim can be made on their behalf. We have not been told that this is an indefinite section of the Mazareeb tribe. It is too late now for the appellant to argue that the inhabitants of a village, or members of a family or tribe have not in Palestine been treated as forming a legal entity enjoying rights of tenancy or use of land.

After referring to a number of decisions in the Palestine courts in support of this proposition, their Lordships add :

This case was not brought in a court of law but before a special commission intended to deal in the claims of peasants, and was we think properly brought.

The Court of Haifa accordingly, after dealing with the other points of law brought before them, to which their Lordships do not find it necessary to advert, on Nov. 30, 1939, dismissed the appeal.

The present appellants presented an appeal to the Supreme Court of Palestine from this decision of the Court of Haifa. The appeal came before TRUSTED, C.J., ROSE and KHAYAT, JJ., who, on Feb. 15, 1940, varied the finding of the Special Commission in favour of the present appellants in regard to certain matters which are no longer material and otherwise dismissed the appeal. In delivering the judgment of the court, TRUSTED, C.J., relied on the Interpretation Ordinance as justifying the inclusion in the word "person," as used in the Cultivators (Protection) Ordinance, 1933, s. 18 (1), of a body unincorporate, and held that, having regard to local circumstances, each of the claiming bodies, viz., the Arab Mazareeb Tribe and the villagers of Ma'loul were "persons" within the section.

Their Lordships have had the assistance of a very candid and lucid argument from counsel for the appellants, who ultimately, and, in their Lordships' judgment, quite rightly, conceded that the acceptance of their contention on the point of law quoted above was essential if the appellants were to succeed in the present appeal. It was strenuously argued, as it had been argued before the Supreme Court, that the fact that, in the Cultivators (Protection) Ordinance, s. 2, in the definition of "statutory tenant" the words "family or tribe" were added to the word "person," showed that the wide definition of "person" in the Interpretation Ordinance was not treated as applicable, and that "person" must be given an individual meaning. As was pointed out by TRUSTED, C.J., in the Supreme Court, whatever may be said as to the meaning of "person" in sect. 2 of the ordinance, it seems impossible to exclude the Interpretation Ordinance in construing the term "person" as used in sect. 19 (1) in the definition of "landlord" since it could hardly be contended that the term must be confined to an individual. Feeling no doubt the difficulty of combating this argument, counsel for the appellants argued that the context in which the word "person" occurs in sect. 18 (1) excluded the Interpretation Ordinance ; they pointed to the mention of the person exercising the practice claimed "by himself or his agent" and to the reference to the "livelihood of such person," and suggested that these expressions, while appropriate in the case of individuals claiming as such, were not appropriate to, and excluded the case of, a fluctuating body of persons claiming for the benefit of such individuals as might from time to time constitute the fluctuating body.

Their Lordships see no reason to doubt that the Court of Haifa and the Supreme Court came to a correct conclusion upon the point at issue : and for the reasons forcibly put by SHERWELL and EVANS, JJ., in the former court and accepted as correct by TRUSTED, C.J., in delivering the judgment of the Supreme Court, they are satisfied that, upon the true interpretation of the relevant legislation the Special Commission is charged with the duty of dealing in appropriate cases with the position not only of any individual who claims and proves his right to protection in regard to the matters in question, but also of such fluctuating bodies of persons as the members of a tribe or the inhabi-

tants of a village. The courts below, in their Lordships' opinion, were fully justified in paying regard, on a matter of construction of the relevant legislation, to the peculiar local social conditions which involve the recognition as legal entities of such fluctuating bodies as those in question.

Their Lordships will humbly advise His Majesty to dismiss the appeal. As the appeal is *ex parte* there will be no order as to costs.

Appeal dismissed. No order as to costs.

A Solicitors: *Herbert Oppenheimer, Nathan and Vandyk* (for the appellants).
[Reported by HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

WATKINSON v. HOLLINGTON.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.JJ.), **October 21, 1943.**]

B *Emergency Legislation—Distress damage feasant—Whether leave of court required—Courts (Emergency Powers) Act, 1939 (c. 67), s. 1(2) (a) (i).*

The plaintiff's cattle strayed on to the land of the defendant who distrained upon them on the ground that they were damage *feasant*. The plaintiff made a demand for their return and on this being refused brought an action in detinue for their recovery or their value and for damages. He maintained that the detention constituted a "levying of distress" for the exercise of which leave from the appropriate court was required in accordance with the Courts (Emergency Powers) Act, 1939. The defendant contended that the Act did not apply to distress damage *feasant* :—

C **HELD** : distress damage *feasant* did not come within the Act and the leave of the court was not necessary before seizure.

Decision of OLIVER, J. ([1943] 2 All E.R. 74) reversed.

D **[EDITORIAL NOTE.]** It is clear that the ordinary remedy of distress comes within the Courts (Emergency Powers) Acts, but distress damage *feasant* is a remedy of a nature where application to the court for leave to seize does not seem to be practical. Common sense seems to suggest that in most cases the animal will have escaped beyond hope of capture before such leave can be obtained. It is now held by the Court of Appeal that, on the proper construction of the Acts, such leave is not necessary, reversing a decision which OLIVER, J., reached with great reluctance.

E AS TO THE COURTS (EMERGENCY POWERS) ACT, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 946.]

Cases referred to :

(1) *Thompson v. Clanmorris (Lord)*, [1900] 1 Ch. 718 ; 32 Digest, 320, 57 ; 69 L.J.Ch. 337 ; 82 L.T. 277.

(2) *Butcher v. Poole Corpn.*, [1942] 2 All E.R. 572 ; 167 L.T. 389.

(3) *Hutchins v. Chambers* (1758), 1 Burr. 579 ; 18 Digest 358, 956.

(4) *Hickman v. Potts*, [1940] 1 K.B. 29 ; [1939] 3 All E.R. 794 ; Digest Supp. ; 108 L.J.K.B. 817 ; 161 L.T. 218.

F (5) *S. & A. Services, Ltd. v. Dickson*, [1940] 2 K.B.D. 219 ; [1940] 3 All E.R. 98 ; Digest Supp. ; 109 L.J.K.B. 665 ; 163 L.T. 74.

(6) *Smart Bros. Ltd. v. Ross*, [1942] Ch. 458 ; [1942] 1 All E.R. 1 ; *affd.* [1942] 2 All E.R. 282.

APPEAL by the defendant from a judgment of OLIVER, J., given on May 5, 1943, and reported [1943] 2 All E.R. 74. The facts are stated in the judgment.

Harold Brown for the appellant.

G *H. Malone* for the respondent.

SCOTT, L.J. : On July 31, 1941, some cattle belonging to the plaintiff in the action strayed from the plaintiff's land on to the defendant's land and were there seized by the defendant as cattle damage *feasant*, in exercise of his old common law right, extended by various statutes, to seize and impound the cattle and hold them. The action is brought in detinue on the ground, as H alleged by the plaintiff, that, under the Courts (Emergency Powers) Act, 1939, s. 1 (2), the old common law right of distress damage *feasant* (as it was somewhat ungrammatically called) is suspended during the war, and that, until the court appropriate for the purpose has given leave, the right cannot be exercised at all.

The argument for the plaintiff has throughout been based upon the submission that the legislature in subsect. (2) has used words which, whether advertently or inadvertently, cover the case of "distress damage *feasant*," and therefore require an application to the appropriate court for leave, whatever the nature of the particular kind of distress. OLIVER, J., was impressed by the argument,

addressed to him by counsel for the respondent and repeated to us, that the words of the Act, "the levying of distress," are wide enough to include this particular kind of distress, and accordingly gave judgment for the plaintiff with damages for the detention of the animals. Counsel for the appellant submitted that the legislature did not mean to include "distress damage *feasant*," and that, if one has regard to the purport and purview of the Act in question, there is strong reason for reading its language as excluding "distress damage *feasant*." Even if the statutory words are ambiguous so as to be capable of including that kind of distress, which I doubt, I agree with the argument for the appellant.

It is necessary to consider the nature of the old common law remedy and also its incidents in law. Straying cattle may come from almost anywhere within a considerable distance. They do not carry their owners' names upon their horns, and the old law was that, if they are doing damage, they may be seized and impounded and there detained indefinitely pending compensation. It was realised that, in practice, the detention would be short, because it was practically certain that the owner would turn up and want his cattle. He was not allowed himself to retake his cattle, because that might very likely lead to a breach of the peace, especially if he did not tender money in compensation for the damage done. On the other hand, the injured person, the occupier of the land whose crops had been damaged, was not required to do anything. The law left it to the owner of the cattle to take the necessary steps, and that was to apply to the sheriff to "replevin" the cattle, i.e., to take them back and deliver them into his, the owner's, possession. But that was not to be done by the sheriff unless the owner entered into a "replevin bond" to be answerable to the occupier of the land where the damage had been done for the amount in money of that damage. That was the procedure, and it was an effective procedure, which worked very well; for it prevented a breach of the peace and provided adequate compensation. Subsequently legislation was passed to allow the farmer whose crops had been damaged by the cattle to sell the cattle if not reclaimed, so as to cover the cost of their keep. The gist of the procedure was the right of the occupier to seize the cattle at the very moment of the damage, whilst they were doing it— "damage *feasant*"—and to detain them. It was a remedy of distress which, differing from other forms of distress, could be exercised out of hand, not by taking possession, but by keeping possession.

I will read the words of the Courts (Emergency Powers) Act, 1939, s. 1 (2), which are said to alter the law:

Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court:— (a) to proceed to exercise any remedy which is available to him by way of (i) the levying of distress: (ii) the taking of possession of any property or the appointment of a receiver of any property; (iii) re-entry upon any land; (iv) the realisation of any security or the forfeiture of any deposit; or (v) the serving of a demand under the Companies Act, 1929, s. 169 (1); or (b) to institute any proceedings for foreclosure or for sale in lieu of foreclosure.

Those remedies which were subjected to the overriding condition of leave from the court have been styled remedies by way of self-help. In regard to others than that of levying a distress for "damage *feasant*" there is no interference by the subsection with the existence of the right, in regard to which the conditions are imposed: but in the case of damage *feasant*, if the occupier of the land, where the damage is being done, is not allowed to go and take the cattle then and there, but is called upon to go to the court to get leave, the right is really destroyed; for it is a right which, if it is to be exercised at all, must be exercised on the spot at the time.

In my view, it could not have been the intention of the legislature that the words "the levying of distress" should be extended to so very peculiar a kind of distress as that called "distress damage *feasant*." I should have thought that the ambit of the subsection was satisfied by applying it to ordinary forms of distress for rent of various kinds. But there is an additional reason for so limiting the interpretation of the words of the Act itself. Where an Act uses ambiguous language one is entitled to look at the long title of the Act, and this long title is as follows:

An Act to confer on courts certain powers in relation to remedies in respect of the non-payment of money and the non-performance of obligations, including powers in

tion of bankruptcy and winding up proceedings, and to make decisions for purposes connected with the matters aforesaid.

There are two purposes expressly mentioned. To levy distress damage *feasant* is not to enforce the payment of money, because at that time no money is due. In my view, it is not to enforce performance, nor is it in respect of non-performance of obligations. The word "obligation" primarily means a tie, and legally it was in origin the binding tie established by what is called a "bond" as between the obligor and the obligee, and I see no reason for disregarding that ordinary legal meaning of the word "obligation" in construing the long title. Sect. 1 (1) deals with the enforcement of rights through the court, such as execution in order to recover a sum of money, which falls directly under the first part of the long title, the non-payment of money. The language of the second part of the long title is, I think, satisfied by treating the word "obligation" as used in its primary meaning of a contractual or statutory obligation and not as including a mere liability in damages; and that interpretation is reinforced by observing that the proviso to subsect. (1) expressly excludes from the scope of the subsection a judgment for the recovery of damages for tort. Indeed, claims for damages for torts are wholly outside the Act, and in so far as "distress damage *feasant*" can be regarded as a remedy in damages for damage done by the cattle it is for a tort. But the main object of the right is to prevent further damage.

For these reasons, in my view, it is clear that the phrase "the levying of distress" in subsect. (2) (a) (i) does not include distress in respect of animals found by the occupier damage *feasant*. I do not think it is necessary to refer to any authorities because the interpretation of the Act which I have expressed seems to me to be self-evident. I think that the judge felt rather regretful in giving it the wide interpretation he did; but, at any rate, I am satisfied that his interpretation was too wide. The appeal must be allowed with costs.

MACKINNON, L.J.: I agree. Distress is the substantive expressing the process indicated by the verb "distrain." "Distrain" meant originally "to constrain a person by the seizure and detention of his property." That was all it meant as to any sort of distraining until 1869, in which year a landlord was given the right to sell the property of his tenant which he had seized in order to constrain him to pay his rent. In that sort of distraining, therefore, the landlord, exercising the right, did more than seize and detain. He paid himself by selling the property seized. Hence came naturally the phrase, on such action by the landlord, "levy distress," and the word "levy" means "to raise a sum by legal execution or process." One who exercises the old common law right of distraining beasts damage *feasant* does not "raise a sum by legal execution or process." He does not "levy a distress." He merely exercises the ancient right of seizure and detention in order to constrain the owner of the beasts. I am quite clear that he who exercises this right is not "exercising a remedy by way of the levying of a distress" within the meaning of the Courts (Emergency Powers) Act, 1939, s. 1 (2) (a) (i).

GOFFARTH, L.J.: I agree. The chief question for decision is whether the words in the Courts (Emergency Powers) Act, 1939, s. 1 (2) (a) (i), which provide that a person shall not be entitled, except with the leave of the appropriate court, to proceed to exercise any remedy which is available to him by way of levying distress, include the distress of cattle damage *feasant*. In my opinion, that they clearly do not.

When one is construing the words of an Act of Parliament one must, to use the words of LORD LINDLEY in *Thompson v. Lord Clamorris* (1), have regard not only to the words used but to the history of the Act and the reasons which led to it being passed. You must look at the mischief which had to be cured as well as the cure provided. In *PARCQ, L.J.*, put the same consideration in *Butcher v. Poole Corpn.* (2), when he said, at p. 579:

It is, of course, impossible to construe particular words in an Act of Parliament without reference to their context and to the whole tenor of the Act.

Now what is the whole tenor of this Act, the Courts (Emergency Powers) Act, and what were the reasons which led to it being passed, the mischief which had to be cured as well as the cure provided? The original Act was passed dealing only with matters which arose before the war, to suspend not to destroy rights of property, and to give the courts power to deal with such matters.

and only out of contract, and matters akin to contract have no relation to tort at all. You have to get leave of the court before you can exercise certain remedies and when you apply for leave to exercise a remedy, the operation of the Act is that it is for the defendant to show that he is unable, in the words of the Act, "to pay the rent"—observe those words—"or other debt, or to perform the obligation in question immediately by reason of circumstances directly or indirectly attributable to the present war."

The presence alone of those words in subsect. (4) "to pay the rent," seems to me to show quite clearly what Parliament had in mind in using the word "distress" in subsect. (2). The absurdity of the position which would be reached in this case if we had to give effect to the argument of the respondent would be that, if you did apply or could apply (if it could be imagined that an occupier of land could apply) to the court for leave to distrain on animals then doing damage on his farm, no question could arise with regard to the defendant being unable to show that he could not perform the obligation of paying damages by reason of matters directly or indirectly arising from the war, because the damages would be damages for tort, which are expressly excluded from the Act.

It is quite impossible to suppose for one moment that, in using the words "levying of distress," Parliament was contemplating any sort of distress other than the distress for rent. I think that is completely shown, not only by the long title of the Act, but by subsects. (1), (2) and (4) to which I have referred.

The word "distress" is a word which has varying meanings in the law. Originally it was a seigniorial right by which a lord could enforce by attachment of chattels performance by a tenant of his obligation to pay rent or to perform services; he could attach a man's chattels if he refused to render suit at the lord's court. Just in the same way as he could attach his chattels for his failure to pay rent. As time went on, the word "distress" got an extended meaning. It was used to cover cases of the execution of process which issued out of the seigniorial court, the court baron or the court leet. It was called "distress" because it was attached to the seigniorial right. It was the lord's court, and he had the right of issuing execution without going to the King's court, and, therefore, the same term was applied to that process as was applied to the right that he had of levying in respect of arrears of rent.

To this day one uses the expression "distress" considered in respect of process which is levied by courts of summary jurisdiction; and in the statute of Elizabeth, which imposed the poor rate for the first time, one finds Parliament using the expression "distress" in that Act. Private rates could be recovered by "distress" which has always been known as distress and execution or distress or execution. Distress for rates is an execution. That was quite clearly laid down in *Hutchins v. Chambers* (3), and was re-affirmed by this court and by the House of Lords in *Hickman v. Potts* (4). It was also applied to the right to seize animals which were doing damage on land, and that was a right which was not attached to the ownership of land. The occupier of land could exercise that right and a commoner could exercise that right if beasts were doing damage on a common over which he had rights.

It is conceded in this case that, if the argument for the respondent is right and, if the judgment of OLIVER, J., stood, that right is entirely gone; it is not suspended like all other rights which are dealt with by the Courts (Emergency Powers) Act; it is entirely gone and is destroyed. It is destroyed for this reason. The only thing which the aggrieved occupier could do would be to drive the beasts off the premises, and the right to distress damage *feasant* would be gone; you cannot follow beasts which do damage. It is not, like following goods which are removed for the purpose of avoiding distress.

In my opinion, it is abundantly clear that, in using the words "levying of distress," Parliament was considering the levying of distress for rent and for no other purpose. I agree that the judgment below should be reversed and the appeal allowed.

Appeal allowed with costs.

Solicitors: *Pothecary & Barratt*, agents for *T. Anderson Davis*, St. Albans (for the appellant); *Edward F. Iwi*, agent for *Vyvan Wells & Sons*, Finchley (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

COHEN v. SNELLING. LUBOVSKY v. SNELLING.

[COURT OF APPEAL, Scott, MacKinnon and Goddard, L.JJ.), **October 19, 20, November 3, 1943.**]

Limitation of Actions—Fatal accident—Third-party insurance—Liability admitted by insurance company—Writ issued more than 12 months after death—Fatal Accidents Act, 1846 (c. 93), s. 3.

- A** In a claim under the Fatal Accidents Act, 1846, negotiations proceeded with the insurance company on the basis of admitted liability, but it was necessary to bring an action for the apportionment of damages. By an oversight a first action was commenced before the plaintiff had obtained a grant of letters of administration and was discontinued. A second writ issued after a grant had been obtained was issued more than 12 months after the date of the death. It was contended that the second action was barred by the Fatal Accidents Act, 1846, s. 3:—

B **HELD:** since liability had been admitted, the defendants were debarred from setting up any limitation under the above section.

[EDITORIAL NOTE. The court have decided that this case is covered by the decision in *Wright v. Bagnall* (1). That case was a decision under the Workmen's Compensation Act and, as that is a distinctly separate branch of the law, it might be thought that cases under it were not applicable to others arising under the Fatal Accidents Act. It is held, however, that, so far as the matter here is concerned, the case under the Workmen's Compensation Act governs the position arising under the Fatal Accidents Act.

C AS TO LIMITATION UNDER THE FATAL ACCIDENTS ACT, 1846, see HALSBURY, Hailsham Edn., Vol. 23, pp. 693, 694, para. 980; and FOR CASES, see DIGEST, Vol. 36, p. 131, Nos. 868-871.]

- D** Cases referred to:

- * (1) *Wright v. Bagnall (John) & Sons, Ltd.*, [1900] 2 Q.B. 240; 34 Digest 371, 3009; 69 L.J.Q.B. 551; 82 L.T. 346.
- (2) *Rendall v. Hill's Dry Docks & Engineering Co., Ltd.*, [1900] 2 Q.B. 245; 34 Digest 371, 3010.
- (3) *Groom v. Crocker*, [1939] 1 K.B. 194; [1938] 2 All E.R. 394; Digest Supp.; 108 L.J.K.B. 296; 158 L.T. 477.

- E** **APPEAL** by the plaintiffs from a judgment of TUCKER, J., dated Mar. 22, 1942. The facts are fully set out in the judgment of SCOTT, L.J.
M. Turner-Samuels for the appellants.
N. R. Fox-Andrews for the respondent.

- F** SCOTT, L.J.: On Dec. 28, 1940, the respondent, driving a motor car negligently, ran into the husband and step-daughter of the appellant when the two were walking on the footpath running beside the London Road at Tring, and caused injuries to both of them. The husband died next day. The defendant was a serving soldier at the time. Negligence could not be disputed. The respondent, as the driver, was insured against third party liability as required by the Road Traffic Acts under a policy in the usual form taken out by his employers as owners of the motor car. The daughter's name was Jenny
- G** Cohen and, although her claim was formulated in a separate action, which was consolidated with the appellant's action, nothing arises upon it.

- The sole issue in the appeal is whether it was open to the respondent, in the circumstances of the case, to raise the plea that the appellant's claim was barred by the Fatal Accidents Act, 1846, s. 3, which limits the right of action under the Act to the period of one year from the date of the death. On the facts established at the trial, I have no doubt that the plea was not so open, and to
- H** take the point was, in my opinion, discreditable, if not dishonest, on the part of the insurance company whose policy covered the respondent as driver.

The appellant's solicitors on the record did not at first act for her, but they were retained in July, 1941, and on the 18th of that month addressed a letter to the respondent asking if he admitted liability and where he could be served, or whether any solicitors would accept service. This letter was handed by him, or on his behalf, to the insurance company, and in August they sent a representative to negotiate with the appellant's solicitors, who gave evidence below, and no evidence was called for the respondent. The evidence is clear

beyond all doubt that the representative said (i) that they had no defence, and that the negotiations should proceed "on the basis of admission of liability"; but (ii) that "a writ would have to be issued in any event because whether they agreed about the *quantum* of damages or not, the court would have to approve it and apportion it." There was no other meeting and, in my opinion, the whole of the subsequent correspondence was written by both sides with knowledge of the agreed position which I have just stated. The plain meaning of that agreement was that liability in damages to the appellant's cause of action for the money loss resulting to the deceased appellant's dependants from the respondent's negligence was once and for all definitely accepted by both the respondent and his insurers; and both of them were thereafter precluded from putting forward any defence whatever which would impeach that liability. It was just as much a contract not to plead s. 3 of the Act, as if that undertaking had been put in words; and the insurance society knew it at the time when it caused that plea to be recorded. That is why I have spoken of their conduct in terms of such grave censure.

The arrangement that a writ should be issued was both natural and necessary. It was natural for the appellant's solicitor to be glad to be able, in his negotiation for a suitable figure for damages, to say that, if his reasonable demand was not considered, it should be left to the judge. It was necessary for apportionment that the judge should apportion. But the date of the writ did not matter in the least for either of those purposes. It follows, therefore, that, it did not matter for any purpose relevant to this appeal whether the action started on Nov. 7, 1941, was continued or dropped; or whether the writ in the present proceedings was before or after the lapse of the 12 months from the death. It is evident that the appellant's solicitors felt a procedural anxiety about the correctness of the action begun on Nov. 7, 1941. They seem to have thought that, as the appellant purported to be suing as administratrix and had not, at the date of writ issued, got her grant, the action might be wrongly constituted and consequently that the notice of action to the insurers required under the Road Traffic Act, 1934, s. 10, might not have been effectively given; and he may have had in mind the note in the ANNUAL PRACTICE saying that, though an executor may start an action as executor before probate, an administrator cannot do so before grant of letters of administration (see p. 179 of the 1941 Edn.). The fact that out of caution he dropped the first action and paid its costs and issued a new writ on Feb. 14, 1942, after the appellant had got her grant, has no legal significance whatever in the present litigation. That the insurance society should instruct their solicitor to take the action they did and cause sect. 3 of the 1846 Act to be pleaded shocks me more than I can say. The continuing endeavour at the trial to evade liability, whilst calling no witness to challenge the solicitor's evidence, makes their conduct worse.

The case thus falls wholly within the decision of this court in *Wright v. John Bagnall & Sons, Ltd.* (1), and that decision is in any case binding on us. The judge obviously thought that the meaning of what was said at the August interview fell short of what I feel sure was meant; but I am satisfied that no such reason as that actuated the insurance company.]

I would only add that this judgment was written before the case of *Ingall v. Moran* was heard in this court by LUXMOORE and GODDARD, L.JJ., and myself. The question of the validity of a representative action in the name of the administrator before the grant of letters of administration to which I have referred above incidentally was there fully argued, although our judgment has not yet been delivered.

The appeal must be allowed with costs here and below.

MACKINNON. L.J. : I agree.

GODDARD, L.J. : I agree with the judgment of SCOTT, L.J., but as we are differing from the judge I will add a few words. There was clearly an agreement made by the representative of the defendant's insurance company with the plaintiff's solicitor that liability was admitted but that the amount of the damages was to be fixed and apportioned by the court. There was, and would be, no question as to the authority to make this agreement in view of para. 3 of the defence and, in my opinion, sect. 3 of the Fatal Accident Act, 1846, does

not affect the cause of action but merely prescribes a period of limitation. It in no way differs from the provision in the Workmen's Compensation Act that the claim for compensation must be made within six months. I can, therefore, see no distinction between this case and that of *Wright v. John Bagnall & Sons, Ltd.* (1), which is binding on this court. There it was found that the employers had agreed to pay compensation and that each party reserved the right to go to the court to get the amount fixed. COLLINS, L.J., said that there was an agreement that compensation was to be fixed, the only question left open being the amount, which is exactly the case here. If that is the case, said COLLINS, L.J., the respondents are debarred from raising the point that the statutory limitation applied. VAUGHAN WILLIAMS, L.J., concurred as to the existence of the agreement, and said that he thought that the lapse of time could not be set up as a bar to the claim. TUCKER, J., thought that an essential element in the decision was that the applicant had been lulled into a sense of false security and so distinguished it, but I am unable to agree with him. COLLINS, L.J., mentioned that consideration as a further ground for holding that lapse of time could not be set up, but his first reason, which was the only one given by VAUGHAN WILLIAMS, L.J., remained unqualified. If there could have been any doubt on the subject it was resolved by *Rendall v. Hill's Dry Dock Co.* (2), where A. L. SMITH, L.J., explains in terms the *ratio decidendi* of *Wright's* case (1), that the parties had agreed that there was a statutory liability on the respondents to pay compensation and that each had reserved the right to go to the court to have the amount determined. The defence now taken is in fact set up by the insurance company, and I will say no more than that I regret that in the circumstances they should have taken such a point.

I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Milner & Son*, agents for *Silverman & Livermore*, Liverpool (for the appellants); *L. Bingham & Co.* (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

BLACKWELL v. BLACKWELL.

[COURT OF APPEAL (Scott, Luxmoore, and Goddard, L.J.J.), **October 28, 1943.**]

Husband and Wife—Separate property of wife—Savings from housekeeping allowance while parties living together—Right of husband to savings.

A husband and wife separated in 1941. At that date there was standing to the credit of the wife in the books of a co-operative society a sum of £103 10s. which upon the evidence represented moneys saved from a housekeeping allowance made to the wife while the parties were living together. It was contended for the wife that this sum was her own property:—

HELD: in the absence of any evidence of a gift by the husband, this sum belonged to the husband.

[**EDITORIAL NOTE.** This is a direct decision on a point which is really settled by previous authority. Some little doubt has been felt whether the position has been affected by social change and the various statutes dealing with the property of married women.

AS TO SAVINGS FROM HOUSEKEEPING ALLOWANCE, see HALSBURY, Hailsham Edn., Vol. 16, p. 630, para. 1001; and FOR CASES, see DIGEST, Vol. 27, pp. 94, 95, Nos. 730-739.]

Cases referred to:

- (1) *Montgomery v. Blows*, [1916] 1 K.B. 899; 34 Digest 250, 2147; 85 L.J.K.B. 794; 114 L.T. 867.
- (2) *Barrack v. McCulloch* (1856), 3 K. & J. 110; 27 Digest 94, 730; 26 L.J.Ch. 105; 28 L.T.O.S. 218.

APPEAL by the wife from a decision of His Honour JUDGE HURST, given at the Oxford County Court. The parties were married in 1925, but separated in 1941. At that time there was standing to the credit of the wife in the Oxford Co-Operative Society a sum of £103 10s. This sum the husband alleged represented savings out of a housekeeping allowance made by him to his wife during the time they were living together and he claimed that it was his property.

C. Colwill and *D. Knight Dix* for the appellant.

Holroyd Pearce for the respondent.

Colwill: The keeping of a house is the occupation of a wife and what she saves by her skill in that occupation belongs to her. [Counsel referred to *Montgomery v. Blows* (1) and *Barrack v. M'Culloch* (2).]

SCOTT, L.J.: This appeal raises the question whether, where money is handed by a husband to his wife for housekeeping purposes and that money is not fully used by her for those purposes, the balance becomes the wife's private property so that she can keep it for herself. The county court judge decided that the husband was entitled to the balance.

In my view there is no justification at all for the contention that, where a husband hands to his wife an allowance for housekeeping purposes, the husband is to be taken as a matter of law as presenting the savings out of that money to the wife for her sole use. The position in law will no doubt depend upon the evidence of what has passed between the parties. Here nothing was said at all and no arrangement was made by which the husband made a gift of the money to her. The result in such circumstances is that any savings remained the property of the husband. It appears that the wife had paid the money, so saved, into an account in her name with a co-operative society and that these savings together with interest, dividends or bonuses allowed by the society eventually amounted to the sum of £103 10s. It was, however, clear that the source of this money was the husband's weekly allowance and that was sufficient in the absence of any evidence to the contrary that this money was still the property of the husband.

The judgment appealed from was perfectly correct and the appeal must be dismissed with costs.

LUXMOORE, L.J.: I agree. It is clear law that savings made by a wife out of money handed to her by her husband for housekeeping purposes belongs to the husband.

GODDARD, L.J.: I agree. In my view there is no legal right in a wife to retain savings made out of housekeeping money. Even if there had been an arrangement between the husband and wife with regard to those savings, I am far from saying that this sort of domestic arrangement can necessarily result in a legal contract. The appeal fails.

Appeal dismissed with costs.

Solicitors: *C. Morrison* (for the appellant); *Wellington Taylor & Sons*, agents for *Thomas Mallam, Grimsdale & Co.*, Oxford (for the respondent).

[*Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.*]

J. LEAVEY & CO., LTD. v. GEORGE H. HIRST & CO., LTD.
 [COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.),
October 25, 26, 27, 1943.]

Contract—Supply of goods—Government order limiting supply except under licence—Sellers refusal to accept licence—"Unforeseen circumstances"—Frustration—Measure of damages—Limitation of Supplies Order, 1941 (S.R. & O., 1941, No. 323).

Practice—Pleadings—Necessity for amendment where new case set up at hearing.

The appellants claimed damages for breach of contract to supply certain goods to which the Limitation of Supplies Order, 1941, applied, delivery as ready after June, 1941. The respondents, by their defence, set up one defence only, namely, that the Order had the effect of making it illegal, and therefore impossible, for them to fulfil their contract with the appellants. No attempt was made at the trial to support that proposition. The respondents, however, set up two new defences. First, relying upon a term in the contract "strikes, breakdowns, or other unforeseen circumstances excepted," they said that unforeseen circumstances had arisen which excused them from the performance of the contract. Secondly, they maintained that, as soon as the Order came into operation, the contract was at an end by reason of the doctrine of frustration. The respondents also contended that the appellants were not entitled to more than nominal damages. The Limitation of Supplies Order, 1941, applied only to the period ending Sept. 30, 1941, and the court held as a fact that, in Mar., 1941, when it was made, there was no sufficient reason to suppose that it would be continued:—

HELD : (i) on the facts proved there was nothing to bring into operation the clause relating to unforeseen circumstances.

(ii) as the Limitation of Supplies Order, 1941, on the face of it, did not make it impossible for the contract to be performed after Sept. 30, 1941, there had been no frustration.

(iii) as there was no available market for the purchase of substituted goods, the appellants were entitled to recover loss of profit owing to the respondents failure to perform the contract.

(iv) where a new case not covered by the pleadings is set up at the hearing, the court should insist upon a proper amendment of the pleadings and it is the duty of counsel to see that the record is kept in order.

[EDITORIAL NOTE.] There has in modern times been a considerable relaxation in the strictness of pleading, but it is essential in order that justice may be done that the case set up at the hearing shall be covered by the pleadings. If the case there set up is departed from it may well be that one party will be denied the advantage he would have obtained from particulars and proper discovery, and, in addition, he may not have come prepared with evidence to meet the new case. These matters can be cured by adjournment, but, for the purposes of an appeal, it is essential that the pleadings, at least, should be put in order, so that the issues between the parties are clear. It is here stated that it is the duty not only of the court but of counsel to see that this is done. Apart from this the case is of interest in dealing with the effect of emergency orders upon contracts and upon the point of the measure of damages. The decision, though not so stated in the judgment, is that where there is no available market, the provisions of the Sale of Goods Act, 1893, s. 51 (2) must be applied to the circumstances.

AS TO DAMAGES FOR NON-DELIVERY, see HALSBURY, Hailsham Edn., Vol. 29, pp. 193-199, paras. 258-267; and FOR CASES, see DIGEST, Vol. 39, pp. 668-672, Nos. 2563-2587].

Case referred to:

(1) Wills (George) & Sons, Ltd. v. Cunningham (R. S.) Son & Co., Ltd., [1924] 2 K.B. 220; 39 Digest 668, 2561; 93 L.J.K.B. 1008; 131 L.T. 400.

APPEAL of the plaintiffs from a judgment of CASSELS, J., dated May 27, 1943. The facts are fully set out in the judgment of LORD GREENE, M.R.

G. J. Lynskey, K.C., and H. J. Astell Burt for the appellants.

A. T. Denning, K.C., and P. B. Morle for the respondents.

LORD GREENE, M.R.: This case affords a very striking example of the confusion and possible injustice that may result when pleadings are treated

at the trial in a very loose way. The defendants by their defence set up one defence only. It was a defence in law and consisted of an allegation that the Limitation of Supplies Order, 1941, had the effect of making it illegal; and, therefore, impossible, for the defendants to fulfil this contract with the plaintiffs. That was the defence and it was based on the theory that, when the Order prohibited the supply by a manufacturer of more than a certain proportion of his deliveries in the standard year, it operated to prohibit him from supplying to any individual customer more than a similar percentage of the goods supplied to that customer in the standard period. No attempt was made before CASSELS, J., to support that proposition, nor was any attempt made before us; and it is, on the face of it, quite insupportable. A

At the trial the defendants put up two quite new cases. One was based on a provision in one of the contractual letters: "Strikes, breakdowns, or other unforeseen circumstances excepted." It was said that unforeseen circumstances had taken place and that, therefore, the defendants were excused from performance of the contract. It will be noticed that the pleading to which I have referred is quite insufficient to support that case, because it would have been necessary to allege that unforeseen circumstances had taken place and to particularise what those circumstances were. The only matter referred to in the pleadings was the alleged illegality of the performance of the contract, due to the terms of the Order; but the defendants, in support of this new allegation, relied on and led evidence dealing with the facts which were alleged to form part of the unforeseen circumstances on which they relied. B
C

The other new case which was raised at the trial was that of frustration. If that had been properly pleaded, it would have been necessary to allege the facts which were relied upon to bring into operation the doctrine of frustration. No such facts were alleged. Nevertheless, in spite of protests by counsel for the plaintiffs, the defendants were allowed to lead evidence in support of their case of frustration. That evidence was relevant both to the issue of frustration and to the matter of unforeseen circumstances within the clause in the contract. It consisted, in substance, of evidence as to the total number of orders which they had on hand when the Order came into operation on Mar. 15, 1941; and the case was made that, in view of the bulk of those orders, it was impossible to fulfil any one of them, including that of the plaintiffs, up to 100 per cent., and that, therefore, the effect of the Order was to abrogate those contracts. It is quite obvious that a case of that kind required the production and scrutiny of all those orders, in order to see whether, in fact, according to their terms, they were to be fulfilled within the period of restriction laid down by the Order, which, on its face, came to an end on Sept. 30, of that year. In fact, the terms of all those orders would have had to be looked at. Further, there were other matters upon which the plaintiffs might well have wished to call evidence, matters relating to the possibility of obtaining a licence, and so forth, which, in the way the case was dealt with in the court below, was made impossible to them. D
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The result was that CASSELS, J., found in favour of the defendants on both those new issues, in spite of the fact that counsel for the plaintiffs had throughout protested against the introduction of evidence which bore upon them. Obviously that situation might have resulted in a very serious injustice. I have said more than once in this court that, where a substantial departure from the pleadings is desired to be made, it is the duty of the judge to see that a proper application is made to him for leave to amend the pleading at the trial. The proposed amendment should be put in writing, so that counsel on the other side can consider it and, if necessary, apply for an adjournment, if the nature of the amendment is one which involves his calling further evidence which he was not prepared to call on the pleadings as they originally stood. I hope that it will not be thought that I am in any way pedantic on the matter of pleading. I hope that I am not. It will be seen at once what grave possibilities of injustice there are if pleadings are brushed aside at the trial, new issues are raised which have never been pleaded, and evidence is called bearing on those issues with regard to which there has been no discovery and which the other side have no opportunity of meeting by other evidence. In the present case we required the defendants to formulate the amendment which they desired and to ask for leave to amend before us. G
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On the particular facts of this case, having regard to what took place at the trial, we came to the conclusion that, in the circumstances, no real injustice would be done by allowing the amendment. I may say for myself that I did that with some uneasiness, because it may very well have been that further evidence might have been called by the plaintiffs; but, in view of the fact that no request was made for an adjournment, I did not feel (and I think my colleagues agreed with me) that any injustice would be done by allowing the amendment.

A However, I think that it is important to make it quite clear that cases may very well occur in future where this loose way of dealing with pleadings and of allowing new issues to be introduced at the trial may lead to grave injustice to the other side and, in a case where this court was satisfied that that had been the result, I apprehend that we should feel no difficulty in keeping the side which had introduced this new case strictly to its pleadings and allowing it to argue the appeal on the basis of those pleadings and not on the new case which they had endeavoured to introduce. This court is continually being put in the difficult position of having to deal with matters of this kind, and discussions arise between counsel whose recollections differ as to what was said and what was not said at the trial, and we are then put into the very awkward position of having to decide what is the proper method of doing justice when we have not the full facts before us.

B When I spoke of the duty of the judge to see that proper applications for leave to amend are made, I would repeat what I have said before that a similar duty is incumbent on counsel on each side to see that the record is kept in order and is dealt with *modo et forma*.

C In the present case, dealing with the substance of the appeal and taking the case based on the allegation that unforeseen circumstances had taken place, I find myself in agreement with the view taken by CASSELS, J., that, on the true construction of this contract, the phrase "unforeseen circumstances" in its context refers to circumstances making the performance of the contract impossible. That view was taken by GREER, J., in *George Wills & Sons, Ltd. v. R. S. Cunningham, Son & Co., Ltd.* (1), where he had to construe a similar phrase. A phrase of that kind, like all these very loose and ambiguous phrases which commercial men are in the habit of using, may have one meaning in one context and quite a different meaning in another context. In the present context, it has, in my view, the meaning which I have stated.

D Is there anything in the facts as proved at the trial which would bring that clause into operation? In my opinion there was not anything sufficient to produce that result. I can deal with the matter really more conveniently on the issue of frustration because, in effect, the construction which I favour means that the clause does no more than the doctrine of frustration itself would have done if it had been applicable. Counsel for the respondents, in dealing with this clause, made an alternative suggestion that it might mean unforeseen circumstances hindering the delivery of the goods within the delivery period contemplated by the contract. In my opinion that argument also fails, for a reason which will become apparent when I deal with the construction of the contract under the frustration issue.

E On the frustration issue, this case is made. The coming into force on Mar. 15, 1941, of the Limitation of Supplies Order in question had the effect of making it impossible for the defendants to perform this contract; and the impossibility is alleged to consist in the fact that the orders which they had on hand on Mar. 15 from all their customers, as I have already said, far exceeded the quota allowed to them under the Order. That was the case which the defendants at the time raised and persisted in, although they put it on the ground that the effect of the Order was to apply to the various customers a quota corresponding to that which affected the defendants themselves. Nevertheless, they maintained that, as soon as that Order came into operation, the contract was at an end. That they maintained throughout.

F It was said that there could have been no impossibility caused by the Order even in the circumstances proved, because the Order itself only applied to a limited period, namely, a period ending on Sept. 30, 1941; and it was said that, on the true construction of the contract, there was no necessity for any delivery to take place during that period of restriction. Counsel for the respondents argued that the period of restriction mentioned in the Order ought

not to be given any particular importance, because anyone would have imagined and realised that an Order of this description would be renewed when the period mentioned in it had come to an end. I see no ground whatever for saying that such an assumption ought to have been made on Mar. 15, 1941, when the Order came into operation. There may have been many good reasons for making an Order to operate during a limited period, and we can only deal with the matter according to its terms. The Order, therefore, on its face could not make it impossible for this contract to be performed after the end of September. A

If, on the terms of the contract, the delivery period would have expired before the end of September, the argument of the plaintiffs which I am at present considering would have failed; but the delivery provision in the contract is: "Delivery as ready after June, 1941." That is obviously a very loose period, and it would be impossible to say that, if the suppliers had tendered goods in October, that tender could have been refused on the ground that they were out of time. It seems to me that a phrase of this kind is to be construed broadly, as it was intended to be construed, because the language is just about as unprecise as any language can be; and, in my opinion, there is no justification for saying that the Order, coupled with the facts proved, made it impossible to perform this contract during the delivery period contemplated by the contract. B

There is, however, another view which, in my opinion, makes the doctrine of frustration inapplicable. The Limitation of Supplies Order in question provides that the quota which is fixed for a manufacturer may be departed from by licence granted by the Board of Trade. The position, therefore, on Mar. 15, 1941, accepting for the moment the defendants' allegation at its highest—here I am assuming that the construction I have put on the delivery provisions is not the right one—was that the contract would only become impossible of performance, not by the mere making of the Order, but by the failure within, I apprehend, a reasonable time to obtain the necessary licence. Indeed, when I asked counsel for the respondents what would be the implied term in this contract imported by the doctrine of frustration, he admitted, and very fairly admitted, and, in my opinion, correctly admitted, that it would not be that the contract between the parties should be at an end when the Order came into operation, but that it could only be at an end when an application had been made for a licence and it had been refused within a reasonable time. That obviously, if I may say so, was the business view of the situation, and anyone who understood this order and behaved in an ordinary business way would have said to the plaintiffs: "We are very sorry; but unless you get a licence, we cannot carry out this order; now what about getting a licence?" Instead of that, the defendants took up the attitude, and declined to depart from it, that, as soon as the Order was made, the contract was at an end. In fact, the plaintiffs were in a very good position for obtaining a licence from the Board of Trade, because their stock had been destroyed by enemy action. Accordingly, what they did was this. In correspondence, the defendants insisted on treating the contract as at an end and the plaintiffs, who themselves were under a misapprehension as to the meaning of the Order, suggested that the matter could be dealt with by their obtaining a quota; but nothing came of that suggestion owing to the flat refusal of the defendants to entertain it. On July 10, 1941, the plaintiffs applied to the Board of Trade for a licence. On July 22, 1941, they wrote to the defendants a letter from which the following is an extract: C

Under the terms of the contract, deliveries were not to commence until after June, and then only as the goods were ready. The practice of the parties in the past has been to extend deliveries over several months. Within the time limited for delivery, our clients will be in possession of the necessary quota or other authority. In these circumstances our clients are not prepared to accept a repudiation of the contract and they intend to hold you strictly to its terms. D

They received no satisfactory answer to the letter, and their letters asking the defendants to make their position clear were ignored. E

Meanwhile a licence was obtained from the Board of Trade and was sent to the defendants on Oct. 9, 1941, giving them a licence to supply in excess of their quota. On Oct. 13 the defendants returned it, saying that they had no intimation whatever from the plaintiffs that they were applying for the licence F

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and adding this very curious statement :

If the firm had enquired from us, we should have been compelled to inform them that our machinery is so fully committed for months ahead on Government and export work and the utility clothing scheme that we could not entertain additional business.

The result was that, although the licence had been obtained, they refused to take advantage of it.

A It appears to me to be quite manifest that, if one assumes a clause inserted in the contract of the kind which I have described, it would have been impossible to say that the event contemplated by that clause had happened, because here a licence was obtained, and how is it possible to say that the performance of the contract had become impossible, when it was possible if the defendants had chosen to perform it ? In the circumstances, the licence was obtained, having regard to the correspondence and the periods of delay which normally take place in obtaining licences of that character, within a reasonable time. B Therefore, it seems to me that the defendants entirely fail to establish on the facts that events had happened which made this contract impossible of performance.

I need not take up time by referring to a matter which I have already touched upon, namely, evidence as to other contracts the existence of which was said to lead to frustration owing to their quantity. Those contracts were not produced. C An answer was given by a witness who quite clearly does not mean what he said, because he said that they were all in precisely the same form and all on precisely the same terms. It is quite impossible to suppose that that was so ; and, in any case, the proper way to prove those contracts and their terms was by producing them. That was never done, and, in my opinion, the case based on frustration failed on that issue of fact. Quite apart from that, the D other matters to which I have referred are quite sufficient to make the doctrine inapplicable on the facts of this case. The question of liability must, therefore, be determined in favour of the plaintiffs.

The only other question relates to damages. The effect of the Limitation of Supplies Order was that the plaintiffs were unable to obtain substituted goods from some other source ; in other words, there was no available market into which they could go and limit their damages by purchasing goods of the same character. E CASSELS, J., held that that circumstance, as there was no market, was sufficient to justify him in saying that the damages could only be nominal damages. With great respect to him, I cannot help thinking that the conciseness of his language possibly did not reflect his thought, because such a proposition will not bear examination. Counsel for the respondents put it in a way which it may very well be was the way in which it struck the mind of the judge, although he has not so expressed himself, by saying that, as *prima facie* the F market price is the basis of the calculation of damages and no other admissible principle of assessing damages has been shown to be applicable and no relevant evidence had been led, the result must necessarily be that the defendants had not established any damage other than nominal damage which the law assumes to have taken place on a breach of contract.

In my opinion that proposition, on the particular facts of this case, is not correct. G The evidence led at the trial on both sides went to the question of the profits which the plaintiffs would have made by making the goods up into overcoats and selling them, if the contract has been carried out. There was a conflict of evidence. The plaintiffs' evidence fixed the profit at 18s. 0d. an overcoat, if I remember rightly, and the defendants' evidence fixed the profit at 10s. 0d. an overcoat. The judge took the view that, if he had had to fix the damages on the basis contended for by the plaintiffs, he would have fixed them H at the lower figure. Before us, it was not contended that that view was wrong, and the figure so arrived at is £525. In my opinion, in the circumstances of this case, the method of reaching the figure of damage was the only available method. In other cases, in other circumstances, this particular method might not be appropriate ; but, in my opinion, in this case it was appropriate.

There is only one other matter which I must mention on the substance of the case and which I should have mentioned before. It was argued as an alternative argument by the defendants that the only damages which could be recovered were not damages as on the basis of an entire breach of

contract by repudiation and acceptance of repudiation, but damages in respect of failure to deliver down to the date of the issue of the writ. It must be remembered that the whole basis of this claim and, indeed, in the amended statement of claim it is so pleaded, was repudiation accepted by the plaintiffs; and no such alternative defence as that relied upon by counsel for the respondents is suggested in the defence as pleaded; but that perhaps is not so important as the fact that the defendants themselves plead facts which amount to repudiation, plus acceptance of repudiation. They do not cast it in those words, because they allege in para. 5 that the contract was rescinded by mutual consent. Any suggestion more wildly different from the facts of this case I find it difficult to imagine. There was not an element of mutual consent from beginning to end in these transactions; but what they say in their particulars is that the plaintiffs, by a certain letter accepted the cancellation referred to in a letter of June 19, which they had written. The letter of June 19 was not a cancellation at all. There is no such thing as unilateral repudiation of a contract. It was repudiation pure and simple, and nothing else, and when they say that that repudiation, which is what it was, was accepted, it must mean that they are putting themselves completely out of court for suggesting that there was no acceptance of the repudiation. There is no substance in that point. The result, in my opinion, is that the appeal should be allowed with costs here and below and that judgment should be entered for the plaintiffs for the sum of damages which I have mentioned.

MACKINNON, L.J.: I agree. The defendants refused to deliver the goods which they had agreed to sell. To escape from liability for that *prima facie* breach of contract they can only rely either (a) on the clause in their letter "unforeseen circumstances excepted," or (b) on an implied term in their contracts pursuant to what is commonly spoken of as frustration. In either case they must prove that the effect of the Limitation of Supplies Order, 1941, was to make it impossible for them to deliver these goods.

The prohibition upon which they rely begins: "Except under the authority of a licence granted by the Board of Trade . . ." Therefore proof that delivery of these goods was rendered impossible by this Order must include proof that a licence could not have been obtained. The correspondence shows that the plaintiffs did in fact procure a licence from the Board of Trade. It is true that that was after the issue of the writ; but it is very good evidence of what was possible. Quite apart from that, when the defendants received a letter from the Board of Trade stating that they had issued this licence to the plaintiffs, the defendants refused to accept it and said: "We therefore beg to return this licence." The reason why they say that they will not have it and that they return it is: "Our machinery is so fully committed for months ahead on Government and export work and the utility clothing scheme that we could not entertain additional business." When their managing director was giving evidence he was asked, in cross-examination, whether, when the plaintiffs got the licence, the defendants would have been in a position to supply at some time. He replied that, had the defendants accepted the licence, they would have been able to supply.

The result is that the defendants entirely failed to prove that this order rendered delivery by them impossible. Indeed, their own evidence admitted and proved that a licence could have been obtained and, therefore, they could deliver. Therefore, the defence that delivery had been rendered impossible was not made out and the defendants have no defence to the claim for breach of contract.

As regards damages, I do not think that I need add anything to what my Lord has said.

DU PARCQ, L.J.: I agree, and have very little to add. I should, however, like to say a few words about this phrase "other unforeseen circumstances excepted." I agree that in this particular context it has the meaning that, if the vendors were wholly prevented by unforeseen circumstances from fulfilling their contract, they should be absolved.

It may be well that business men making contracts of this kind should realise the great danger to themselves and possibly unfairness to the other party to the contract of using indiscriminately phrases of this kind, which are often either

meaningless or (what is equally bad) have too many possible meanings. It was suggested here, for instance, that the phrase might mean that, if unforeseen circumstances made it difficult or impossible to deliver the goods as early as might reasonably have been expected apart from such circumstances, the delay should be excused. It was suggested also by counsel for the respondents that it might mean that, if unforeseen circumstances hindered the delivery, the contract should be at an end. Finally, there is the view which, as I have said, I believe to be the correct view, which was taken by the judge, following the decision of GREER, J., as he then was. I would very diffidently suggest to business men that they would be wise, before they write into a contract a phrase of this kind, to ask themselves two questions. The first question that each business man should address to himself is: Do I quite clearly understand what this means? The second question is: Am I quite sure that the other party to the contract will understand what it means and that his view will be the same as mine? I have very little doubt that if three business men were asked the meaning of these words, one would be very likely to get three different answers.

I am not forgetting that we all know that there are phrases which when new did not have any very clear meaning, but have in the course of many years come to have a perfectly clear meaning, not only to business men but to lawyers—words, and sometimes initials. They are a kind of shorthand which everyone concerned with business contracts understands. That is not true of this phrase “unforeseen circumstances excepted,” whether you write it in full or whether you write down the letters “u.c.e.” It is most desirable, as I think, that business men should understand that.

The only other thing that I would wish to say is that in this particular case I do not know any way in which the value of the goods to the plaintiffs could have been arrived at except that which LORD GREENE, M.R., has already said should be adopted. It is very difficult to lay down general rules and very difficult to argue from one case to another case; but in this particular case I believe that to be the only rule that could be adopted, as it is quite impossible to say that, where there is no market price and where the manner of computing the value is not perfectly straightforward and simple, the plaintiff is to get no damages at all. That most unjust result obviously must be avoided. I agree that this appeal should be allowed and that the order proposed by my Lord should be made.

Appeal allowed.

Solicitors: *H. B. Wedlake, Saint & Co.* (for the appellants); *Jaques & Co.*, agents for *Scholefield, Taylor & Maggs*, Batley (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

SOUTH WALES ALUMINIUM CO., LTD. v. ASSESSMENT COMMITTEE FOR THE NEATH ASSESSMENT AREA.

[KING'S BENCH DIVISION (Atkinson, J.), July 22, 1943.]

Rates and Rating—Industrial hereditament—Assessment—Machinery and plant deemed to be part of hereditament—Motor generators used as transforming plant—Cells for electrolytic process—Rating and Valuation Act, 1925 (c. 90), s. 24, Sched. III, Cases 1 (a), 4—Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O., 1927, No. 480).

The plaintiff company manufactured metallic aluminium by an electrolytic process which required direct current. In order to convert the alternating current supplied from the mains, the plaintiffs passed the current through a transformer system to a distribution board, and from thence to three motor generators equipped with three dynamos which produced the direct current which was passed to cells composed of plates and fittings assembled together. The plaintiffs contended (i) that the motor generators were not machinery used for the “primary transformation of power” within the meaning of the Rating and Valuation Act, 1925, Sched.

III, Class 1 (a); (ii) that the cells were not in the nature of a "building or structure" within the meaning of Class 4; and (iii) that, therefore, the specified machines and plant were not rateable:—

HELD: on a true construction of the Act the motor generators were not used for the "primary transformation of power," nor were the cells in the nature of "buildings or structures."

[EDITORIAL NOTE.] Statutes and statutory orders must at times contain technical terms and the meaning to be applied to such technical terms must be that applied to them by men accustomed to use such terms in the industry which is being dealt with. The construction of the rating order here in question is, therefore, largely subject to the expert evidence of technical persons, but the meaning of the term "structure" is based upon more general considerations. A

FOR THE RATING AND VALUATION ACT, 1925, s. 24, Sched. III, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 14, pp. 650, 794-798.]

APPEAL by way of case stated from a decision of an arbitrator. The facts are fully set out in the judgment. B

A. S. Comyns Carr, K.C., and *Rowe Harding* (for *T. Wyndham Jennings* on war service) for the assessment committee.

Sydney G. Turner, K.C., and *Frederick Grant, K.C.*, for the company.

ATKINSON, J.: The Rating and Valuation Act, 1925, was intended to relieve industry from, at any rate, a part of the burden of rating. Sect. 24 (1) provides as follows: C

For the purpose of the making or revision of valuation lists under this part of this Act, the following provisions shall have effect with respect to the valuation of any hereditament . . . which is [to be] ascertained . . . (a) all such plant or machinery in or on the hereditament as belongs to any of the classes specified in Sched. III to this Act shall be deemed to be a part of the hereditament . . .

That meant that everything in Sched. III to the Act should be rated as if it were part of the hereditament. If the plant was not in Sched. III, then it was not to be taken into consideration. Subsect. (3) provided: D

For the purpose of enabling all persons concerned to have precise information as to what machinery and plant falls within the classes specified in the said Sched. III, there shall be constituted a committee consisting of five persons to be appointed by the Minister . . . E

To put it shortly, the committee were to prepare a detailed list, and, if that were ultimately approved by the Minister, an order could be made giving effect to that which the committee had recommended. That procedure was followed in 1927 when there was issued the Plant and Machinery (Valuation for Rating) Order, 1927.

The determination of the issues raised in this case depends upon the understanding and the proper application of what is contained in that order. The phrase in the latter subsection, "all persons concerned to have precise knowledge," is important, because it was never intended for a moment that the schedule to that order should be expressed in language which the ordinary man in the street would understand. It was meant to be, and could only have been meant to be, something which would be as clear as possible to the understanding of persons connected with the industry, who would know the meaning of a number of technical words, and who would know what was intended by a number of expressions found therein, which I, and other people who only know the very elements of this sort of thing, could not interpret without the benefit of evidence. I stress this because the arbitrator, who himself is a person with a good deal of knowledge of these matters, has had the benefit of hearing the evidence of people to whose understanding this order was intended to appeal. He has had the benefit of their evidence, and with the aid of their evidence he has come to certain decisions. I think it will be shown that a great many of the questions arising in this case could only be properly determined as a result of a correct appreciation of technical evidence. Having said that, I will put the three points which arise as clearly as I can. The industrial undertaking concerned here, the South Wales Aluminium Co., Ltd., carry on the business of producing metallic aluminium from aluminium ore. They do that by a process of electrolysis. The raw material is put in a number of cells where it is broken up by electrolytic action and pure aluminium is obtained. There F
G
H

are 68 electrolytic cells; and I will have to consider their construction later on. The problem with which the manufacturers had to deal was this. For the above process the only current which is of any use is direct current, and, as everybody knows, nearly all the big electricity producers today are producing alternating current. The local authority in this district produces only alternating current. The problem was solved in this way. The company brought the current to the premises by the usual cables at a voltage of 68,000, where the voltage was cut down to 6,600 volts by passing it through two transformer systems. It was then conducted to what I may call a distribution board. The question has to be determined whether it is a "distribution board" within the meaning of the order, but for the sake of clarity I will call it a distribution board. Having reached that board, it is then conducted along five different channels. Three of those channels lead to three motor generators; the fourth leads to a transformer, where the voltage is reduced to 420. The fifth leads to another transformer, where it is reduced to 240 volts. That last system supplies the lighting of the works and the fourth supply goes to a minor distribution board, where it feeds certain minor machines or does certain minor work. But 94 per cent. of the electricity which comes to the distribution board is handed on to those three motor generators. These three motor generators are alike, so that I need only describe one. The motor generator consists of a motor at the end nearest the distribution board and then all set on the same shaft are three generators, so that you have four units all set on the same shaft; and the motor is worked by the alternating current supplied to it by the distribution board. This motor causes the shaft to revolve; and the revolving shaft causes the three generators, or dynamos as they really are, to do their work of producing direct current. I think it is said there are never more than six dynamos working at a time. There is one always resting, so that, if there is a breakdown, there are two available. The current produced in this way is then passed into common conductors and led to this series of cells.

The first question which arises in this case is whether these motor generators are rateable. The next question that arises is whether the 68 cells are rateable. They are totally different questions. The relevant parts of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927, are as follows:

Classes of machinery and plant deemed to be part of the hereditament. Class 1 (*a*) Machinery and plant specified in paras. (*a*) to (*l*) of the Schedule to this Class . . . which is used or intended to be used mainly or exclusively in connection with the generation, storage, primary transformation (as herein defined) or main transmission (as herein defined) of power in or on the hereditament.

I pause there for a moment. Two of the classes of plant there referred to have to be considered here. One is plant used in connection with the generation of power; and the second is plant which is used in the primary transformation of power. Coming to paras. (*a*) to (*l*) one sees that the machinery or plant referred to is there divided up into a number of classes. There is nothing in the words to indicate why they are divided into classes, or what the point of the classes is; but that can be ascertained by looking at them and seeing the sort of thing which is included in these paragraphs. It is plain that the first three or four paragraphs dealing with steam boilers, steam engines, steam turbines and continuous and alternating current dynamos, couplings to engines, turbines and so on, are all dealing with primary production. Para. (*d*) deals with storage batteries and the like. Para. (*e*), which is obviously intended to cover all the different kinds of transformers, includes static transformers, auto-transformers, motor converters, rotary converters, transverters, rectifiers, phase converters and frequency changers. In reading that, I have left out "motor generators," which is the exact technical description of the three machines I have to consider in this case. Motor generators, however, are mentioned there among a class of plant which is solely concerned with transformation. If this plant is to be regarded as plant used exclusively in connection with the generation of power, there is an end of the matter—it is rateable. I think that would be conceded. However, the company contends, and have contended successfully before the arbitrator, that it would be taking a wrong view to regard this plant as intended to be used mainly in connection with the generation of power. They say the true view is that it is used for the primary

transformation of power. If it is used for the primary transformation of power, it does not necessarily take it out of rating, as it may still be hit by the definition of "primary transformation of power," to which I will come in a moment. Obviously the first thing to determine is whether these motor generators are to be regarded as used mainly in connection with the generation of power or mainly in connection with primary transformation.

The first point which counsel for the company made before the arbitrator, and makes before me, is that the expression "motor generator" in para. (e), as everything else mentioned in the class, is concerned with transformation. It is quite true that in para. (c) you have the expression "dynamos"; and it is true that in para. (l) you have :

Steam or other motors which are used or intended to be used mainly or exclusively for driving any of the machinery and plant falling within this Class.

If one were considering a system where you have got separate dynamos and separate motors not forming part of the same unit with the dynamo, but perhaps a powerful motor driving a number of different machines, including dynamos, it may very well be that you would have to regard the matter rather differently. However, what I have to consider here, and what the arbitrator had to consider, were these particular units. The expression "motor generators" seems to be classed among transformers, but, to my mind, whether a motor generator used in circumstances of this sort is to be regarded as one or other, must be determined by what the ordinary expert, or ordinary man in the trade who understands these expressions, would say. If the ordinary man in the trade would say that these motor generators are employed as primary transformers, I should have thought that must be a very relevant matter; or, if a person who understood this industry said that no one would regard this as transformation but would regard it as generation, that would be a very important matter to take into consideration.

Counsel for the defendant committee says : What are those dynamos doing ? They are producing direct current. They are generating direct current. They are not strictly speaking transforming anything. The alternating current which works the motor is one thing—then its use ends—and certain mechanical power is thereby produced which proceeds to this shaft on which the dynamos are set and something new is produced. It is said that is not transformation. On the other hand, it is said : If you look at this broadly, the question is what is the whole unit engaged on ? It receives at one end alternating current and by the process through which it goes it turns out direct current. They say broadly speaking that is transformation and that is what this plant was there to do—to transform as a working agency that which was received as alternating current and to utilise that, not the precise current which was there, but to transform that power received in that way into something which they could use, namely, direct current. The point can only be put in that way ; and to my mind that is not a question of law. It may be in part a question of construction ; and, of course, to that extent it is law.

In so far as one gets help from this schedule, it supports the contention of counsel for the company. It points to it being regarded as a transformer. If I had been the arbitrator trying this matter, I would have tried to find out what the man in the industry says. Would he regard this as engaged on transformation work or would he regard it as generation ? If I received evidence, as no doubt the arbitrator did, to the effect that everybody would regard that motor generator as a transformer, as doing the work of transformation, then I think the arbitrator would be well entitled to say this is a transformer ; because this schedule has been prepared not by Parliament, not by people who do not understand the thing, but it has been turned over to experts who have used expressions which they understand, and which they know will be understood by other people in the trade. If people of that class came and said that by this order they would understand that this plant would come under the heading of plant engaged on primary transformation, I think that would be evidence which an arbitrator would be well entitled to follow. If his view was one so hopelessly opposed to the proper interpretation of this schedule, he might be driven to disregard it ; but as it would fit in with the one indication which one can find in the schedule by the inclusion in para. (e) of "motor generators."

in my judgment, I cannot possibly interfere with the arbitrator's finding, express or implied—it is certainly implicit in his finding—that this plant must be regarded as plant engaged on the primary transformation of power.

That does not conclude the matter, because there is a definition in the schedule which is this :

A “Primary transformation of power” means and includes any transformation of electrical power in or on the hereditament by any transforming plant which changes the pressure or frequency or form of current of the power as generated in or on or supplied to the hereditament to another pressure or frequency or form of current for distribution in the hereditament wherever such transformation is effected at some point in the main transmission as hereinafter defined.

B *Prima facie*, this plant comes well within that definition of primary transformation of power. It is transforming a current as received at the point of supply into something which is different. If that is done at some point in the main transmission as hereinafter defined, it is rateable. If it is not done at some point in the main transmission as hereinafter defined it is not rateable. Then :

C “Main transmission of power” means and includes all transmission of power from the generating plant or point or points of supply in or on the hereditament up to and including . . . (iii) where electrical power is transmitted by means of a cable or cables, the main distribution board or boards to which the cable or cables from the generator or generators or point or points of supply is or are led either directly or with the intervention of a transformer or transformers, and whose bus bars carry or are intended to carry electrical energy at the pressure at which the power distribution circuits are supplied . . .

It is not very easy to follow that, but in substance it means this : that main transmission of power includes all the transmission plant between the point of supply and the main distribution board as therein defined.

D If this is a main distribution board which complies with this paragraph, the main transmission is a part between that distribution board and the point of supply. One has to see whether that distribution board complies with the description here. The main distribution board has to be the one to which the cable from the point of supply is led, either directly or through the transformer. It complies with the condition “and whose bus bars carry or are intended to carry electrical energy at the pressure at which the power distribution circuits are supplied.” I take that

E to mean, if it passes on to the machinery which is going to use it at the same voltage—that is the same pressure—as that at which it reached the distribution board—the board complies with this definition. It does as to 94 per cent. of the quantity because it passes it on at precisely the same voltage, 6,600, to these three motors. The bus bars are intended to carry the electrical energy at that pressure and at the pressure at which these power distribution circuits are supplied. I think that these three motors are power distribution circuits, because

F the motors receive the power and distribute it—they utilise it—and therefore, I think, they come within that description. The mere fact that a very small proportion of it, some 6 per cent., passes on and only reaches the power distribution circuits through two different transformers is really irrelevant. If, in substance, the distribution board distributes that which it receives at the same voltage to the point at which the electricity is going to be used, it seems to

G me to comply with that paragraph and I think (as the arbitrator thought) that this distribution board is a main distribution board within the meaning of that paragraph.

If it is not, a very pretty point arises, and one about which it is not easy to form an opinion. Counsel for the defendants says that, if there is no main distribution board, then the whole system from beginning to end has to be regarded as a main transmission of power—as a main system. Counsel for the

H company, on the other hand, says, that, if there is no distribution board, then everything is non-rateable beyond the point of supply. The main transmission of power means and includes all transmission of power from the point of supply up to and including the main distribution board. If there is no distribution board then there is no space in which you can find your main transmission of power, and, therefore, none of it is rateable. I think, strictly speaking, that argument would be well-founded, but I doubt whether it was realised that that might be the result. As I say, I do not know, but I think that argument would be well-founded, but I need not decide that, because, in my view, this is

a main distribution board, and, therefore, everything that takes place after that distribution board in the way of transmission is not a primary transformation of power, and, therefore, is not rateable. I agree with the arbitrator on that point.

Then comes the question of the cells. The point there is this. Class 4 begins in this way :

The following parts of a plant or combination of plant and machinery whenever and only to such extent as any such part is, or is in the nature of, a building or structure . . .

If these cells are in the nature of "a building or structure" they are rateable. If they are not in the nature of "a building or structure" they are not rateable. The facts found about these electrolytic cells are these :

The electrolytic cells are substantial, rectangular receptacles measuring 16ft. by 11ft.

I think those measures must be length and width. The diagram which was used as a plan gives the measurement on the top of the rectangular receptacle as 12ft., so I do not quite know what these two measurements are, but there they are—anyhow they are substantial, rectangular receptacles. The height is 10ft. apparently. The sides are not straight down. For 7ft. 6ins. they go straight, and then run outwards for a foot and then straight down for the other 2ft. 6ins., so that the bottom 2ft. 6ins. is larger than the upper part. These rectangular receptacles are made of steel plates which are specially made and are then bolted together. There are five steel plates in each cell. The plates are brought to the premises where they are assembled. Having been assembled, this wider part that I spoke about at the bottom is lined with fire-bricks, so that when the firebricks are in place the inside of the receptacle is level from top to bottom—it is smooth. They just fill this extra space provided for them at the bottom. Then inside this layer of firebricks there is superimposed a carbon covering. It is placed in position in the form of carbon blocks and a carbon paste is placed in the cracks between the blocks. At the very first heating this paste melts and the carbon blocks become a solid form of block and form a sort of dish at the bottom of the receptacle, the dish in which the raw material is going to be placed. Passing through the carbon and brick lining are steel bars which conduct and take away the current which is to do the work of breaking up this raw material. These steel bars are bolted together, but the cell is not fixed to the ground. It rests upon four brick pillars which seem to me about 1ft. or 18ins. from the ground on a concrete base to keep them firmly in position. On the other side there is a stanchion, which is not fixed to the ground at all, but merely rests on the ground. There are half a dozen steel bars on either side connecting the receptacle with the stanchion. I think that, in substance, describes what these things are. From the top there is an anode, which is a technical description of something necessary for the operating of the current. It is conceded that is not rateable.

The question is whether these big receptacles, as I have described them, are in the nature of "a building or structure." I do not think it is denied that the word "structure" must be construed as in the nature of a building. There has been an argument as to whether this is a question of fact or a question of law. I think it is obvious it is mixed, but it is only a question of law, I imagine, to this extent. It is a question of law to determine what is meant by the word "structure." Then, in the main, it must be a question of fact whether any particular plant or erection, to use a neutral expression, is within it or not. That must be, in the main, a question of fact, although in certain cases it may be mixed law and fact. There is nothing to suggest here that the word "structure" is not to be used in its ordinary sense. As used in its ordinary sense I suppose it means something which is constructed in the way of being built up—as is a building; it is in the nature of a building. It seems to me it is not in the nature of a building, or a structure analogous to a building, unless it is something which you can say quite fairly has been built up. I do not think that is the only guide or the only test, but, roughly, I think that must be the main guide : how has it got there ? Is it something which you can fairly say has been built up ? I do not think it depends at all on whether it is fixed to the ground. That may be a relevant consideration. Here I will just read the matters

which the arbitrator has borne in mind on this part of the case. As set out in para. 19 :

A I hold that the question whether the said cells and absorption plant are, or are in the nature of, buildings or structures is a question of fact to be determined upon the whole of the facts relating to the respective things, including, but not limited to, shape, size, material, method of construction, attachment to the soil or some other building or structure, the feasibility of removal as a whole, and the relation to the other things that are there and are used in connection therewith, but that no single one of these facts is in itself conclusive.

B Certainly he has included there as one of the matters to be considered what does seem to me to be possibly the most important matter : whether the erection can be said to have been built up in the way we understand when we talk of something being built. To my mind there is really nothing of the building up here. The mere bolting together of these plates to form this receptacle cannot be described, I think, in any way as building up or as analogous to building up. It is an assembly of plates which have been specially made for this particular receptacle. You begin by assembling your plates, and you have then got the receptacle, which is the main thing we are considering. The other matters, the stanchions and boards, are only minor accessories, but the receptacle is the main thing. It seems to me it is a thing which has been assembled. These firebricks and carbon blocks are put in, but can these firebricks and carbon blocks turn a receptacle which is not a structure, or in the nature of a structure, into something which is in the nature of a building or structure ? I do not think so at all. It seems to me you have to consider a receptacle as a receptacle, and it cannot change its character by looking at what is put inside it. It is impossible to say that the presence of carbon, merely because, when you use it, it becomes solid blocks, turns this receptacle into a structure within the meaning of this class. If it is not a structure, then it surely does not become a structure merely because it is kept in position by movable stanchions and connecting rods. Nor do I think the mere fact that the conducting bars are made to pass through the installation for the purpose of bringing and taking away current—they do not form part of the cell really, but pass through the cell—turns it, or helps to turn it, into a building or structure.

D In so far as it is a question of fact, I should take the same view as the arbitrator has taken. In so far as it is a question of law again I should take the same view because, I repeat, to my mind it is not something which has been built up. I am sure the idea of structure here involves the idea of building up. I cannot see any evidence of building up or structure in that sense. It is merely an assembling of plates which have formed a receptacle. That receptacle is then used in a certain way and for certain purposes. Therefore, I find it wholly impossible to say (and I am now answering the question asked in para. 22) E that there was no evidence upon which the arbitrator could come to the conclusion at which he has arrived, or that he was wrong on any question of law or mixed question of law and fact. So far from being prepared to say that he was wrong, I think he was right, but again, these questions are all very difficult, and, to a great extent, are matters of opinion. Even there, I have no doubt that he had the benefit of expert evidence on what these expressions mean in this industry and in that respect had an advantage which, of course, F I have not had.

Questions answered accordingly. Costs to be paid by the assessment committee.

Solicitors : Seeley & Son, agents for C. L. Thomas, Neath (for the assessment committee) ; Oppenheimer, Nathan & Vandyk (for the company).

[Reported by R. BOSWELL, ESQ., Barrister-at-Law.]

**Re A DEBTOR, THE DEBTOR v. THE PETITIONING
CREDITORS AND THE OFFICIAL RECEIVER,**

[COURT OF APPEAL (Lord Greene, M.R., Luxmoore and du Parcq, L.JJ.),
October 21, 1943.]

Bankruptcy—Petition—Stay—Application for adjustment order pending.

Bankruptcy proceedings were commenced against the appellant who thereupon applied in the prescribed form for an adjustment order to be made under the Liabilities (War-Time Adjustment) Act, 1941. When the petition came on for hearing, an application for an adjournment was made until the pending application for an adjustment order was disposed of. The registrar held that the debtor, who was a Dutch subject and in the Dutch army, was not ordinarily resident in England and on that ground, *inter alia*, refused an adjournment:—

HELD: (i) the debtor was ordinarily resident in England within the meaning of the Bankruptcy Act, 1914, s. 4 (1).

(ii) the registrar had exercised his discretion on a wrong ground and should have granted an adjournment until the application for an adjustment order had been disposed of and the receiving order must be rescinded.

[EDITORIAL NOTE.] This decision is reported rather as a practice note than as a decision on principle. Generally speaking, debtors who seek relief under the Liabilities (War-Time Adjustment) Act, 1941, will also be subject to bankruptcy proceedings, but it is here made clear that a *bona fide* application under the Act should be disposed of before a bankruptcy petition is proceeded with.

AS TO STAY OF BANKRUPTCY PETITION, see HALSBURY, Halsham Edn., Vol. 2, pp. 76, 77, para. 91; and FOR CASES, see DIGEST, Vol. 4, pp. 144-146, Nos. 1344-1361.]

APPEAL from a receiving order made by Mr. Registrar Parton and dated July 21, 1943. The facts are fully set out in the judgment of LORD GREENE, M.R.

V. R. Aronson for the appellant.

Percy Lamb for the respondents.

LORD GREENE, M.R.: This is an appeal by the debtor against a receiving order made on July 21, 1943. The petition was presented on June 23, 1943, and it was based on bankruptcy notices served on Mar. 25, 1943. These notices were, in their turn, based upon judgments obtained by the two petitioning creditors on Aug. 6, 1942. On July 9, 1943, the debtor made an application to the West London County Court under the Liabilities (War-Time Adjustment) Act, 1941, s. 3, applying thereunder for the adjustment and settlement of his affairs and for a protection order. The hearing of that application was fixed for July 21, 1943, which was the day for which the hearing of the bankruptcy petition was fixed. When the petition came before the registrar the solicitor appearing for the debtor informed the registrar of the application to the county court judge and asked for an adjournment. The solicitor for the petitioning creditors then referred to the Liabilities (War-Time Adjustment) Act, 1941, s. 24, which provides that the relevant part of the Act should apply only if, when the proceedings are commenced, the debtor ordinarily resides in England. He said that the debtor had come to England at the time of the invasion of France and subsequently became a member of the Netherlands Army. It was submitted upon these facts that the debtor was not ordinarily resident in England but that submission appears to have been made by inadvertence, because it could hardly have been present to the mind of the solicitor who made it that, under the Bankruptcy Act, 1914, s. 4 (1), a bankruptcy petition can only be presented against a debtor if:

(d) the debtor is domiciled in England or within a year before the date of the presentation of the petition has ordinarily resided or had a dwellinghouse or place of business in England.

The language of that provision is not the same as that of the Liabilities (War-Time Adjustment) Act, 1941, s. 24. Nevertheless, it was a dangerous submission because it might have been that the petition could not have been supported. The registrar took the view that the debtor was not a debtor within the Liabilities (War-Time Adjustment) Act, s. 24. I do not think that the evidence supports that view. Counsel for the petitioning creditors concedes that the debtor is a person who comes within sect. 24 of the 1941 Act as a debtor who is ordinarily resident in England, and the case must be dealt with on that footing.

That ground of the registrar's decision cannot be supported. The registrar, however, had an alternative ground under the Liabilities (War-Time Adjustment) Act, 1941, s. 20 (3), which is as follows :

Any court before which are pending any proceedings in respect of a debt or liability which would be a debt or liability provable in liabilities adjustment proceedings may stay the proceedings . . .

(b) for the purpose of enabling the debtor or defendant to avail himself of the services of a liabilities adjustment officer or to make an application to the court for the adjustment and settlement of his affairs under this part of the Act.

- A There can be no question that there was jurisdiction in the registrar to accede to the application made to him for an adjournment because the application to the court for the adjustment of the debtor's affairs had been already set in train and an appointment had been made for the hearing of it in the county court. There can be no doubt that jurisdiction to stay the proceedings existed.
- B The registrar seems to have based his decision to refuse a stay on the ground that he had no jurisdiction to order such a stay. He says in his note that there was no suggestion that inability to pay was due to the war. That sentence repeats what he had said when the debtor's solicitor asked for an adjournment. We were told that the documents were tendered to the registrar and that he refused to look at them. That is not on his note. What the registrar had before him, however, was the fact that an application for an adjustment order had been made. When the Liabilities (War-Time Adjustment) Rules, 1941, are looked at, it is found that an application for an adjustment order, namely, such as that for which the debtor was applying, has to be in the form of Form 5. Rule 12 says that application shall be filed together with an affidavit, in the case of an individual, in the form of Form 8. Form 8 is a form of affidavit in which the debtor is not required to swear whether or not a bankruptcy petition is pending against him, but he is required to swear that, owing to war circumstances, he is unable to pay his accrued debts. There is an alternative matter which is not relevant. This debtor has sworn that he was not able to pay his accrued debts. That affidavit is all that is required in the first instance. Under sect. 3 of the 1941 Act it is for the county court judge to find out whether or not there is a *prima facie* case. The real point is that it is for the county court judge to decide whether or not there is a *prima facie* case and, where the court is asked
- E to stay bankruptcy proceedings under sect. 20 of the 1941 Act, it is not the function of the registrar to do what the county court judge will have to do when the matter comes before him, that is, to make up his mind whether there is a *prima facie* case. It does not follow that, in every case, the registrar would be bound to stay the proceedings. There may well be circumstances before him sufficient to convince him that the proceedings in the county court are not *bona fide* and that the whole thing is a sham. In the present case that is not so.
- F The registrar had the fact before him that the debtor had sworn in the county court of his inability to pay his debts owing to war circumstances and he should have known that the function of deciding that is the function of the county court judge. He should then have considered whether he should exercise his discretion. The solicitor for the petitioning creditors had said that there was no evidence on oath setting out the difficulty of the debtor. That, however, is not what the registrar should call for. In my opinion, the registrar exercised his discretion on a wrong ground after misdirecting himself as to the true meaning of sect. 20 of the Act of 1941. In my opinion, the registrar ought to have granted an adjournment as the case is one which comes under the first part of that Act, and the appeal must be allowed.
- G

LUXMOORE, L.J. : I agree and have nothing to add.

DU PARCQ, L.J. : I agree and cannot usefully add anything.

- H Appeal allowed and the receiving order rescinded on the undertaking of counsel for the debtor to proceed with the application in the county court with due diligence and all further proceedings to be stayed until after the application for the adjustment order had been disposed of. Liberty to either side to apply.

Solicitors : S. Myers & Son (for the appellant); Hempsons (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

R. v. DENT.

[COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., Charles and Hallett, JJ.), **October 18, 1943.**]

Criminal Law—Appeal—Jurisdiction—Reversing verdict of jury—Unreasonable verdict—No corroboration—Criminal Appeal Act, 1907 (c. 23), s. 4 (1).

The appellant was found guilty of having carnal knowledge of a girl of 14 and of indecent assault on another girl of 13. The testimony given by those girls^a was not corroborated as required as matter of practice in such cases. The jury were given proper warning of the necessity for such corroboration. The jury decided, however, to act on the uncorroborated evidence and, after having retired for three hours, returned a verdict of guilty:—

HELD : in the circumstances the verdict of the jury was unreasonable and ought to be set aside under the powers given to the court by the Court of Criminal Appeal Act, 1907, s. 4 (1).

[**EDITORIAL NOTE.** The Court of Criminal Appeal has undoubted jurisdiction to set aside the verdict of a jury. Such a step is, however, not only a strong course to adopt but a very serious one, since the jury is essentially the tribunal of fact. Where, however, the court is convinced that a case is not a proper one for conviction, a verdict will be set aside as unreasonable.

AS TO POWER OF COURT OF CRIMINAL APPEAL TO SET ASIDE A VERDICT, see HALSBURY, Hailsham Edn., Vol. 9 pp., 273, 274, para. 400; and FOR CASES, see DIGEST, Vol. 14, pp. 536, 537, Nos. 6074-6078.]

Case referred to:

- (1) *R. v. Baskerville*, [1916] 2 K.B. 658; 14 Digest, 463, 4934; 86 L.J.K.B. 28 115 L.T. 453; 12 Cr. App. Rep. 81.

APPEAL against a conviction in accordance with the verdict of the jury, who acted upon uncorroborated evidence despite the direction of the court that it was contrary to practice.

W. G. Fordham for the appellant.

Laurence Vine for the Crown.

HALLETT, J.: The appellant in this case, James Dent, was charged at the Central Criminal Court in the month of July of the present year with four offences against two young girls. In the first count he was charged with attempted carnal knowledge of a girl called Doris, aged 13. In the second count he was charged with carnal knowledge of a girl named Minnie, aged 14. In the third count he was charged with indecent assault on the girl Doris in February of this year, and in the fourth count he was charged with carnal knowledge of the girl Minnie in May of this year.

Of the first and fourth of those charges he was acquitted, but of the second and third he was found guilty, and he was sentenced by the commissioner to 2 years' imprisonment. There is no appeal against sentence, but there is an appeal, by leave, against the conviction.

On Aug. 26 last, upon the application for leave to appeal, when the court was constituted of HUMPHREYS, ATKINSON and CASSELS, JJ. CASSELS, J. in giving leave said:

This court thinks that this is a matter which requires further consideration, and very serious consideration.

That very serious consideration the matter has now received from the present members of the court, and we desire to make it plain that in taking, as we propose to take, a very exceptional course, we do so because we regard this, upon the facts before us, as a very exceptional case, and not because we regard ourselves as initiating or applying any fresh principle.

The principle applicable to cases of this kind is, as is well known, as follows: On the one hand, it is of the utmost importance that little girls should be protected against conduct of the kind which is here alleged to have taken place; the conduct of the appellant, if the girls' story is to be believed, was indeed of the most filthy and revolting character. The story was correctly described, as we think, by the commissioner as a horrible story. That is one side of the matter. On the other hand, as the commissioner correctly pointed out, these are charges which it is easy for females to bring, and difficult for the man against whom they are brought to refute. Therefore, it has been long laid down, not as a rule of law but as a rule of practice, that it is unsafe for a jury to convict on the evidence of the girls alone.

In the present case it is agreed, and has been agreed throughout, that the evidence of the three little girls was wholly uncorroborated; I say three little girls because there was a third little girl, Doris's sister, aged 12, who also gave evidence. It is also agreed, and it is only fair to the commissioner that this should be stated, that the commissioner did give to the jury the proper warning in the proper way. He told them that it was the practice to warn juries that to convict in a case of sexual offences, and more particularly in a case where the complainants were little girls, was dangerous on the evidence of the complainants alone. He said that quite plainly, and we have no criticism to make of the way in which he stated it. None the less, having received that warning, the jury, after an absence of three hours, thought fit to convict upon the evidence of the girls alone.

The question now arises what this court should do in a case of that kind. Ordinarily speaking, there can be no doubt that where the jury have been given the proper warning, and notwithstanding that warning have convicted, this court will not interfere, but in all these matters it is sometimes advisable to go back beyond the cases to the Act of Parliament which constitutes this court, and is, after all, the final authority upon the principles which should guide this court.

By the Criminal Appeal Act, 1907, s. 4 (1), it is provided as follows:

The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence. . . .

That is the direction to this court: It shall allow the appeal if it thinks that the verdict of the jury should be set aside on either of those two grounds.

If further exposition of the principle be needed, it can be found in *R. v. Baskerville* (1). That was a judgment of a court consisting of the then Lord Chief Justice, LORD READING, SCRUTTON, AVORY, ROWLATT and ATKIN, JJ.. In that case the necessity for corroboration arose from the fact that the witnesses primarily relied upon by the Crown were accomplices, but whatever be the ground upon which corroboration is required, we think that the principle is the same. In that case, LORD READING, L.C.J., said:

If, after the proper caution by the judge, the jury nevertheless convict the prisoner, this court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated. It can but rarely happen that the jury would convict in such circumstances. In considering whether or not the conviction should stand, this court will review all the facts of the case, and will bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony. But this court, in the exercise of its powers, will quash a conviction even when the judge has given to the jury the warning or advice above mentioned if this court after considering all the circumstances of the case thinks the verdict unreasonable, or that it cannot be supported having regard to the evidence: Court of Criminal Appeal Act, 1907, s. 4 (1).

It is upon that principle that the court proposes to act in the present case. The court which heard the application for leave to appeal said that this matter required very careful consideration, and having given that consideration this court does think that, notwithstanding that proper warning or advice was given to the jury, the verdict of the jury in the exceptional circumstances of this case was unreasonable, and was a verdict that cannot be supported having regard to the evidence.

We do not think it necessary to analyse in detail the considerations with regard to the evidence which have led us to that conclusion. These little girls, unfortunately, were plainly little girls whose credibility required very great scrutiny. One of the little girls was described by the doctor as presenting the appearance of a married woman, and for the reasons I have indicated generally, though not in detail, we think that this is a conviction which cannot be safely allowed to stand, and which accordingly should be quashed.

Conviction quashed.

Solicitors: Registrar of the Court of Criminal Appeal (for the appellant).

[Reported by R. BOSWELL, ESQ., Barrister-at-Law.]

BISHOP & BAXTER, LTD. v. ANGLO EASTERN TRADING AND INDUSTRIAL CO., LTD.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.J.J.), October 13, 14, 21, 1943.]

Contract—Offer and acceptance—Acceptance subject to “war clause”—Uncertainty as to terms of clause—Consensus ad idem.

The appellants in a letter purporting to accept an order for the supply of woollen cardigans accepted the order “subject to the necessary licences, etc., being in order and subject to Government restrictions as to sales, and war clause.” It was contended that the words “war clause” were too indefinite and that for this reason there was no binding contract:—

HELD: the words “war clause” were too vague and uncertain and their meaning could not be determined until the parties had agreed upon the terms of the war clause. The parties were not *ad idem* and there was no binding contract.

[**EDITORIAL NOTE.** Some clauses, generally referred to as “usual clauses,” may be inserted in a contract by a kind of shorthand, but unless both parties are clear as to the terms of the clause intended to be inserted by reference, there is in law no completed contract, for the parties are not *ad idem*.

AS TO ESSENTIALS OF AGREEMENT see HALSBURY, Hailsham Edn., Vol. 7, pp. 65, 66, para. 83; and FOR CASES, see DIGEST, Vol. 12 pp. 51-53, Nos. 277-298.]

Cases referred to:

- * (1) *Love & Stewart, Ltd. v. Instone, Ltd.* (1917), 33 T.L.R. 475; 12 Digest 84, 493.
- * (2) *Scammell v. Ouston*, [1941] A.C. 251; [1941] 1 All E.R. 14; Digest Supp.; 110 L.J.K.B. 197; 164 L.T. 379.
- (3) *Shamrock S.S. Co. v. Storey & Co.* (1899), 81 L.T. 413; 5 Com. Cas. 31.
- (4) *Foley v. Classique Coaches, Ltd.*, [1934] 2 K.B. 1; Digest Supp.; 103 L.J.K.B. 550; 151 L.T. 242.
- (5) *Wills (George) & Sons, Ltd. v. R. S. Cunningham, Son & Co., Ltd.*, [1924] 2 K.B. 220; 39 Digest 668, 2561; 93 L.J.K.B. 1008; 131 L.T. 400.
- (6) *Zinc Corporation, Ltd. v. Hirsch and Others*, [1916] 1 K.B. 541; 12 Digest 394, 3208; 85 L.J.K.B. 565; 114 L.T. 222.
- (7) *Lebeaupin v. Richard Crispin & Co.*, [1920] 2 K.B. 714; 12 Digest 381, 3152; 89 L.J.K.B. 1024; 124 L.T. 124.

APPEAL by the plaintiffs from a judgment of ATKINSON, J., given on March 26, 1943. The facts are fully set out in the judgment of the court.

P. Quass for the appellants.

P. Devlin for the respondents.

SCOTT, L.J. [delivering the judgment of the court]: This is an appeal by Bishop and Baxter, Ltd., from a judgment of ATKINSON, J., on a counterclaim by the respondent company for damages for repudiation of a written contract to sell 20,000 woollen cardigans which the respondent company alleged that the appellant company had made with them by two letters dated May 27 and June 2, 1942. By their defence to the counterclaim the appellants denied that the two letters constituted any contract.

The primary question we have to decide is whether the respondents or the appellants are right on that issue; and primarily that is a pure question of construction depending entirely on the proper interpretation of the appellants' answer. The respondents' letter of May 27 was in these terms:

Following the visit of Mr. Lehrer [representing the respondents] to-day, we have pleasure in ordering 20,000 All Wool Men's Cardigans as per sample at 61s. 6d. per dozen, sizes 36, 38, 40, 42, 44. Assorted colours as swatch in our possession. It is understood that minimum delivery will be at the rate of 2,500 per month, but we should be grateful if you could double or even treble this quantity. These goods are destined for U.S.S.R. and the above order has been accepted by the Board of Trade. We have applied for the free quota coupons and export licence, which we hope to receive within a fortnight. The goods should be despatched to Lloyds Packing Warehouse, Ltd., 75, Whitworth Street, Manchester, 1, on our behalf, and no other name is to appear on any labels or documents.

That letter purported to be an order: it was in truth an offer. The answer of June 2 was as follows:

We thank you very much for your esteemed order dated May 27 last for 20,000

cardigans at 61s. 6d. per dozen which we are accepting subject to the necessary licences, etc., being in order and subject to Government restrictions as to sales, and war clause. We confirm also our arrangement that the sizes shall be men's sizes as previously delivered. Assuring you of our best services at all times.

That answer was obviously not an acceptance but a counter-offer. Our decision turns on the meaning to be attributed to the three words "and war clause", and nothing else in the letter matters.

- A Counsel for the appellants in a clear and concise argument submitted to us that the judge had misconstrued the counter-offer contained in the appellants' letter of June 2. The error he complained of was that the judge had misconstrued the appellants' stipulation that their acceptance of the respondents' order should be "subject" not only to "necessary licences, etc., being in order and the Government restrictions as to sales," but also to "war clause." The two first stipulations might, he conceded, be sufficiently clear to be susceptible
- B of tacit acceptance by conduct; but the added words "and war clause" he contended made the plaintiffs' counter-offer incapable of acceptance and required an express consensus on the content of some specific war clause, since that was what the plaintiffs had asked for in their counter-offer. We agree with that argument. Counsel for the respondent was alive to its force, and was driven into submitting that the word "clause" should be disregarded as mere surplusage, and that the appellants' third stipulation should be construed as if it had read "and war conditions" or "war contingencies." We can see no
- C justification for disregarding so plain and definite a word whatever the surrounding circumstances at the time of negotiation might be: but in June, 1942, the internal disorganisation of normal manufacturing and mercantile conditions in England, as a result of the country's concentration on the war effort, made it most natural for a seller of woollen goods to seek the protection of a war clause
- D in his contract. It may be that the manager of the appellant company had a mistaken notion that the two words he inserted were sufficient of themselves to give his company the protection against the interference of all war contingencies, direct or indirect, not covered by his first two stipulations; but what he thought is as irrelevant as what the would-be buyers might think. He asked for a war clause; and we have only to construe his letter. War
- E clauses take many forms, and the protection afforded to a seller by one may differ from that given by another. Until the parties had met and agreed on a particular form and content of a war clause, there was and could be no *consensus ad idem*.

- It was urged by counsel for the respondents that both parties after June 2 thought a contract existed, and that that fact entitled the judge to hold that a contract did exist. The answer is obvious. The erroneous legal views of the parties did not alter the legal interpretation of the written words "and war
- F clause" in the counter-offer; and, until the parties had agreed on the particular clause to be incorporated in their agreement, there could be no contract binding the parties to all the other terms of the two letters. After June 2, some other contract might, of course, come into existence, as a result either of express oral agreement, or to be inferred from the conduct of the parties; but that is not the contract sued on by counterclaim. The respondents were there relying
- G expressly and solely on a written contract alleged to be contained in the two letters which I have read out. If those letters, properly construed, constituted no completed contract, the misapprehension of the respondents could not turn them into one.

- That there were in June, 1942, many forms of war clauses is notorious; and that fact was also admitted and, indeed, proved in evidence; and the joint selection of one form was therefore a necessary preliminary to the contract
- H proposed in the counter-offer coming into existence. Since no such clause was agreed on, the contract upon which the counterclaim rested and judgment was given never came into existence. The subsequent acceptance by the respondents of the appellants' deliveries of 3,000 cardigans necessarily imported sales, and every sale imports an agreement of sale, either express or to be implied from conduct; but no agreement could be inferred in the terms of the respondents' counter-offer to sell "subject to war clause," since *ex hypothesi* the very words precluded the possibility of *consensus ad idem* until the parties had discussed and agreed on some particular clause. The parties may, both of them, after

June 2, have erroneously supposed that a contract in writing was already in existence; but, if they did, it was because they did not realise that the appellants' counter-offer required a further consensual step, before the law could recognise the formation of a completed contract; and their bad law could not make a contract. Counsel for the respondents was fully alive to this difficulty, and saw that there was no way out of it, but to contend, first, that the words "and war clause" in the plaintiffs' letter of June 2 only had the effect of introducing an exception of war, and, secondly, that such a vague exception would not give the appellants any exemption from liability on the facts of the case. This was, we think, the view taken by the judge; and it may well be that that conclusion would, if the word "clause" had been omitted from the letter, have been unassailable. But the word was there; it was quite unambiguous, and it introduced as unambiguous a condition as would have been introduced by the phrase "strike clause"; but the condition was equally undefined, and equally demanded consensual definition in order to make it an effective term of the agreement between the parties.

Viewed in this last aspect, the question of interpretation, upon which the appeal turns, is, in our opinion, covered by the decision in the House of Lords in *Love & Stewart, Ltd. v. Instone, Ltd.* (1), where letters, otherwise constituting a complete and enforceable contract of sale of coal, bore a printed endorsement "subject to strike and lock-out clauses." The House of Lords there held that, as such clauses differed in their content, there could be no *consensus ad idem* and, therefore, no completed contract resulting until the parties had come to some further agreement upon the content of some particular clause. It is not necessary to cite that case at length, but the reasoning of their Lordships is, in our opinion, directly apposite to the present case. The only other case to which it is necessary to refer is that of *Scammell v. Ouston* (2), where the House of Lords held that the additions to a written contract, which without the addition by means of a hire-purchase arrangement, was fatal to the existence of any enforceable contract at all. Their grounds were both that the condition was too vague to carry contractual force and that "the parties had never in intention or even in appearance, reached agreement" upon it (*per* LORD WRIGHT, at pp. 267-272 ([1941] 1 All E.R., at pp. 21-29)). Both decisions are relevant and both are binding on this court.

In deference to the argument of counsel for the respondent, we would add one further observation. Abbreviated references in a commercial instrument are, in spite of brevity, often self-explanatory or susceptible of definite application in the light of surrounding circumstances; as, for instance, where the reference is to a term, clause, or document, of a well-known import like "c.i.f." or which prevails in common use in a particular place of performance; as may be indicated by the addition of the epithet "usual": see *Shamrock S.S. Co. v. Story* (3), where "the usual colliery guarantee" was referred to in a charter-party in order to define loading obligations. But in the case before us the phrase in controversy gave no clue of any sort to indicate what particular war contingencies affecting performance were intended to apply. The stipulation necessarily remained wholly vague till the parties could agree on some particular war clause; and no implication from the appellants' deliveries or the respondents' payment can take the place of such a further agreement in fact.

Appeal allowed with costs.

Solicitors: *Abbott Anderson, Braithwaite & Whittaker* (for the appellants); *Dehn & Lauderdale* (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

FRANCIS JACKSON DEVELOPMENTS, LTD., v. STEMPE.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.),

October 22, 1943.]

Landlord and Tenant—Rent restriction—Tenancies within the Acts—Agreement to purchase house—Possession as tenant at will pending completion—Payment of sum representing interest on unpaid purchase money—Failure to complete—Statutory tenancy.

A

On Sept. 9, 1939, the appellant entered into a contract in writing with the respondents to purchase a house for £510. The date fixed for completion was Sept. 23, 1939, and in default of completion on that date the appellant agreed to pay interest on the unpaid balance of the purchase money at the rate of one per cent. over bank rate with a minimum payment at the rate of 5½ per cent. per annum until completion. On Sept. 23, 1939, the appellant was allowed to enter into possession and on that date he signed a letter acknowledging that he was a tenant at will of the respondents. It was common ground that it was contemplated that a mortgage would be obtained from a building society on terms specified in advertising matter issued by the respondents. The building society put up their terms and required a larger initial payment. This larger initial payment the appellant was not able to provide. On Nov. 3, 1939, the respondents offered the appellant the option of either paying the increased deposit demanded or of rescinding the contract and vacating the property, receiving back the deposit he had paid, or of remaining as a tenant at a rent of 17s. 6d. a week. The appellant did not accept this offer and the respondents issued a writ claiming possession of the property :—

B

C

D

HELD : there was a tenancy to which the Rent Restrictions Act applied and the respondents were not entitled to an order for possession.

E

F

[EDITORIAL NOTE. This case, like the similar decision in *Dunthorne and Shore v. Wiggins*, [1943] 1 All E.R. 577, may be said to be a decision on its own facts. It would appear, however, to be a general proposition that, where a purchaser is let into occupation as a tenant at will in consideration of the payment of sums for use and occupation, he becomes a tenant who will be entitled to the protection of the Rent Restriction Acts. The judgment of LORD GREENE, M.R., herein does, however, suggest a loophole. If the sums are payable under a separate agreement having no reference to occupation, it may be that there is no tenancy within the Acts. There may, however, still be the difficulty of getting the documents stamped and the stamping authorities may require them to be presented together for stamping and stamped as a lease. The position is thus for the moment a little uncertain. This decision, subject to the facts being a little different, confirms the decision in *Dunthorne and Shore v. Wiggins* (*supra*), but the effect of both decisions is narrow because the normal practice is to arrange such a purchase by means of a mortgage.

AS TO TENANCIES WITHIN THE RENT ACTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-316, paras. 368-373; and **FOR CASES**, see DIGEST, Vol. 31, pp. 556-562, Nos. 7029-7096.]

APPEAL by the defendant from a judgment of ATKINSON, J., dated Apr. 5, 1943. Cross-appeal of the plaintiffs on the question of damages. The facts are fully set out in the judgment of LORD GREENE, M.R.

G

The appellant in person.

C. E. Rochford for the respondents.

H

LORD GREENE, M.R. : In this case the defendant, on Sept. 9, 1939, entered into a contract in writing with the plaintiffs to purchase for the sum of £510 a house at Ickenham. Completion was to be on Sept. 23 following, and in default of completion on that day he was to pay interest at the rate of 1 per cent. above current bank rate, with a minimum rate of £5 10s. 0d., until completion. He went into possession on Sept. 23 on the terms of a letter to the plaintiffs bearing that date, which he signed. It is in the following terms :

In consideration of your having this day, at my request, given me possession of the above-mentioned property, pending the completion of my purchase thereof from you, I hereby acknowledge that I am your tenant at will thereof, and I undertake to vacate the premises at any time forthwith on demand. For the same consideration, I further undertake to pay you for occupation and use, a sum equivalent to interest at the rate of 5½ per cent. per annum on the balance of my purchase money, calculated *de die in diem* from to-day's date until the actual completion by me of the purchase.

It is common ground that at the time of the contract it was contemplated—and I purposely use a neutral expression—that a mortgage would be obtained from a building society on repayment terms specified in the advertising matter put out by the plaintiffs. It so happened that just at that time the building society with whom the plaintiffs were in the habit of conducting this class of business decided, apparently in common with other building societies, to put up their terms and to require a larger initial payment. That increased initial payment was one which the defendant found himself unable to provide. A good deal of delay took place. He remained in occupation, but in October, I think it was, after having been informed (and, indeed, he knew already from the other earlier developments in the case) that the building society was not prepared to give the lower terms which had originally been in contemplation, he was offered by the plaintiffs the alternative either of paying an increased deposit in accordance with the revised terms of the building society, or of rescinding the contract, vacating the property and receiving back the deposit he had paid, or of remaining in possession as a tenant on certain terms, viz., payment of 17s. 6d. a week. That offer was contained in a letter of Nov. 3, 1939. He did not accept it, and matters dragged on until on Dec. 8, 1939, the writ in this action was issued claiming possession.

In the meanwhile a notice had been served determining the tenancy at will created under the letter of Sept. 23, 1939, and determining the purchase agreement, or rather fixing a time for completion of the purchase agreement and stating that, if it was not completed within that time, the matter was rescinded.

By their writ the plaintiffs claimed possession of the premises, which in the statement of claim it is alleged were held by the defendant as tenant at will under the letter of Sept. 23, 1939, and they claimed use and occupation for the period mentioned. The defendant counterclaimed, and he set up this case. He first of all denied the agreement—the letter of Sept. 23. I need not go into that plea, because it was held by the judge that he did sign it and must be taken at any rate to have known what he was signing. But his substantial case was a claim for specific performance of the purchase agreement, based on the allegation that the plaintiffs contracted to provide a mortgage, on the terms stated in the advertising matter, from a building society, or, alternatively, if they did not do that, to grant him a similar mortgage themselves.

The only part of the case made in his pleading which I need mention was that part which based that allegation on an alleged verbal agreement. That agreement was denied. The judge found in favour of the defendant on one branch of that allegation and against him on the other. Having seen and heard him in the witness box, he believed the defendant when he said that the plaintiffs through their representatives had guaranteed to find him a building society mortgage on the terms advertised. The judge did not accept the further statement by the defendant that they also agreed to grant him such a mortgage themselves in default of their being able to obtain one from a building society. The judge, however, apparently was satisfied that it was not possible to obtain a mortgage from a building society on the terms advertised, and, although he had found that that was the obligation which the plaintiffs had undertaken, he refused to grant specific performance, saying that he could not grant specific performance in the circumstances because an order for specific performance must necessarily contain an order that the plaintiffs should procure such a mortgage, and quite obviously (at any rate on the basis on which the decision rested) they were unable to do so, and therefore no such order could be made.

It was not suggested by the defendant before us that anything was wrong in that part of the learned judge's conclusion, namely his refusal to grant specific performance, but the result of his refusing to grant specific performance was that the notice to quit under the tenancy at will must, in his view, be regarded as operative, and accordingly he made an order for possession against the defendant. He also, on the defendant's counterclaim, awarded damages for the breach of the plaintiffs' undertaking, as he found it had been given, to procure a mortgage from a building society.

Now the defendant appeals to this court on a ground that was not taken below. He does not attack the judge's decision on any of the grounds on which he decided, but he says that in the circumstances he was a tenant entitled to the protection of the Rent Restriction Acts, and that, therefore, no order

for possession ought to have been made against him. That point was one which, as I say, was not taken below, but it is one which, if brought to the notice of the court, the court is bound to take cognisance of, because the court has no jurisdiction to make an order for possession in a case to which the relevant provisions of the Act apply. Accordingly, there can be no objection to the matter being taken before this court, it being a matter which goes to the jurisdiction of the court.

- A The defendant's argument can be put quite shortly. He says that under the agreement (the letter) which has been found to be binding on him, he is constituted a tenant at will at a rent. It is true it says it is for occupation and use, but that means nothing more nor less than rent. True it is that under the letter the amount of rent which has to be paid is measured by $5\frac{1}{2}$ per cent. interest on my purchase money, but that does not mean that it is $5\frac{1}{2}$ per cent. interest, because the plaintiffs were already entitled, or at any rate expecting to get their $5\frac{1}{2}$ per cent. under the purchase contract. The fact that it happens to be the same amount as $5\frac{1}{2}$ per cent. interest, and is measured by that, does not make it any the less rent. It is settled that a tenant at will is entitled to the protection of the Acts, and, therefore, the court had no jurisdiction to make an order for possession against him.

- C Against that it was said, first of all—but the argument was, quite properly withdrawn because obviously there could be no substance in it—that there was no evidence as to the rateable value of this property. When it appears that the relevant rateable value under the Acts for this house is £100 a year, and the purchase price was only £510, it is manifest that this house must come within the limits of the statute, and quite properly that purely technical point was abandoned. The substantial point that was taken was, not that the Acts do not apply to a tenant at will, because that was conceded, but that according to the letter no rent was payable at all, but that all the letter provided was, in effect, that the defendant should pay interest on the purchase money at the contractual rate. In my opinion that is a misconstruction of the letter. True it is that under the purchase contract he had to pay $5\frac{1}{2}$ per cent. interest, or possibly a higher rate, but under this he contracts to pay rent, and the difference between the obligation of a tenant to pay rent and the position of a tenant who, not being bound to pay any rent at all, is bound to pay interest under a different agreement, is obviously quite different in law. In my opinion this tenancy was a tenancy at a rent, and the result is that the Acts apply. I do not take up time by referring to the authorities which were cited to us, which at any rate settle, so far as this court is concerned, that the Acts do apply to a tenant at will. That being so, the appeal must succeed, and the order for possession cannot stand.

- F There is a cross-appeal on the damages which the judge awarded for breach of that agreement. The judge awarded a total sum of £95, which included the £25 deposit the defendant had paid, £20 for the expense of getting into a new house and £50 for the loss of the benefit of the contract which would have enabled him to obtain from the building society a favourable mortgage, and, of course, as a result of the failure to obtain that mortgage, the whole purchase transaction fell through. It was said that, in view of the fact that, if he is entitled to remain in under the Rent Restriction Act, he will not be put to the expense of going into a new house, that £20 cannot stand. In my opinion there is substance in that argument. But the Rent Restriction Act may not go on for ever. There may be reasons which will cause him to move—a thing which he would not have had to do if he had been able to buy the house. But at any rate the £20, based as it is on the idea that he would have had to move at once, is too high, and we think it should be reduced to the sum of £5.

- H The other head of damage, that is to say the £50, was assailed on the ground that there should have been taken into account against it the fact that the defendant will now have the benefit of the Rent Restriction Act, and will, therefore, be able to remain in the house at what would be less than the economic rent, and will have a "statutory tenancy" as it is called. In my opinion, that circumstance is one which ought not to be taken into account in fixing the damages for the breach of this contract, because the fact that he has that security of tenure does not flow in any way from the breach of contract at all: it merely derives from the fact that they chose to put him in there under a

separate agreement as tenant at will at a rent, and the statute beneficently allows him to remain in. He may want to go; he may find it necessary to go at any time. Moreover, he is in a position where, instead of buying a house under a favourable building society contract, if he wants to buy a similar house at a similar price he can only get very much worse terms from a building society than those which were guaranteed to him. In those circumstances I cannot see that the damages awarded were excessive, or that the fact that he is now being held to have the benefit of the Rent Restriction Act ought in any way to lead to cutting them down.

The result, therefore, is that the defendant succeeds on the appeal, and the plaintiffs succeed on their cross-appeal by reducing the damages by the sum of £15.

MACKINNON, L.J.: I agree.

DU PARCQ, L.J.: I agree.

Appeal and cross-appeal allowed.

Solicitor: *Champion & Co.*, agents for *Turberville, Smith & Co.*, Uxbridge (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

Re MAY'S WILL TRUSTS, COCKERTON v. JONES.

[CHANCERY DIVISION (Uthwatt, J.), October 6, 1943.]

Wills—Construction—Gift over on particular event—Attainment of 21 years—Confirmation by two codicils—Testator predeceased by sole member of class dying over 21 and after the will but before the two codicils.

By his will, dated Aug. 17, 1913, the testator gave his estate to his trustees upon certain trusts and then directed that the residuary trust estate should be held upon trust for his nieces. He further provided that the income of the shares in a certain company, which might form part of the share of any of the nieces in the residuary estate, should be paid to such niece during her life and after her death to her surviving husband, if any, and, subject as aforesaid, in trust for any of the issue of such niece as she should appoint, and, in default of appointment and subject to any partial appointment, in trust for the children of such niece who either before or after her death should, being sons, attain 21 or, being daughters, attain that age or marry under that age, if more than one in equal shares; and, if there should not be any child of such niece who should fulfil the condition, then in trust for her next of kin. The testator died in 1920 leaving a niece, L., who had one son, G., who attained 21 in 1915 and died in 1916. The testator confirmed his will by two codicils made in 1920. L. died in 1943. The executors of the testator took out a summons to determine whether L.'s share in the shares of the company formed part of her estate or were to be held in trust for her next of kin:—

HELD: giving due consideration to the fact that at the dates of the two codicils G. had attained 21 and was already dead, the intention and the expression of intention in the will was clear and the ultimate trust for the next of kin took effect.

[EDITORIAL NOTE. It was argued here that, where there is a limitation conditional of the death of all the children of a named person under 21, the gift fails if one of the children attains that age. This was a view very strongly taken by the Exchequer Chamber in *Brookman v. Smith* (2) and the court was asked to follow that case. UTHWATT, J., has, however, distinguished that case, partly by reason of the fact that the will was confirmed by codicil after the death of the only child over 21 and partly on the ground that the testator has provided for all possible contingencies.

AS TO GIFTS OVER ON A PARTICULAR EVENT, see HALSBURY, Halsham Edn., Vol. 34, p. 376, para. 421; and FOR CASES, see DIGEST, Vol. 44, pp. 1175-1177, Nos. 10164-10181.]

Cases referred to:

(1) *Lassence v. Tierney* (1849), 1 Mac. & G. 551; 44 Digest 554, 3715; 2 H. & Tw. 115; 15 L.T.O.S. 557.

* (2) *Brookman v. Smith* (1872), L.R. 7 Exch. 271; 44 Digest 1176, 10177; 41 L.J.Ex. 114; 26 L.T. 974.

SUMMONS by the executors of the testator to determine a question of construction arising under the testator's will. The facts are set out in the judgment.

Wilfrid M. Hunt for the applicants.

E. M. Winterbotham for the personal representatives of the niece.

A. H. Droop for the next of kin.

UTHWATT, J. : The testator in this case, who died on Mar. 17, 1920, made testamentary dispositions which are contained in the will dated Aug. 17, 1913, and two codicils dated respectively Nov. 28 and Mar. 30, 1920. By each of these two codicils he confirmed his will, so for the purpose of determining the effect of the testamentary dispositions one must bear that fact in mind.

The testator had several nieces and I need only refer particularly to one of them, the niece Leila, who survived the testator and died on Jan. 31, 1943. Leila had one son, named Geoffrey, who died on Sept. 2, 1916, having attained the age of 21 in April, 1915. It will be observed that Geoffrey died after the date of the will but before the date of confirmation of that will by the two codicils.

The question which I have to consider is a short question of construction arising upon the gift in the will and it arises in this way. After making certain bequests, to which it is not necessary to refer in detail, the testator gave his real and personal estate to his trustees upon trust for sale. Then, after giving directions as to the disposition of his income during the period of 21 years from his death, he provided that at the end of the said period his trustees should stand possessed :

... of my residuary trust estate and the income thereof in trust for my said five nieces [of whom Leila was one] or such of them as shall survive me in equal shares . . . except that the share of certain of the nieces should exceed the share of others. Then comes the proviso :

Provided always and I direct that any shares in John May & Co., Ltd., which in the division of my residuary estate may either under the provision of my will or under any arrangement made by my said nieces between themselves form part of the share therein of any of my said nieces shall not be made over to her but shall be held and retained by my trustees upon trust to pay the dividends thereof as and when the same shall from time to time become actually receivable and not by way of anticipation into the hands of such niece during her life for her separate use and after her death to the surviving husband if any of such niece during her life and subject as aforesaid in trust for all or any of the issue of such niece in such proportions for such interests and generally in such manner as whether covert or sole shall from time to time by deed with or without power of revocation and new appointment or by will appoint.

Then there is a hotchpot clause which I need not read. He then provided :

In default of appointment and subject to any partial appointment in trust for the child if only one or all the children if more than one of such nieces who either before or after her death shall being a son or sons attain the age of 21 years or being a daughter or daughters attain that age or marry under that age such children if more than one to take in equal shares and if there shall not be any child of such niece who being a son shall attain the age of 21 years or being a daughter shall attain that age or marry under that age . . .

then in trust for her next of kin to be ascertained in a particular way.

By reason of the death of Leila, without I understand any issue who survived the testatrix, and by reason of the fact that her son Geoffrey had attained 21, the following question arises : does the gift, "if there shall not be any child of such niece who being a son shall attain the age of 21 years or being a daughter shall attain that age or marry under that age," take effect, or does it not ?—in other words, has the condition arisen under which it takes effect. If it takes effect the class mentioned are entitled to Leila's share ; if it does not take effect it is quite clear that the rule in *Lassence v. Tierney* (1) applies and Leila and her legal personal representatives become absolutely entitled to it.

The question is a short one of construction upon a form of will which is in common use. To my mind *Brookman v. Smith* (2) however interesting it may be as an application of well-known rules of construction, lays down no general rule of construction and lays down no principle which I have to follow in this case. One has to bear in mind throughout the confirmation of the will by the two codicils. At the dates of the 2 codicils Geoffrey had attained 21 and was already dead. In these circumstances, looking at this general formula

which has to be applied in the case of the five nieces, what is the right view to take of it? Leaving aside the power to appoint to issue, what you get in substance are alternative gifts. If there are children who being sons attain 21 or being daughters attain that age or marry, then such children are to take. If there are no children who being sons attain 21 or being daughters attain that age or marry, then it goes to a different class. What the testator obviously intended to do and what he in fact has done is to provide completely for the disposition of his property in two alternative events which completely exhaust the possible events; in other words, it is a proper and complete dichotomy. The only children who could possibly take under the gift to children of Leila in default of appointment could not include the son Geoffrey; he was dead and a dead man cannot take under a will. What reason is there for including him among the class to be considered in determining whether or not the second gift is to take effect? In my opinion, none. It is a matter of the English language. Treating the will as speaking as at the date of the last codicil the intention is perfectly clear. To my mind the expression of the intention is no less clear. A

I, therefore, propose to declare that upon the true construction of the will and in the events which have happened the ultimate trust in favour of the next of kin is effective. B

Declaration accordingly. Costs to be paid out of the share in question.

Solicitors: *Withers & Co.* (for the applicants); *Maude & Tunncliffe*, agents for *Louch, Belcher & Co.*, Newbury (for the defendants). C

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

DAVID KENNEDY v. DANDRICK. D

[CHANCERY DIVISION (Morton, J.), June 30, 1943.]

Practice—Setting aside judgment on ground of fraud—Application to impose terms on plaintiff as a condition of proceeding—R.S.C., Ord. 27, r. 15—R.S.C., Ord. 36, r. 33.

The respondent brought an action to set aside a judgment given against him and in favour of the applicant on the ground that it was obtained by the applicant's fraud. The applicant, relying on R.S.C., Ord. 27, r. 15, and R.S.C., Ord. 36, r. 33, took out a summons asking that terms should be imposed upon the respondent as a condition of the respondent's proceeding with the action:— E

HELD: (i) the judgment which it was alleged was induced by the applicant's fraud was not a judgment delivered by default within the meaning of R.S.C., Ord. 27, r. 15. F

(ii) to proceed by writ is a proper method of impeaching a completed judgment on the ground that it was obtained by fraud, and the court has no jurisdiction to put the plaintiff upon terms as a condition of proceeding with the action.

[**EDITORIAL NOTE.** Normally a litigant is entitled to proceed with his action without paying any sum into court. It was here suggested that, where it is sought to set aside a previous judgment on the ground that it was obtained by fraud, the party setting up such a case should be put upon terms. It is held, however, that there is no such rule. G

AS TO SETTING ASIDE A JUDGMENT OBTAINED BY FRAUD, see HALSBURY, Halsham Edn., Vol. 19, pp. 266, 267, paras. 564, 565; and FOR CASES, see DIGEST, Practice, pp. 626, 627, Nos. 2606-2624. See also YEARLY PRACTICE OF THE SUPREME COURT, p. 433.]

Cases referred to:

* (1) *Wyatt v. Palmer*, [1899] 2 Q.B. 106; Digest, Practice, 626, 2613; 68 L.J.Q.B. 709; 80 L.T. 639. H

* (2) *Cole v. Langford*, [1898] 2 Q.B. 36; Digest Practice, 626, 2608; 67 L.J.Q.B. 698.

(3) *Jonesco v. Beard*, [1930] A.C. 298; Digest, Practice, 626, 2612; 99 L.J.Ch. 228; 142 L.T. 616.

APPLICATION by the defendant in the action to have terms imposed upon the plaintiff as a condition of proceeding with the action. The facts are fully set out in the judgment.

I. J. Lindner for the applicant.

P. B. Morle for the respondent.

MORTON, J. : This summons raises the interesting question of law whether I have jurisdiction in the circumstances of the present case to put David Kennedy, the plaintiff in an action, upon terms as a condition of proceeding with that action. The terms suggested are that Kennedy should pay certain costs and should bring into court a substantial sum of money.

A The history of the matter is as follows. On June 26, 1940, Dandrick, who is one of the defendants in the action of Kennedy v. Dandrick, commenced proceedings claiming amongst other things damages for conversion of certain machinery and other chattels. That action came on for trial before me in May, 1942, and I ordered an inquiry as to the damages suffered by Dandrick. Subsequently, it was ordered that the inquiry should be referred to an official referee. The official referee conducted the inquiry and he reported that the value of the machinery and chattels, the subject of the inquiry, was £14,100. B A further consideration of the action was duly set down for hearing and due notice was given to Kennedy. On Dec. 4, 1942, an order was made by UTHWATT, J., adopting the report of the official referee and giving judgment in favour of Dandrick against Kennedy and the other defendant in Dandrick's action for the sum of £14,100 and costs. In the present action Kennedy alleges that he C was induced to absent himself from the proceedings before the official referee and to absent himself from the further consideration before UTHWATT, J., by the fraud of Dandrick. That is a matter as to which there is, I understand, a strong conflict of evidence and one which, of course, I cannot determine to-day. But it is said by counsel for Dandrick that Kennedy ought to be put on the terms which I have indicated as a condition of proceeding with this action.

D The claim in the action is, first, a declaration that the judgment, dated Dec. 4, 1942, was obtained by the fraud of Dandrick; and, secondly, a declaration that the report of the official referee was obtained by the fraud of Dandrick, and an order setting aside as against Kennedy the judgment and the report and all subsequent proceedings thereon.

E Counsel for the applicant frankly admits that this is an unusual application, but he relies, in support of it, in particular upon an observation of LINDLEY, M.R., in *Wyatt v. Palmer* (1), and upon a statement in the ANNUAL PRACTICE, 1943, at p. 470, in a note to R.S.C., Ord. 27, r. 15. He has sought to convince me that the court has jurisdiction in the present case to put the plaintiff, Kennedy, upon terms. *Prima facie*, in the absence of any statement or rule containing some special provision to the contrary, any man is entitled to issue a writ and to proceed with his action without being put on terms to pay money into court or to pay the costs of any previous proceedings. It is only in special F cases that the court has power to impose such terms upon any man. He is entitled to have recourse to the courts to have his case tried.

Turning to the arguments relied upon by counsel for the applicant, R.S.C., Ord. 27, r. 15, is in the following terms :

G Any judgment by default, whether under this order or under any other of these rules, may be set aside by the court or a judge, upon such terms as to costs or otherwise as such court or judge may think fit, and where an action has been set down on motion for judgment under r. 11 of this order, such setting down may be dealt with by the court or a judge in the same way as if a judgment by default had been signed when the case was set down.

H It is to be observed that the rule says that a judgment may be set aside by the court or a judge upon such terms as to costs or otherwise as such court or judge may think fit, and, *prima facie*, and as a matter of first impression, I should have thought that the rule had nothing to do with the imposing of terms as a condition of proceeding with the action. But there is a note in the ANNUAL PRACTICE, at p. 470, in the following terms :

The procedure under this rule does not interfere with the right to bring an action to set aside a judgment on the ground of fraud but, if that course is adopted, it would seem that the court could exercise the same power to impose terms as that provided by this rule.

In support of that observation reference is made to *Wyatt v. Palmer* (1), and to *Cole v. Langford* (2).

Dealing first with *Cole v. Langford* (2), that being the earlier of the two cases, I can find nothing in that case to support the observation contained in the ANNUAL PRACTICE. That case decided that, where the judgment has been obtained by fraud, the court has jurisdiction in a subsequent action brought for that purpose to set the judgment aside, and it has been said by LORD BUCKMASTER in the House of Lords in *Jonesco v. Beard* (3), at p. 300 :

It has long been the settled practice of the court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires.

Turning now to the other case referred to in the ANNUAL PRACTICE, *Wyatt v. Palmer* (1), the facts, so far as they are material, are as follows. It was an action to set aside a judgment on the ground that that judgment had been obtained by fraud. The defendant in that action applied in chambers, amongst other things, that a portion of the statement of claim should be struck out unless certain money was paid into court, or secured. After a refusal by KENNEDY, J., to make such an order, the matter came before the Court of Appeal, and LINDLEY, M.R., after saying that an action could be brought to impeach the judgment on the ground of fraud, continued as follows, at p. 110 :

. . . I am not prepared to say that because there is a summary method of impeaching that judgment provided by the rules recourse cannot be had to the old method of impeaching the judgment by action. The old jurisdiction of the court is not touched or taken away by the rule in question. But then there is a subsidiary question. The rules having provided a short method of getting a judgment set aside upon such terms as may be just—namely, by an application in chambers—it is worthy of consideration whether, if the plaintiff chooses not to avail himself of that method but to have recourse to the more dilatory method of bringing an action, he should not be put upon terms. There is much to be said for that. But it would not be right in this case to order the money to be paid into court as a condition of allowing the action to proceed . . . Then LINDLEY, M.R., gives his reasons for not ordering payment into court in that particular case.

It is to be observed that the judgment which I have just quoted does not contain any expression of opinion by LINDLEY, M.R. He merely says that a certain operation is worthy of consideration. I have very grave doubt as to whether, even if the case does come within the provisions of R.S.C., Ord. 27, r. 15, the court has any power to impose the term of payment into court as a condition of allowing a man to proceed with an action to impeach the judgment on the ground that it was obtained by fraud. All that LINDLEY, M.R., says is that such a matter is worthy of consideration. However, it is not necessary for me to say more than that I have grave doubts as to whether the court has any such jurisdiction, especially having regard to what was said by the House of Lords in *Jonesco v. Beard* (3) to which I have already referred.

So far as R.S.C., Ord. 27, r. 15, is concerned, however, the matter is simple in the present case, because the present case does not come within that rule at all. The judgment which was delivered in the action of Dandrick against Kennedy was not a judgment by default within the meaning of that rule. The defendant had entered an appearance in the action and had delivered a defence.

Counsel for the applicant has also referred me to R.S.C., Ord. 36, r. 33, which is in the following terms :

Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the court or a judge upon such terms as may seem fit, upon an application made within 10 days after the trial : such application may be made either at the assizes or in Middlesex.

It is argued that in the present case Kennedy did not appear at the trial upon the action of Dandrick *v.* Kennedy, within the meaning of that rule. It is said that the judgment which is sought to be set aside is the judgment of UTHWATT, J., and that Kennedy was absent when that judgment was pronounced, and was also absent when the official referee was considering the matter and hearing the evidence upon which his report was subsequently founded.

I am prepared to assume in favour of the applicant in the present case, Dandrick, that Kennedy might have made an application under that rule within 10 days after the trial, but, even so, I do not think that I have any jurisdiction to impose upon Kennedy the terms suggested. He did not in fact make any application within 10 days after the trial, and according to the

allegations in his statement of claim he did not discover the fraud until after that date. But I regard that matter as being immaterial. Not having made that application, assuming it was open to him, he has proceeded by writ to attempt to set aside the judgment on the ground that it was obtained by fraud. That proceeding is one which is described in *Jonesco v. Beard* (3) as being the proper method of impeaching a completed judgment on the ground of fraud. I am not aware of any statement, or rule, or any general jurisdiction in the court which enables me in the present case to say to Kennedy: You shall not proceed with your action unless you pay the costs already awarded against you in the action *Dandrick v. Kennedy*, or unless you bring into court a sum of money.

In these circumstances, taking the view that I do of my jurisdiction, the only possible result of this application is that it must be dismissed, and the costs of the application will be the plaintiff's in any event.

B *Application dismissed with costs.*

Solicitors: *Ashurst, Morris, Crisp & Co.* (for the applicant); *Woodham, Smith & Borradaile* (for the respondent).

[Reported by HUBERT B. FIGG, ESQ., Barrister-at-Law.]

No longer of authority. Re WINGHAM (decd.). [1948] 2 All E.R. 908.

C *In the Estate of ANDERSON (deceased), ANDERSON v. ANDERSON AND ANOTHER.*

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.),
October 22, 1943.]

Wills—Soldier's will—Actual military service—Home Guard—Instructions to solicitor as civilian—Killed on home guard duties—Wills Act, 1837 (c. 26), s. 11—Army Act, s. 189 (1)—Defence (Home Guard) Regulations, 1940, regs. 2 (1), (2), (3).

The deceased made a valid will dated May 29, 1940, and on or about July 25, 1941, he instructed his solicitor to prepare another will in accordance with certain directions which he gave at the time. On Aug. 1, 1941, the deceased, who was in the Home Guard, was accidentally killed whilst acting as a musketry instructor to recruits for the Home Guard. The dispositions which the deceased instructed his solicitor on July 25, 1941, to embody in a formal document could be admitted to probate provided that the instructions were made in such circumstances that they amounted to a "soldier's will":—

HELD: (i) whether an individual in any given circumstances is "in actual military service" is to be determined by the courts and not by a declaration of any military or civil authority.

(ii) the deceased must be "in actual military service" at the moment of the making of the will, and this must be decided on the circumstances applying to the particular individual at the time and not by general conditions. On the facts the deceased was not "in actual military service" when he instructed his solicitor on July 25, 1941.

[EDITORIAL NOTE.] The changed conditions of warfare have already given rise to decisions relating to "soldiers' wills" or, more strictly, when a member of the forces can be said to be "in actual military service." No doubt, a more difficult problem arises in the case of branches of these forces who spend part of their time in civilian life and part as members of the forces. The position of the Home Guard is here fully discussed, and it is held that in each particular case it must be decided whether the deceased was in actual military service at the time of the making of the will.

H AS TO ACTUAL MILITARY SERVICE, see HALSBURY, Halsbury Edn., Vol. 14, p. 198, para. 325; and FOR CASES, see DIGEST, Vol. 39, pp. 333-335, Nos. 193-219.]

Cases referred to:

(1) *In the Estate of Grey*, [1922] P. 140; 39 Digest 334, 196; 91 L.J.P. 111; 126 L.T. 799.

* (2) *In the Estate of Rippon*, [1943] P. 61; [1943] 1 All E.R. 676.

* (3) *Drummond v. Parish* (1843), 3 Curt. 522; 39 Digest 333, 195; 1 L.T.O.S. 207.

* (4) *In the Estate of Spark*, [1941] P. 115; [1941] 2 All E.R. 782; 110 L.J.P. 71; 165 L.T. 234.

(5) *In the Goods of Gibson*, [1941] P. 118 n.; [1941] 2 All E.R. 91; 110 L.J.P. 73 n.

PROBATE ACTION in which the plaintiff set up the testator's will dated May 29, 1940, and in which the defendants set up a "soldier's will" made by the deceased on July 25, 1941. The facts are fully set out in the judgment.

Gilbert H. Beyfus, K.C., and *R. T. Barnard* for the plaintiff.

Felix C. Denny for the first defendant.

Geoffrey C. Tyndale, K.C., and *T. J. L. Stirling Boyd* for the second defendant.

LORD MERRIMAN, P.: In this case the plaintiff sets up a will, of which he is the sole executor, dated May 29, 1940. There is no contest about the due execution of that will, but the defendants are seeking to set up a "soldier's will" made on or about July 25, 1941. On that date the deceased testator went to his solicitor's office in Worthing and gave him certain instructions for the preparation of a will, to which I will refer more particularly in a moment. On Aug. 1, 1941, the testator, who was a member of a platoon of the Home Guard at Angmering in Sussex, and while acting as musketry instructor of that platoon in the training of recruits, was accidentally shot; and the defendants seek to prove that, at the time when the testator gave the instructions to his solicitor in Worthing, he was, within the meaning of the Wills Act, 1837, s. 11, "a soldier being in actual military service."

The Angmering platoon, of which the deceased was a member, was recruited under the regulations relating to the Home Guard (to which I will refer presently) and was responsible for duties in the Angmering Rural District Council area, an area of Sussex which does not actually embrace the adjacent sea coast, and which does not include the town of Worthing, in which the office of the solicitor was situated.

As one might suppose, evidence has been given to show that this particular platoon was ordered from time to time, during what is always referred to as "the Battle of Britain," to "stand to," and I have had evidence before me that this was a frequent occurrence in the months of September and October, 1940; but that no such order has in fact been given to that platoon since about November, 1940. In particular it is not suggested that any order of that nature was in operation on July 25, 1941.

I propose to deal, first of all, with the instructions given to the solicitor, and their effect, on the hypothesis that the Wills Act, 1837, s. 11, applies. I have had the solicitor before me, who has given me his contemporary note of the instructions. They are short, and I propose to read them in full:

Attending you on your instructing us to prepare a fresh will for you under which you wished Miss Anderson to have a life interest in your house "Brentor" and the contents, and the residue of your estate to pass to your son. Also on your stating that you wished our Mr. Cobby to be co-executor with your son, and on your stating that you would call to sign the new will next time you were in Worthing and would phone us and let us know when to expect you.

It seems to me to be established beyond any doubt—and counsel for the first defendant, in the course of a very careful and helpful argument, made this quite clear to me, and the proposition is not disputed on the other side—that, assuming the conditions of the Wills Act, 1837, s. 11, are complied with, it is quite immaterial whether the testator knew that what he was doing, at the moment when he gave his instructions, might of itself operate as a testamentary disposition, and—again this proposition is not disputed—provided his wishes were definitely determined and expressed, the mere fact that he intended, as he obviously did, that they should subsequently be embodied in some more formal document, namely, the usual form of a will duly executed, is also immaterial.

On the other hand, it is said that, if the intended dispositions, or suggested dispositions, were still indeterminate pending further discussion, then they could not be said to have a testamentary character; but, with that reservation, the propositions that I have stated are not really in dispute.

Upon that basis, I have no doubt at all that, given the essential condition, these instructions could operate as a soldier's will. I need no more than the note of what occurred to interpret the facts as follows: in accordance with the note itself, Anderson told the solicitor that he wished Miss Anderson to have a life interest in his house and contents, that he wished the residue of his estate to pass to his son, and he wished Cobby to be co-executor with his son. To my mind, there is nothing indefinite or indeterminate about that. It is quite clear,

and I should have no doubt at all, if the essential condition were fulfilled, about holding that those dispositions could be admitted to probate.

The real difficulty in this case is on the question whether Anderson was a soldier in actual military service. I have referred solely to the provisions of the Wills Act, 1837. It seems to me to be unnecessary, having regard to the well-known line of authorities, to go back to the Statute of Frauds, 1677, or forward to the extension of that section of the Wills Act, 1837, by the Act of 1918.

A This latter Act, it is true, has extended to sailors, though not at sea, the identical conditions applying to a soldier. It has also enacted other extensions of what has always been called, rightly or wrongly, the "privilege" of the soldier; but those extensions are irrelevant for my present purpose, save only from this point of view, that counsel for the first defendant is quite justified in saying that they show a disposition on the part of the legislature rather to extend than to restrict the privilege.

B Before dealing with the particular facts, I think one or two general observations should be made. It seems to me to be established—and again I think I am right in saying there is no doubt about this proposition—that the status of the testator must be determined as at the time of the making of the alleged will, and not at the time of the death. For example, the death may occur, and has in reported cases occurred, after the service has ended; and after any possibility of asserting that the service continues has long passed. Equally, however,

C I think it is true to say that, if the death, as in this case, happens to occur in what may be called service conditions, those circumstances may be relevant in considering the nature of the service. That is not because the status has to be determined as at the time of the death, but because the circumstances of the death may throw some light upon the nature of the service. I mention that because in this case it is said, and said truly, that, but for his service in the Home Guard, Anderson would not have met his death as and when he did.

D The next general observation which I wish to make—because I think it will absolve me from going through some of the older textbooks and older authorities—is this: reference has often been made to the fact that the soldier is *inops consilii*; but I am satisfied that the mere fact that he is or is not, as the case may be, *inops consilii* at the time of the making of the will, is not of itself decisive; though undoubtedly, as a matter of history, it may be one of the reasons or

E foundations for the privilege. For example—and I am only giving in my own words, and applying it to the facts of the present day, an illustration which figures in more than one of the cases—a solicitor, or, indeed, a member of the Bar, or, to be more particular, a member of the Bar practising in this court, may be serving unquestionably on an expedition; but can hardly be said to be *inops consilii*, nor would those immediately surrounding him; whereas, on the other hand, a member of some isolated unit serving in the North of Scotland, where there was no possibility of consulting an English solicitor, would be more truly said to be *inops consilii*; but, in my opinion, one way or the other that fact is not decisive.

F The next proposition—which I think is established beyond any doubt and is very very to the point in the present case—is that the question of whether or no the testator is a soldier, or, being a soldier, is in actual military service, must be determined in relation to the individual, and not in relation to all members of the armed forces of the Crown, or even in relation to all members of the armed forces of the Crown serving in the United Kingdom, and must be determined on the facts relating to his service at the time of the making of the will.

G That proposition seems to me to follow clearly from the decision of HILL, J., in *In the Estate of Grey* (1), and from the decision of PILCHER, J., in *In the Estate of Rippon* (2), and I am in complete agreement with the expressed views of both those learned judges to this effect. I mention this particularly for the reason that I felt myself bound to introduce something which had come to my own knowledge judicially in a case, not unlike this case, which never came to judgment because it was settled part heard.

H By Army Order, 1940, No. 94, it was notified for information that troops in commands at home and abroad were on active service within the meaning of the Army Act, s. 189 (1), with effect from Sept. 3, 1939. That subsection of the Army Act reads as follows:

In this Act, if not inconsistent with the context, the expression "on active service" as applied to a person subject to military law means whenever he is attached to or forms part of a force which is engaged in operations against the enemy or is engaged in military operations in a country or place wholly or partly occupied by an enemy, or is in military occupation of any foreign country.

The last of those alternatives is irrelevant for the purposes of this case; the middle one, fortunately, has not occurred so far as this country is concerned; and the declaration, so far as it affects this case, must be taken to apply because soldiers in this country are attached to or form part of a force which is engaged in operations against the enemy.

It may be—though I do not think I am called upon to decide it in this case—that it is extremely difficult to distinguish, in any essential respect, between a member of a force which is engaged in operations against the enemy and one who is in actual military service. The point, I think, however, is this, that, while that Army Order may or may not be decisive on the point whether the force generally is on active service or in actual military service, as the case may be, the cases of *Grey* (1) and *Rippon* (2) to which I have referred, nevertheless seem to me still to leave it open whether at any given moment, and in any given circumstances, an individual member of the force may or may not at the critical moment, namely, the moment at which he makes his testamentary disposition, be himself engaged in operations against the enemy; and, as I have already said, it is his position that is decisive, and I agree with HILL, J., that that matter must be decided by the court, and is not determined one way or other by any declaration of a military or other authority.

In the circumstances of this case, which, as I shall show in a moment, really fall within a very limited compass, I do not propose to make any general review of the line of authorities. Suffice it to say that it has been accepted, for the purposes of this case, that, whatever the words may mean, it has to be taken as established that "in actual military service" is, as it has always been taken to be, the equivalent of being "on expedition." I am not bound, I think, to express any opinion whether, in its application to service in this country, HODSON, J., went too far in saying that mere service in a camp which was liable to be bombed was, in the circumstances of the present war, decisive that the soldier concerned was in actual military service; or whether, on the other hand, HENN COLLINS, J., went too far the other way in saying that a man who was a member of the armed forces, but whose occupation in the armed forces could fairly be described as a civilian employment, could not be in actual military service because, amongst other reasons, in that case he would have to include every member of the Home Guard.

After all, what has always been accepted as the leading case, *Drummond v. Parish* (3), recognises that, though the soldier lying safely in the castle merely in readiness to repel the invader is not on expedition, he may become so; and it seems to me to be impliedly, if not expressly, recognised in that decision itself that his service in repelling the invader or the rebel need not necessarily be overseas.

Counsel for the first defendant is perfectly right in directing attention to the fact that the 19th century decisions after the passing of the Wills Act, 1837, were all in relation to campaigns which, in fact, were overseas; and counsel for the plaintiff has expressly admitted that he is not prepared to dispute that a soldier, including a member of the Home Guard, may, in the circumstances of this present war, be in actual military service in this country; though he very strongly resists the suggestion that this particular member of the Home Guard was in fact, at the time of making this alleged will, in actual military service. Counsel for the first defendant, on the other hand, argued that there was a continuous obligation to serve, and that this continuous obligation resting on Anderson was the same as continuous service. I shall have to examine that proposition, but I think he recognised I am not going to put it into his mouth, but I think it necessarily follows from the argument—that, unless he could make good that or some similar proposition he would be out of court. Again, reducing it to terms which do not carry the matter any further but are only used by way of illustration, he had to assert, in effect, that the continuous obligation in that respect of his learned opponent, appearing before either of two of my learned Brethren in this Division, when they were following their ordinary professional or judicial avoca-

tions, would create circumstances in which all of them were, at that moment, soldiers in actual military service. That is only an illustration, it carries the matter no further; but there is the argument and there seems to be no escape from it. Counsel for the plaintiff naturally says that that is reducing the thing to an absurdity.

In order to bring the matter to a point on the actual facts relating to this particular man at the particular time, I have been referred to the official documents relating to service in the Home Guard. They are conveniently collected, **A** for my purpose, in the *MANUAL OF REGULATIONS FOR THE HOME GUARD*; though I am not overlooking the circumstance that, put together in the present print, certain alterations made in 1942 are embodied. Nobody has suggested that those alterations are of any importance for my present purpose, and therefore I may safely refer, as it is most convenient to do, to this little manual.

The first and most important document is *The Defence (Home Guard) Regulations, 1940* (as amended up to 1943), under reg. 2 (1) of which it is laid down :

There shall be established a force to be called the Home Guard consisting of such male persons as may, in accordance with instructions issued by the Army Council, voluntarily undertake to serve therein without pay, and be accepted for such service, or as may, in accordance with such instructions as aforesaid, be enrolled for service therein without pay after being directed to enrol therein under reg. 3 of these regulations.

C I need not pursue that, because there is no question whatever that Anderson came within that sub-paragraph.

Reg. 2 (2) reads :

The period for which persons may be enrolled to serve in the Home Guard and the conditions of their service therein shall be such as may be prescribed by instructions issued by the Army Council, and such instructions shall make provision for matters relating to the Home Guard and, in particular, for their organisation, government, **D** training and duties, and for regulating the position as to the determination of the service of members of the Home Guard (whenever enrolled and whatever the conditions of their enrolment), but shall not require members of the Home Guard : (a) to give whole-time service ; or (b) to live away from their homes ; or (c) to enrol for a period exceeding the period of the present emergency. Provided that such instructions may require members of the Home Guard to serve continuously during any period, or any part of a period, during which the platoon or other part of the Home Guard to which they belong is mustered for the purpose of resisting an actual or apprehended invasion, **E** and, while so serving, to live away from their homes.

I call attention to one significant point. It is quite plainly contemplated in these regulations that one single platoon may be mustered while the whole of the rest of the Home Guard is still governed by the ordinary conditions ; or, to take the other extreme, the whole Home Guard may be mustered with the exception of one or two or a certain number of platoons or companies. The **F** point is that it emphasises, in very practical form, the fact that what has to be decided is what were the circumstances applicable to each particular man.

Then it says in reg. 2 (3)—and this is important :

Members of the Home Guard shall be members of the armed forces of the Crown and every such member shall, notwithstanding that he may hold any rank or commission in any other of His Majesty's forces, be subject to military law . . . (b) in the case of any other member, as a soldier . . .

G and a corresponding amendment is made to the Army Act, s. 176, in order to make "All members of the Home Guard, other than those serving on a commission in that force" subject to military law as soldiers.

It is worth noticing in passing, I think, that there is another paragraph in these regulations which appears to recognise very clearly that some special provision is necessary in the case of the Home Guard, when not mustered, to deal with absence without leave or desertion ; for, instead of relying on the general provisions of the Army Act in that regard, a special provision is made **H** by reg. 5 (1) for absence without reasonable excuse, while at the same time, in reg. 5 (2), safeguarding the member's amenability to the provisions of the Army Act respecting absence without leave and desertion when the platoon or other part of the Home Guard to which he belongs is mustered for resisting an actual or apprehended invasion. At the same time, it must be pointed out, on the other hand, that the general applicability of the Army Act remains, notwithstanding ; but that again, I think, tends to show that those particular

provisions in regs. 5 (1) and (2) emphasise that it is the particular circumstances in which the member of the particular unit is serving, and not the general conditions applying to the Home Guard as a whole, which really matter.

I turn to the instructions referred to in the regulations which govern the service, and, putting it quite generally, para. 4, which is to be found on p. 3 of the Manual, without reading out particular sub-paragraphs, shows that the Home Guard, as an organisation, is under the competent military authority—I am not quoting, I am stating its effect—for operational purposes is under the Commander-in-Chief, Home Forces, and for administration purposes is under the Territorial Association in the particular zone.

Then there is the heading “Training and duty”; and here it is important to note that, save in those special cases where the Home Guard is mustered, the man’s obligation is limited to 48 hours in 4 weeks, and there are the strictest injunctions that, in arranging his service, for operations or training, regard is to be had to the exigencies of his civilian employment which, *ex hypothesi*, he is carrying on at the same time; and there are also instructions which, even in the case of calling up, make it necessary at a certain stage to consider whether the civilian occupation is of more importance than the Home Guard duty, and so forth. In other words, short of the muster, the division between his ordinary occupation and his Home Guard service is clearly defined and emphasised.

Then I come to the “Definition of duty,” and that reads as follows:

The following definition of duty is not intended to be a complete statement of all the circumstances in which a member of the Home Guard may be “on duty”; it shows when a member comes on duty in the most usual kind of case; and in particular that a member is not “on duty” when he is neither actually engaged in any authorised training or other duty of a military nature nor has arrived at the place where he is so engaged.

It goes on, under the heading “Definition”:

A member of the Force comes “on duty” at the time he reports at a place of assembly (e.g., unit headquarters, a post, a rendezvous, etc.), for the purpose of carrying out such military duty as may have been, or may be assigned to him by a superior officer, or when he begins to perform such a duty without being required to report to a place of assembly . . .

and then there are corresponding provisions to show when he comes “off duty.”

Of course, it would be unarguable, in my opinion, that Anderson was not “on duty,” within the meaning of that definition, at the time of his death; but equally it is unarguable, within the terms of that definition, that he was on duty at the time of making his alleged will.

I think only one other citation need be made. Para. 9 of these instructions, on pp. 6 and 7 of this Manual, relates to “Employment,” and distinguishes between employment before invasion and employment during invasion, and amongst the tasks upon which a Home Guard may be likely to be employed before invasion is, as stated in para. 9 (a) (iii):

Assistance to Civil Defence authorities, both during normal times in routine duties and during and after heavy raiding. (All such assistance will be carried out as an operational duty and members of the Home Guard will act under their own commander.)

Therefore you may have the case in which the particular unit, and the particular member as a member of the unit, may be called out in the actual progress of a raid, though the Home Guard, as such, has not been mustered; and, in the terms of these instructions, he will then be on an operational duty. It may then, I think, fairly be summarised in this way: there are three stages—there may be more, but for my purpose it is sufficient to say there are three stages or conditions contemplated by these regulations with reference to any individual member of the Home Guard. The case most favourable to the argument would be the case of the individual who has in fact responded, or is in the process of responding, to an order to muster because of an invasion or apprehended invasion; and, as I have already said, with regard to such an one, counsel for the plaintiff has admitted that he is not prepared to dispute that he would be a soldier, and would be a soldier in actual military service. Descending the scale, the next case is that of the man who, like Anderson at the time of his death, was on training duties, or the man covered by the paragraph to which I last referred, who was assisting the Civil Defence authorities, as an operational duty, in the actual progress of a raid;

I regard that category as one involving some difficulty, and one the determination of which would involve a consideration and an attempt to reconcile—or, if not to reconcile, to choose between—the decisions of HODSON, J., in *In the Estate of Spark* (4), and of HENN COLLINS, J., in *Gibson's case* (5), but, as those are not the circumstances in which this alleged will was made, I propose to say no more about it.

A At the other end of the scale is the member of the Home Guard who, not having been called upon to live away from his home, not being engaged, in any sense of the word, in any duties, operational, training, or otherwise, moving, maybe, about the country, whether inside or outside the area in which his duties would compel him to be if he were on duty, is carrying on purely civilian activities.

B To return to the circumstances of this particular case, I am satisfied, beyond any doubt whatever, that it is impossible to say that this testator, visiting his solicitor as a civilian on the date in question, was a soldier in actual military service, and, for these reasons, I am not able to admit to probate the wishes which, on that occasion, he expressed to his solicitor. That being so, I pronounce against the alleged will of July 25, 1941, and in favour of the will of May 29, 1940, which has been formally proved.

Declaration accordingly.

C Solicitors: *Burton, Yeates & Hart*, agents for *Charles, Malcolm & Wilson*, Worthing (for the plaintiff); *Raymond-Barker, Nix & Co.* (for the first defendant); *C. J. C. Davenport & Son* (for the second defendant).

[Reported by D. ARMSTEAD FAIRWEATHER, ESQ., Barrister-at-Law.]

D *Re FISHER, HARRIS AND FISHER v. FISHER AND OTHERS.* [CHANCERY DIVISION (Bennett, J.), July 26, 1943.]

Distribution and Descent—Life interest of widow—Annual sums payable under policy of insurance after intestate's death—Whether capital or income—Reversionary interest—Administration of Estates Act, 1925 (c. 23), s. 33.

E Under a policy of insurance and in the events which had happened a sum of £50 was payable on death, an annual sum of £52 for 16 years and £450 on the cesser of the payment of the annual sums. The insured died intestate leaving a widow and four sisters of the half blood, so that the widow took a life interest in the residuary estate. The questions were (i) whether the annual sums were payable to the widow as income or capital payable to the administrators for investment; (ii) whether the annual payments and the sum of £450 were reversionary interests within the meaning of the Administration of Estates Act, 1925, s. 33 (1):—

F HELD: (i) the annual payments were not income but capital of the estate of the intestate.

G (ii) subject and without prejudice to the power of postponement contained in the Administration of Estates Act, 1925, s. 33, the annual payments and the future payment of £450, since they are not reversionary interests within the meaning of the section, ought to be converted into money in execution of the trusts imposed by the section, and invested in trustee securities and the income of such investments paid to the widow. If and so long as the power of postponement is exercised, these sums ought to be treated as capital.

H [EDITORIAL NOTE. A life tenant is entitled only to the income produced by the estate. Sums which come into the estate otherwise than the interest on investments of part of the estate and the actual income from part of the estate are not income to which the tenant for life is entitled but, as between tenant for life and remainderman, are capital. The case goes a step beyond this. The future payments to the estate are clearly not reversionary interests. By the terms of the Administration of Estates Act, 1925, s. 33, these interests should have been converted into cash unless the power to postpone conversion was exercised. Therefore, in such a case the duty of personal representatives is in the first place to determine whether they will exercise the power of postponement and then, if they exercise that power, those sums are capital, but, if they do not exercise that power, then their duty is to convert these sums into money and invest the proceeds of conversion, the tenant for life taking the income produced by the investments.]

AS TO RIGHTS WHERE RESIDUARY ESTATE IS SETTLED, see HALSBURY, Hailsham Edn., Vol. 14, pp. 368-370, paras. 689-692 ; and FOR CASES, see DIGEST, Vol. 23, pp. 464-467, Nos. 5358-5374.]

Cases referred to :

- (1) *Re Thomas, Wood v. Thomas*, [1891] 3 Ch. 482 ; 44 Digest 208, 366 ; 60 L.J.Ch. 781 ; 65 L.T. 142.
- (2) *Howe v. Earl of Dartmouth* (1802), 7 ves. 137 ; 420 Digest 197, 265.
- (3) *Re Chesterfield's (Earl) Trusts* (1883), 24 Ch.D. 643 ; 20 Digest 368, 1065 ; 52 L.J.Ch. 958 ; 49 L.T. 261.
- * (4) *Re Sullivan, Dunkley v. Sullivan*, [1930] 1 Ch. 84 ; Digest Supp. ; 99 L.J.Ch. 42 ; 142 L.T. 187.
- (5) *Bate v. Hooper* (1855), 5 De G.M. & G. 338 ; 43 Digest 868, 3134.

SUMMONS to determine the rights of a widow under an intestacy. The facts are fully stated in the judgment.

C. L. Fawell for the plaintiffs, the personal representatives.

Wilfrid M. Hunt for the widow.

E. M. Winterbotham for the other parties interested under the intestacy.

BENNETT, J. : By this summons the court is asked to decide a question which has arisen in the administration of the estate of the late Frederick Stanley Fisher, who died intestate on Dec. 14, 1941. The intestate was married, but he left no children. He was survived by his widow, the defendant Madeline Jane Fisher. He was the only child of his parents, both of whom predeceased him. His father had issue by a previous marriage, six children and no more. Of these the two plaintiffs and the defendants Mrs. Browne and Mrs. Henley are living. He had two half brothers, one of whom is stated to have died in the year 1937 without leaving any issue him surviving. The other went to sea in 1910, and is believed to have died long ago without having been married. On Nov. 27, 1942, letters of administration to the estate of the intestate were granted to his widow, the defendant Mrs. Fisher, and to the two plaintiffs, two of his half sisters. The net value of his estate is between £2,400 and £2,500.

Upon these facts, by virtue of the provisions of the Administration of Estates Act, 1925, the residuary estate of the intestate charged with the payment to his widow of £1,000 with interest thereon at the rate of £5 per cent. per annum from Dec. 14, 1941, until payment is held by the legal personal representatives in trust for the widow during her life, and subject thereto, if his legal personal representatives are satisfied that both his half brothers predeceased the intestate without leaving any issue, upon the statutory trusts for the intestate's four sisters of the half blood.

The intestate's estate included a policy of insurance effected by him upon his own life dated Apr. 12, 1938 and issued by Boots Co-operative Insurance and Pension Society, Ltd. The sum insured by this policy was £500 with profits, payable at death or at the age of 60. The policy contained a promise by the society expressed in the following terms :

In the event of death occurring within 20 years, income of £52 per annum for the remainder of the 20 years, £50 immediately at death, and £450 when the income ceases. On death after 20 years or at age 60, £500 with profits is payable.

An annual premium of £21 4s. 1d. was payable under the policy on Mar. 11 in each year.

Upon the death of the intestate the society paid to his legal personal representatives the sum of £70, being as to £50 part thereof the sum named in the policy as payable in the event of death occurring within 20 years, and as to £20 the balance thereof as profits in respect of the sum assured calculated down to the date of the intestate's death. In addition, the society have paid and are now paying to the legal personal representatives what is described in the policy as income of £52 per annum. This sum has been and is being paid by monthly instalments of £4 6s. 8d. Under the policy this sum is payable until Mar. 11, 1958, when the liability to pay it ends. There will then become payable the sum of £450. When that sum has been paid the society will have discharged all its obligations under the contract in the policy. At the death of the intestate the policy was valued for estate duty at the sum of £1,036 18s. 6d., composed of the following items, viz., first, £70 the capital sum payable at death, secondly, £684 12s. 6d. the then present value of the annual income of £52, payable until Mar. 11, 1958, and lastly, £282 6s. the then present value of £450 due on Mar. 11, 1958.

By the summons the court is asked to answer the following questions :

(1) That it may be determined whether in the administration of the estate of the said intestate the monthly sums of £4 6s. 8d. payable from the death of the said intestate down to Mar. 11, 1958, under a policy D.4151 dated Apr. 12, 1938, issued by Boots' Co-operative Insurance and Pension Society Limited ought to be treated as capital or income or partly one and partly the other. (2) If the said monthly sums ought to be treated as partly capital and partly income then that it may be determined how as between capital and income the said monthly sums ought to be apportioned.

A The answer depends upon the proper interpretation and application to the facts of the Administration of Estates Act, 1925, ss. 33 and 46. I will now read sect. 33 and the relevant parts of sect. 46 :

(1) On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives—(a) as to the real estate upon trust to sell the same ; and (b) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money, with power to postpone such sale and conversion for such a period as the personal representatives, without being liable to account, may think proper, and so that any reversionary interest be not sold until it falls into possession, unless the personal representatives see special reason for sale, and so also that, unless required for purposes of administration owing to want of other assets, personal chattels be not sold except for special reason. (2) Out of the net money to arise from the sale and conversion of such real and personal estate (after payment of costs), and out of the ready money of the deceased (so far as not disposed of by his will, if any), the personal representative shall pay all such funeral, testamentary and administration expenses, debts and other liabilities as are properly payable thereout having regard to the rules of administration contained in this Part of this Act, and out of the residue of the said money the personal representative shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased. (3) During the minority of any beneficiary or the subsistence of any life interest and pending the distribution of the whole or any part of the estate of the deceased, the personal representatives may invest the residue of the said money, or so much thereof as may not have been distributed, in any investments for the time being authorised by statute for the investment of trust money, with power, at the discretion of the personal representatives, to change such investments for others of a like nature. (4) The residue of the said money and any investments for the time being representing the same, including (but without prejudice to the trust for sale) any part of the estate of the deceased which may be retained unsold and is not required for the administration purposes aforesaid, is in this Act referred to as "the residuary estate of the intestate." (5) The income (including net rents and profits of real estate and chattels real after payments of rates, taxes, rent, costs of insurance, repairs and other outgoings properly attributable to income) of so much of the real and personal estate of the deceased as may not be disposed of by his will, if any, or may not be required for the administration purposes aforesaid, may, however such estate is invested, as from the death of the deceased, be treated and applied as income, and for that purpose any necessary apportionment may be made between tenant for life and remainderman. (6) Nothing in this section affects the rights of any creditor of the deceased or the rights of the Crown in respect of death duties. (7) Where the deceased leaves a will, this section has effect subject to the provisions contained in the will.

E 46 (1) The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely : (i) If the intestate leaves a husband or wife (with or without issue) the surviving husband or wife shall take the personal chattels absolutely, and in addition the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a net sum of one thousand pounds, free of death duties and costs, to the surviving husband or wife with interest thereon from the date of the death at the rate of five pounds per cent. per annum until paid or appropriated, and, subject to providing for that sum and the interest thereon, the residuary estate (other than the personal chattels) shall be held—
G (a) If the intestate leaves no issue, upon trust for the surviving husband or wife during his or her life ; . . . (v) If the intestate leaves no issue or parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be
H held in trust for the following persons living at the death of the intestate, and in the following order and manner, namely : . . . Secondly, on the statutory trusts for the brothers and sisters of the half blood of the intestate.

The residuary estate to which the provisions of sect. 46 are to be applied is the residuary estate as defined by sect. 33 (4), that is to say, the net moneys arising from the sale and conversion of the real and personal estate of the intestate and his ready money after payment of his funeral and testamentary expenses and debts and any pecuniary legacies and any investments for the time being representing the same including (but without prejudice to the trust for sale)

any part of the estate of the deceased which the legal personal representatives have retained unsold; and the provision in sect. 46 (1) (i) (a) that the residuary estate is to be held upon trust (if the intestate leaves no issue) for the surviving wife during her life means that the surviving wife is entitled to be paid during her life the actual income produced by the residuary estate as so defined; so that, if the legal personal representatives of an intestate, exercising their discretion in that behalf, have postponed the sale and conversion of an unauthorised or wasting security belonging to the intestate and that security produces income, a surviving wife is entitled to be paid that income: see *Re Thomas* (1). I do not myself find any great difficulty in applying the provisions of sect. 33 of the Act to the facts of the case, or in deciding what are the duties of the intestate's legal personal representatives in regard to the moneys payable under the policy and what are the rights of the intestate's widow in those moneys; but there are two questions which have given rise to discussion. A

The first is, whether the annual sums of £52 described in the policy as income are income arising since the intestate's death from his estate, and whether they differ in any way from the sum of £450 which is due for payment on Mar. 11, 1958. The second question is, whether the annual payments and the sum of £450 are reversionary interests within the meaning of those words in sect. 33 (1). Counsel for the widow argued that the annual sums were income arising since the intestate's death from his estate. He argued that they differed in some way from the £450, which he said was capital and was a reversionary interest of the intestate excepted from the trust for sale. In my judgment, this argument is unsound. The foundation of it was the fact that the annual sums are described in the policy as income. But words cannot alter things. An oak tree remains an oak tree, although parties as a matter of convention between themselves agree to call it an acorn. B

Save in respect of amount and dates of payment, no distinction is, in my judgment, to be drawn between the annual sums payable under the policy and the sum of £450. All the sums become payable after the intestate's death. All of them are payable under the same contract. All of them come from the same source. It is not possible to point to any property of which the intestate was possessed when he died and to predicate of the annual sums that they are income arising from that property since the intestate's death. There was not and is not any tree belonging to the intestate of which the annual payments are the fruit. Counsel for the widow suggested that the annual sums might be regarded as income of the sum of £450. But this suggestion is pure fancy, the creature of a fertile brain. It has no foundation in fact. There is no sum of £450 invested and producing an annual income of £52. In my judgment, when the intestate died, the annual sums and the £450 were all part of the capital of the intestate's personal estate. They were all debts due at different dates after his death and payable to his legal personal representatives as a result of a contract which he had made. C

The second question is one of construction of sect. 33 (1) of the Act, and is whether these future payments are reversionary interests and so excepted from the trust for sale. In my judgment, they are not. The words, in my judgment, mean a future interest vested in the intestate at the moment of his death in some specific property which at that moment is in the possession or enjoyment of some other person. They do not mean or include a mere promise made to a man to pay his legal personal representatives a sum or sums of money at a specified time or times after his death. The language of the section points, in my judgment, quite clearly, to specific property which at the intestate's death is in the possession of another, which property will on the happening of an event after the intestate's death come into the possession of his legal personal representatives. A debt payable in the future is not, in my judgment, such property. It is not possible now to point to any property in the possession of Boots' Co-operative Insurance and Pension Society, Ltd., and to say of it that that property will at some future time come into the possession of the intestate's legal personal representatives. D

On the two questions that I have indicated, I come to the conclusion, first, that the annual payments are not income of the intestate's estate, that save in respect of the amount and dates of payment they are indistinguishable from the sum of £450 and that the annual payments and the £450 were parts of the E

intestate's estate at his death; and, secondly, that neither the annual payments nor the sum of £450 are reversionary interests within the meaning of sect. 33 (1). On these conclusions the duty of the intestate's legal personal representatives is clear. When the intestate died their trust was to convert all the future payments under the policy into cash. They had a power to postpone conversion, but it is quite clear on the evidence that they have not hitherto exercised that power.

- A Before answering the questions asked by the summons, there was an argument advanced by counsel for the widow with which I must deal. On the footing that the annual payments were income, he claimed that his client was entitled to receive all of them which were made during her life, and this argument was based upon the proposition that the rule in *Howe v. Earl of Dartmouth* (2) did not apply in the case of an intestacy occurring since 1925, with the consequence that the duty of the legal personal representatives was not to realise the present value of the £450, but to leave it outstanding until 1958. If then the widow was alive, the whole sum would be invested and his client would receive the income of the investments. His argument was that, as the rule in *Howe v. Earl of Dartmouth* (2) was excluded, there could be no apportionment between capital and income on the principle of *Re Chesterfield's Trusts* (3) of the sum of £450 when that sum was paid to the legal personal representatives in the year 1958.
- B It is necessary to consider this argument, because I have to decide what adjustments, if any, have now to be made between tenant for life and remaindermen in regard to the annual payments which have been made since the intestate's death and in regard to the future payments which have to be made and which ought to have been converted into cash at the intestate's death.
- C The argument of counsel for the widow was rested upon the observations of MAUGHAM, J., in *Re Sullivan* (4). In that case the testator, a nephew of the late Sir Arthur Sullivan, the well-known musical composer, was entitled to Sir Arthur's musical copyrights. Being so entitled, the testator made a will whereby he appointed executors and trustees, and after certain legacies and gifts, disposed of his real and the residue of his personal estate to his trustees upon these trusts:

- D Upon trust so long as any royalties shall be payable to me to receive and invest the same in any securities hereinafter authorised, it being my wish that my royalties shall be treated as capital moneys.
- E The testator then made provision for the investment of the residue of his moneys which, with the royalties payable to him, he called his trust fund, and for payment of the income of the trust fund to his wife during her life. Subject to the life interest of his wife, the ultimate trusts of his trust fund were in favour of his children and remoter issue. The testator died in Nov., 1928, leaving a widow and brothers and sisters and without having had any children, and so intestate.
- F save in regard to the legacies and the life interest to his widow. The trustees of the will issued an originating summons asking the question whether the testator's widow, if she executed a disclaimer of her life interest under the will, would be entitled under the intestacy and under the Administration of Estates Act, 1925, to a life interest in the testator's residuary estate, and whether in that event royalties received by the trustees in respect of copyright or other interests in the estate would be income or capital, or how otherwise such royalties would be applicable. The point of the case, of course, was whether the disclaimer of the life interest would get rid of the duty imposed upon the trustees by the will to invest the royalties. After summarising the facts, MAUGHAM, J., said, at p. 87:
- G

- Royalties are *prima facie* in the nature of wasting property, to which the rule in *Howe v. Earl of Dartmouth* (2) applies. Where there is a complete intestacy the provisions of the Administration of Estates Act, 1925, s. 33 (5), will apply, with the result, in the present case, that the widow, having (if she disclaims) the interest of a tenant for life, will be entitled, assuming that cll. 6 and 7 become inoperative, to the whole of the royalties, as that subsection excludes the rule in *Howe v. Earl of Dartmouth* (2). The only question is whether the disclaimer will render inoperative for all purposes that part of the will which it affects.
- H

As I have said, the point of the summons was to get a decision upon the question whether, if the widow disclaimed her life interest, the trust to invest the royalties, the income of copyrights owned by the testator would come to an end, and whether in that event the royalties would be income of the testator's

residuary estate. Both these questions were answered in the affirmative. MAUGHAM, J., was not asked to decide, and did not decide, whether the copy-rights which produced the royalties were freed from the trust for conversion contained in sect. 33 (1). The argument of counsel for the widow, if I followed it correctly, was that I was to regard the observations of MAUGHAM, J., as having been made after a consideration of all the provisions to be found in sect. 33, and as an exposition of the meaning and effect of all the provisions to be found in the section after such consideration. I feel sure, after a study of the report, including the report of the arguments, that this is not the case, and I feel equally sure, in view of the unambiguous language of sect. 33 (1) (b) of the Act, that MAUGHAM, J., could not have decided that all the income of a wasting security such as a copyright was receivable by the tenant for life, unless there had been an exercise of the power to postpone conversion. Of course, if that power has been exercised, the whole of the income of a wasting security is receivable by a tenant for life.

In the case of a residuary bequest of personalty to trustees upon trust for conversion with a power to postpone and a trust to pay the income of the subject of a bequest to a person for life with a gift over, the rule of administration formulated by LORD ELDON in *Howe v. Earl of Dartmouth* (2) never arises. It only arises in cases where there is a residuary bequest to persons in succession and no trust for conversion: see LORD CRANWORTH in *Bate v. Hooper* (5). In *Howe v. Earl of Dartmouth* (2), LORD ELDON, L.C., was considering the bequest in the will of William, Earl of Strafford, the bequest being:

... to his wife Anna Countess of Strafford all his personal estate whatsoever for her life.

It was when deciding how a court of equity would administer this bequest that LORD ELDON, L.C., formulated his famous rule, and I will now read the language LORD ELDON, L.C., is reported as having used when formulating his rule at p. 148:

It [the personal estate] is given as all his personal estate; and the mode, in which he says it is to be enjoyed, is to one for life, and to the others afterwards. Then the court says, it is to be construed as to the perishable part, so that one shall take for life, and the others afterwards; and unless the testator directs the mode so that it is to continue, as it was, the court understands, that it shall be put in such a state, that the others may enjoy it after the decease of the first; and the thing is quite equal; for it might consist of a vast number of particulars: for instance, a personal annuity, not to commence in enjoyment till the expiration of twenty years from the death of the testator, payable upon a contingency perhaps. If in this case it is equitable, that long or short annuities should be sold, to give everyone an equal chance, the court acts equally in the other case; for those future interests are for the sake of the tenant for life to be converted into a present interest; being sold immediately, in order to yield an immediate interest to the tenant for life. As in the one case that, in which the tenant for life has too great an interest, is melted for the benefit of the rest, in the other that, of which, if it remained in specie, he might never receive anything, is brought in; and he has immediately the interest of its present worth.

It is to be noted that the rule LORD ELDON L.C., formulated has two branches, the one designed to ensure that the remainderman shall enjoy the interest in the residuary estate which the testator is presumed to have intended him to enjoy and requiring, therefore, the sale of wasting or hazardous investments and the investment of the proceeds in permanent securities; the other designed to ensure that the tenant for life shall enjoy the interest in the residuary estate which the testator is presumed to have intended, and, therefore, requiring the present value of future interests to be obtained and invested. The rule cannot apply to a case where the trust is one to convert with a power to postpone. In such a case the terms of the trust have to be observed, and *Howe v. Earl of Dartmouth* (2) and *Re Chesterfield's Trusts* (3), only become relevant when the terms of the trust have not been complied with and there has been an adjustment of the rights of the tenant for life and remainderman. In such a case the adjustment is made in accordance with the way in which in those two cases the rights of the parties were adjusted.

It now remains to apply the provisions of the Administration of Estates Act, 1925, s. 33, having regard to my decision. None of the payments under the policy falling due after the intestate's death are income. No distinction is to be drawn between the payments described as income and the sum of £450.

All of these sums should have been converted into cash and invested as soon as possible after the intestate's death, and the income of the investments should have been paid to the intestate's widow. In fact nothing has been sold and the power to postpone conversion has not been exercised. As regards payments made in the past, in respect of each of them a calculation should be made in accordance with the principle laid down in *Re Chesterfield's Trusts* (3) and each sum apportioned between capital and income in accordance with that decision ; but the sums are so small, and the intestate has been dead for so short a time that it may be that the widow will be content to have all the past payments treated as capital and invested. As regards the future payments, these should be realised at once and invested. I, therefore, declare that the right to receive the monthly sums of £4 6s. 8d. and also the sum of £450 payable under the policy, not being a reversionary interest within the meaning of the Administration of Estates Act, 1925, s. 33, ought to be converted into money in execution of the trust imposed by that section, subject and without prejudice, however, to the power of postponement therein contained and that any moneys received by the administrators under the policy during the period during which they exercise such power to postponement ought to be treated as capital.

Order accordingly. Costs as between solicitor and client to be paid out of the estate.

Solicitors : *Kingsford, Dorman & Co.*, agents for *Kingsford, Flower & Pain*, Ashford, Kent (for all parties).

[*Reported by* HUBERT B. FIGG, Esq., *Barriater-at-Law.*]

DUNCAN *v.* CAMMELL LAIRD & CO., LTD. CRAVEN *v.* SAME.

DUNCAN *v.* WAILES DOVE BITUMASTIC, LTD.

CRAVEN *v.* SAME.

[KING'S BENCH DIVISION (Wrottesley, J.), **September 29, 30, October 1, 21, 22, 1943.**]

Negligence—Dangerous article—Test cock made dangerous by painting—Liability of contractors and sub-contractors.

A firm of shipbuilders were building a submarine for the Admiralty and they employed sub-contractors for certain painting operations. In the course of such painting, a tube in a test-cock was blocked by paint and, when the submarine put to sea for her trials, this stoppage was the cause of a serious disaster in which many persons lost their lives, including the husbands of the plaintiffs. The husband of one of the plaintiffs was an employee of the shipbuilders and the husband of the other was an employee of a sub-contractor for certain work on the ship. It was contended for the plaintiffs (i) against the shipbuilders that their husbands were invitees of the shipbuilders when the ship was on its trial and (ii) against the sub-contractors, that the blocking of the tube of the test-cock had caused it to become a dangerous thing and that this was a negligent act for which the sub-contractors were responsible to the plaintiffs :—

HELD : (i) in the circumstances, there was no duty owed by the sub-contractors to the plaintiffs.

(ii) the contractors were liable to the plaintiffs in negligence, having failed to discover a defect in the test-cock which could have been discovered by proper inspection of the painting.

[**EDITORIAL NOTE.** The two questions in this case are both questions of negligence. In the first it was a question whether a man is responsible where a careless act turns a thing not dangerous in itself into something which is a danger. It is here held that there is no such liability where a reasonable man would not have perceived that what had been done or omitted would have had the effect of making the thing a dangerous article. The other point shows that contractors have a duty to inspect and supervise the work of sub-contractors and the fact that sub-contractors are specially skilled in particular work or that the work is to be inspected and passed by a higher authority does not relieve them of this responsibility.

AS TO LIABILITY FOR DANGEROUS THINGS, see HALSBURY, *Hailsham Edn.*, Vol. 23, pp. 629-634, paras. 883-889 ; and FOR CASES, see DIGEST, Vol. 36, pp. 56-58, Nos. 353-365.]

Cases referred to :

- * (1) *Dominion Natural Gas Co., Ltd. v. Collins & Perkins* [1909], A.C. 640 ; 36 Digest 28, 142 ; 79 L.J.P.C. 13 ; 101 L.T. 359.
- * (2) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562 ; Digest Supp. ; 101 L.J.P.C. 119 ; 147 L.T. 281.
- (3) *Heaven v. Pender* (1883), 11 Q.B.D. 503 ; 36 Digest 8, 9 ; 52 L.J.Q.B. 702 ; 49 L.T. 357.
- (4) *Buckner v. Ashby & Horner, Ltd.*, [1941] 1 K.B. 321 ; 110 L.J.K.B. 460 ;
- (5) *Mersey Docks & Harbour Board v. Proctor*, [1923] A.C. 253 ; 36 Digest 15, 59 ; 92 L.J.K.B. 479 ; 129 L.T. 34.
- * (6) *Kimber v. Gas Light & Coke Co.*, [1918] 1 K.B. 439 ; 36 Digest 18, 83 ; 87 L.J.K.B. 651 ; 118 L.T. 562.
- (7) *Smith v. Steele* (1875), L.R. 10 Q.B. 127 ; 36 Digest, 41, 247 ; 44 L.J.Q.B. 60 ; 32 L.T. 195.
- (8) *Marney v. Scott*, [1899] 1 Q.B. 986 ; 36 Digest 42, 257 ; 68 L.J.Q.B. 736 ;
- (9) *Indermaur v. Dames* (1866), L.R. 1 C.P. 274 ; 36 Digest 35, 208 ; 35 L.J.C.P. 184 ; 14 L.T. 484.
- * (10) *Haseldine v. Daw & Son, Ltd.*, [1941] 2 K.B. 343 ; [1941] 3 All E.R. 156 ; 165 L.T. 185.

ACTION for damages for negligence. The plaintiffs were the widows and personal representatives of two men who were lost in the submarine "Thetis," when, on her diving trials in Liverpool Bay, she dived, struck the bottom and could not be raised either by her own power or by salvage until all aboard, with the exception of four, had perished.

The first defendants were Cammell Laird & Co., Ltd., who built the vessel, and from whose shipyard the "Thetis" set out on the day of the accident with a view to performing her diving trials. She had not then been accepted by the Admiralty for whom she was being built. The second defendants are Mrs. Hambrook, the widow of a leading seaman in the Royal Navy, and Lieut. Woods, an officer of the Royal Navy, both of whom were members of the naval crew provided by the Admiralty for the purpose of attending at and conducting this trial. The third defendant was Mrs. Bolus, the widow of Commander Bolus, late of the Royal Navy who was in command of the "Thetis" on the occasion of her loss. The fourth defendant was the Wailes Dove Bitumastic Co., Ltd., a firm which specialised in the production of a particular kind of bitumastic enamel suitable for application to metal surfaces which would be exposed to sea water, referred to as the Bitumastic company. These last defendants were not parties to the original actions by Mrs. Duncan and Mrs. Craven, but by consent of all parties, the action against these particular defendants was consolidated with the other two actions. This report deals only with the case against Cammell Lairds and the Bitumastic company.

On the morning of Thursday, June 1, 1939, the submarine "Thetis" left the shipyard of Cammell Laird in order to be subjected to her diving and other trials. There were on board 103 men, of whom 53 were officers or ratings of the Royal Navy provided by way of crew by the Admiralty : 3 were officers of the Royal Navy attending in the way of duty, but not members of the crew : 4 were officers attached to other ships building at Cammell Lairds ; 9 were Admiralty and overseeing officers ; 26 were employed at Cammell Lairds ; 4 were employees of Vickers-Armstrong & Co., Ltd., and were responsible for some of the equipment ; 1 was from Brown Bros. & Co., Ltd. ; 1 was a Mersey Pilot ; and 2 were employees of Liverpool City Caterers, who were present to deal with messing arrangements necessary because the trial would be likely to last about 12 hours or so.

From the facts it appeared that the cause of the accident so far as material to this report arose out of the painting of a torpedo tube with bitumastic paint. This tube was provided with a test cock and it was found that this test-cock had become blocked with paint so that water would not pass from it. The result was that the tube was thought to be empty when in fact it was full of water. The further material facts appear from the judgment.

H. J. Wallington, K.C., Geoffrey Hutchinson, K.C., E. Holroyd Pearce for the plaintiffs.

F. A. Sellers, K.C., H. I. Nelson for the defendants, Cammell Laird & Co., Ltd.

G. H. B. Streatfield, K.C., Withers Payne, for the defendants, Wailes Dove Bitumastic Ltd.

The Attorney-General (Sir Donald Somervell, K.C.), the Solicitor-General (Sir

David Maxwell Fyfe, K.C.), and Hon. H. L. Parker for Lieut. Woods and the personal representatives of Captain Bolus and Hambrook.

WROTTESELEY, J.: The plaintiffs allege that the action of the Bitumastic company by their servants in obstructing the test-cock holes in No. 5 torpedo tube was a negligent act which led directly to the disaster, by turning what was a safety device into a trap, so as to mislead anyone who should rely on it for the purpose for which it is designed. The man who did this did a slovenly piece of work. A It was not, as at one time seemed to be suggested, that he thought it did not matter whether he obstructed the hole or not. He described the precautions he took to prevent obstruction. But in the end he so left the job that two at least of these holes were obstructed. Such work would be slovenly if it occurred in the painting of the door of a boudoir: it is not less so when the result is to block a hole which is obviously intended for some purpose, and may well serve B a purpose of vital importance, situated as it is in a submerged weapon in a submarine. A cursory inspection would show that the hole led to what is called a safety latch; and even if the painter did not know this, he could have read the legends on the levers. They were as follows: When the handle or lever was down, "door locked"; when the lever was lifted to the fullest extent on the other end were the words, "door unlocked". In fact it is clear from the evidence that the painter did notice that the hole went right through the door. C I am not prepared to accept the suggestion that a painter who is employed to paint such a thing as a torpedo tube has carried out his work in a workmanlike fashion if he paints over and leaves obstructed such a hole as this one. On the part of the painter employed by the Bitumastic company there was negligence, which led directly to the disaster in which Duncan and Craven lost their lives.

D As regards Cammell Lairds, it is true that by the sub-contract they bound the Bitumastic company to carry out the work to the satisfaction of the Admiralty. But I do not accept the suggestion that this absolved them from seeing that the work was properly done themselves, at any rate *vis-a-vis* the Admiralty. On behalf of the Bitumastic company it was said they were humble painters, and only bound to apply the paint properly to the object to be painted. This argument is not available to Cammell Lairds, who are not humble painters, E but shipbuilders and engineers. In fact their master painter, Mr. Taylor, did inspect the work when done, and should have been qualified to notice the blocked up hole. After all there were 6 rear doors in this part of the vessel, and only two of the holes were blocked up. In addition Mr. Taylor had been responsible for cleaning the tubes before painting, and had plugged the holes in the bottom of the tube. I think that Cammell Lairds were clearly responsible for seeing that the painting of the tubes which they had fitted into the vessel was so done as not to F obstruct anything so vital as a test cock on a safety latch.

It was suggested they could rely on faults of this kind being observed by the Admiralty overseer, who ought to have inspected and passed or rejected this work. I see nothing in the contract which absolves Cammell Lairds from making sure that the painting, like all other work in this submarine, was done in a proper and workmanlike manner. And it would indeed be deplorable if those who G build and equip vessels for the Admiralty could wash their hands of all work for which they sub-contract by providing that it is to be done to the satisfaction of the Admiralty. *Vis-a-vis* the Admiralty I do not think Cammell Lairds can have intended to claim that they are in such a position. The position then is that both the Bitumastic company have broken their contract with Cammell Lairds in the way I have indicated, and also Cammell Lairds theirs with the Admiralty, in not having the faults put right. The defect in the safety H appliance on the rear door of No. 5 torpedo tube prevented it from registering, as it otherwise would have done, that the tube was not merely full of water, but of water under pressure. Had he known this Lieut. Woods would never have opened the rear door, and the disaster would not have occurred.

In this case, however, the claim cannot be based in contract. Before the plaintiffs can be compensated for the fact that the negligence of some of the defendants' servants led to the death of those on whom they depended, it is necessary to establish that the defendants, who employed these men, owed a duty to the plaintiffs, the neglect of which led to the death of Duncan

and Craven. It is clear that neither the Bitumastic company nor Cammell Lairds owed a duty by contract to the employees of Cammell Lairds, or to those of other firms who went on this final trip, not to be unworkmanlike in painting, nor to take care that any unworkmanlike painting was detected and made good. The plaintiffs, therefore, claim that on the facts of this case there was a duty quite apart from the contract. The nature of this door, they say, was such that it could be turned into a dangerous thing. This the defendants did, and it then became their duty to take reasonable care to render it harmless.

Another way in which the case against the Bitumastic company was put is, that they were performing an operation, the vital importance of which they, as ships' painters, knew perfectly well, and they were performing an operation which must produce the greatest damage to persons using the ship if they did not do their work with reasonable care.

Yet another way in which it was put was, that they turned what would otherwise have been a harmless thing into a dangerous thing, just as dangerous as a loaded gun, or anything of that sort; and they say that, on the principles laid down in *Dominion Natural Gas Co., Ltd. v. Collins & Perkins* (1), the plaintiffs are entitled to succeed. For the list of dangerous things to be found in LORD DUNEDIN'S opinion is not, they say, a closed list merely because it ended with the phrase *ejusdem generis*. LORD ATKIN'S observations in *Donoghue v. Stevenson* (2), at p. 596, showed that there are not really two categories, namely, things dangerous in themselves where you must, and things not dangerous in themselves where you need not, apart from contract, take care, or else take the consequences and compensate the men damaged by your lack of care. If, therefore, they say by your carelessness you turn a harmless thing into a dangerous thing, you must take care that damage does not arise from it. And that in fact the Bitumastic company did nothing and took no care.

At p. 646, of *Dominion Natural Gas Co., Ltd. v. Collins & Perkins* (1), I find that LORD DUNEDIN, in giving the judgment of the Privy Council, used the following language :

There may be, however, in the case of anyone performing an operation, or setting up and installing a machine, a relationship of duty. What that duty is will vary according to the subject-matter of the things involved. It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, that there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity.

This is, I suppose, the passage upon which by way of introduction the plaintiffs rely. The duty there referred to was quite apart from any duty required by contract.

Two things appear to follow from this passage. First, that the duty to take care may be owed to what I will call third parties, in the case of anyone performing an operation; painting might well, I think, be such an operation. This duty apparently will vary according to the subject-matter of the thing involved. Secondly, that at the top of the scale, as it were, of such subject-matters lie things called dangerous in themselves. It has not been suggested that the rear door of a torpedo tube is a thing dangerous in itself. The case against the Bitumastic company must, therefore, be justified on some other ground. Nowhere I suppose have the other grounds on which such an action can be supported been so thoroughly discussed as in *Donoghue v. Stevenson* (2). It has been found easier to illustrate than to propound the law relating to the matter. In the speech of LORD ATKIN are collected most of the decided cases which illustrate the circumstances in which a person performing such an operation, as is the painting of this torpedo tube, makes himself liable for the damage flowing from his negligent performance of the act. The keynote to liability is expressed by LORD ATKIN himself in the word "proximity," that is to say, proximity to the person damaged; proximity not necessarily in time or space, but extending to such close and direct relations that the act complained of directly affects a person whom the defendant would know would be directly affected by the careless act, and his Lordship quotes with approval from LORD ESHER'S judgment in *Heaven v. Pender* (3), at p. 510, among the exceptions which negative proximity, the case where there was a chance whether this thing would be used before there would probably be means of observing any

defect. The object of this is, as LORD ATKIN points out, to exclude the possibility of an inspection either by the person who uses it or an intermediate person. From that I think I can derive this, that at any rate, so far as the law touching this matter was explored in *Donoghue v. Stevenson* (2), I must consider whether between the slovenly painting of this particular door, and before it was used, there would be the chance of inspection whether by the person who would use and rely on this door and this appliance, or by some intermediate person. LORD

A MACMILLAN, at p. 620, develops the same point, and thinks that liability for negligence will not lie, where between the manufacturer and the user there is interposed a party who has the means and opportunity of examining the manufacturer's product before he re-issues it to the actual user.

Upon this matter the contract itself appears to me to be decisive. The Bitumastic company undertook to Cammell Laids to perform the painting. The contract says :

B . . . the whole of the work . . . to be to the entire satisfaction and approval of the Admiralty overseer.

Nor was this understood to be any mere formality. The Admiralty kept a team of overseers, and the painting of the holes was inspected by Cammell Laids' master painter in order to see whether it was fit for inspection by these

C overseers. For this purpose it was passed, and it was the purest oversight and a deplorable one that those overseers never did the work for which they were presumably employed. It was doubtless for this reason that the plaintiff's case was not rested on *Donoghue v. Stevenson* (2). Nevertheless as against the Bitumastic company, in my opinion, it falls to be tested by the reasoning underlying that decision. If proximity as interpreted by LORD ATKIN and LORD MACMILLAN is the real ground of liability where the article is not dangerous

D of itself, then the absence of it in cases of the kind discussed in those speeches provides the answer to any claim. This was the ground of the decision in *Buckner v. Ashby & Horner, Ltd.* (4).

What then of the other argument upon which the plaintiffs' claim is based, namely, that by their negligence these defendants, the Bitumastic company, turned what was a harmless thing into a dangerous thing? Now first of all here it must be conceded that at least these defendants never knew that by the act of one of their painters the safety device had been obstructed. It has to be remembered here that the action is against the employers of the painters, and not against the painter himself. The phrase "things dangerous in themselves" has more than once come under fire, both as a phrase and also as regards the view taken by lawyers that they call for a higher degree of care, and should impose a wider field of duty than things not dangerous. Things not dangerous

F in themselves but rendered dangerous by neglect are it is said more deadly. When one thinks of such things as ladders with rotten rungs, it is obvious that this may be true. On the other hand, things dangerous of themselves are presumably known to be such by those who handle or deal with them. Certainly those in LORD DUNEDIN's list are so known. The average man may, therefore, reasonably be said to have a peculiar duty imposed on him to take precautions if he is going to send forth poison, or loaded firearms, or explosives. It is a

G peculiar duty, because it is a peculiar thing. To suggest that a man who unknowingly renders a harmless thing into a dangerous thing is on that account under liability to future users to show care seems to me illogical. It may well be that a man who knowingly does such a thing will find himself under liability; and in such a case the chance of intermediate inspection may not avail to exclude liability. At any rate I see nothing contrary to the common sense supposed to underlie the common law in holding that, even if the careless

H act renders the article dangerous, the doer of the act is not liable, if a reasonable man would not have perceived that what had been done or omitted turned the article into a dangerous article. For I think that it follows from what was said by LORD MACMILLAN in *Donoghue v. Stevenson* (2) that the standard to be applied is that of the reasonable man. The contention of the plaintiffs here really amounts to this : that in respect of a harmless thing, a defect in which may render it a dangerous thing, the maker or repairer is responsible to the person likely ultimately to use it for seeing that in fact it shall not have such a defect. I know of no authority for such a proposition, and such a duty would have so

wide a scope that I am not prepared to hold that it exists. In the result, therefore, I am of opinion that, in the circumstances attending the painting of this rear door by the Bitumastic company, there was no duty owed by them to Duncan and Craven, in which they can be said to have failed.

That brings me to the claim against Cammell Lairds. These defendants undertook to paint this door and to do it in a workmanlike fashion. In fact they did not do the painting themselves but contracted with the Bitumastic company to do the work; nevertheless they remained liable to the Admiralty, and in the matter of this particular door, and also in respect of that of No. 4 they were in breach of their contract. But the fact that they had no excuse *vis-a-vis* the Admiralty does not alter the facts. They did nothing to the door which led to the accident. They provided a master painter, who in fact failed to detect the fact that the safety device had been obstructed and rendered useless and so dangerous, unless either the Admiralty overseer, or the ultimate user, should by inspection or use of the rimer detect and repair the defect. By a chain of unfortunate events, including the failure of their own painter and of their own engineering supervisors and of the Admiralty overseers, the "Thetis" put to sea for this trial with the defect still there.

It is said that the plaintiffs have a claim against these defendants on the same grounds as against the Bitumastic company. To a claim based on those grounds they have the same answer as the Bitumastic company. By the terms of their contract with the Admiralty everything they did with regard to the "Thetis" was subject to the approval of the Admiralty. This, as I have pointed out, was no mere formality. Overseers and others were in fact appointed and were busy inspecting on behalf of the Admiralty all that was done by Cammell Lairds, whether directly or by sub-contract. In fact, as we have seen, the painting of the torpedo tubes and doors was done by sub-contract, a term of which was that the work must be done to the satisfaction of the Admiralty. It was only by an oversight that the overseers, who inspected and passed the painting of the tubes, failed to inspect the door.

There is a great deal of difference between the position of Cammell Lairds and that of the Bitumastic company. The latter did their work, submitted it for approval, provided a man to stand by and make good any deficiency which might be found on inspection, and none being pointed out, went away, leaving the "Thetis" and all her apparatus and appliances in the hands of Cammell Lairds. Moreover, by the terms of the contract Cammell Lairds were responsible to the Admiralty for this painting; they would be paid for it, and would be liable to the Admiralty to make good any deficiencies. Until the trial the vessel remained in their hands, though it was not in law their property. If anything were needed to impress upon Cammell Lairds their responsibility for seeing that the whole vessel was fit, or as fit as care could make her, for her trials whether on or under the sea, it is to be found in the forms attached to the contract with the Admiralty.

In particular there are Forms "A" and "B", forming part of the contract which I need not read through, and cl. 5 of the contract which says:

The whole of the work hereby contracted to be performed together with all alterations or additions ordered by the Admiralty in accordance with this contract shall be completed and all trials shall be carried out and all the work required by the specification and the contract to be performed by the contractors subsequently to the trials and before the vessel and machinery are accepted by the Admiralty shall be completed and all defects if any which may be developed in the vessel and machinery before during or after the trials shall be made good.

Both from the contract and from the general evidence it is clear that Cammell Lairds prepared the "Thetis" for the trial. For instance, in the matter of the trim, that is to say, the various spaces in the vessel which would have to be filled with water, they collaborated with the Admiralty representatives. There is no doubt that an agreement was come to on this point which is embodied in the so-called trim statement. The hands which, generally speaking, prepared the "Thetis" for her diving trials by filling the various tanks and spaces were the hands of their employees Robinson and Eccleston, both of them lost.

As to those upon whom the plaintiffs depended for their maintenance it is also clear from the evidence that Cammell Lairds either invited them on board or concurred in the invitation. One of them was their own

employee and would receive his orders; the other was an employee of another firm which supplied some of the apparatus which would have to be used in the trial. He would be ordered aboard by his own employers, and would be invited aboard by Cammell Lairds in the common interest which they had with the man's employers in order to get their respective parts of the vessel tested, approved, accepted and paid for. It was common ground at the trial that all the civilians were there on business, this business.

- A Once they were all embarked, Lieut.-Commander Bolus took charge. He was the captain of the ship. But none the less all these men remained to assist in one way or another the naval crew provided by the Admiralty in the testing of the vessel in various ways, including diving, submersion and surfacing. It is claimed, therefore, on behalf of the plaintiffs that they were what the law calls invitees, as opposed to trespassers or licensees. No question arises here of either of those upon whom the plaintiffs depended being a trespasser.
- B The test usually applied in order to see into which category a person who suffers damage on premises falls, is to ascertain whether he is there on business or not, whether he is there in a common interest with the person inviting him. If he is, he is an invitee: if not, he is merely a licensee: see *per* LORD SUMNER in *Mersey Docks & Harbour Board v. Procter* (5), at p. 272. Here there was sufficient community between the interest of Cammell Lairds and those of the other members of the ship's company.
- C Applying this test there is no doubt that there was a common interest between the deceased and Cammell Lairds. But it is said that Cammell Lairds were not, in control during the trial; and, therefore, they cannot be said to have invited anyone to the diving trial. It is true they were not in control that day after the "Thetis" left Birkenhead. The naval crew controlled the ship and this was particularly true of the diving operation.
- D The facts of this case are peculiar, and it has not been possible to find authority for the proposition that a person not in control at the moment of the accident can nevertheless be said to invite persons on to premises. *Kimber v. Gas Light & Coke Company* (6) is not really an authority for this purpose, for in that case while the gas company's workmen were not occupiers and not in a position to invite the plaintiff to the house, yet they made a hole in the flooring which was a concealed danger, and they knew it, and knew also that the plaintiff
- E was going to where the hole was. The fact that it was a ship and not land is of no importance, as can be seen from *Smith v. Steele* (7), *per* BLACKBURN, J., and from *Marney v. Scott* (8). Both of them were cases of ships. Ordinarily, of course, the invitation is extended by the occupier of the property whether fixed or movable where the damage is caused. But is this essential? It seems to me that the importance of establishing that the defendant who invites is the occupier of the premises lies in the fact that with occupation goes control.
- F And the importance of control is that it affords the opportunity to know that the plaintiff is coming on to the premises, to know the premises, and to become aware of dangers whether concealed or not, and to remedy them, or at least to warn those that are invited on to the premises. Now at any rate when the harm was done, when these test cocks were blocked up with paint, Cammell Lairds were in control and occupation of the vessel. They remained in control and occupation from that time right down to the moment when the "Thetis"
- G cast off. They had ample opportunity to detect and put right the defect, which was instrumental in bringing about this disaster; indeed it was in the ordinary course of their business to do so, in view of their relationship under the contract with the Admiralty.

- H What, in those circumstances, was the duty of Cammell Lairds to those, whether their own employees, or the employees of other firms, who would embark for the purposes of this trial? I understood counsel for Cammell Lairds to agree that they were under duty to take reasonable care to see that the vessel was fit for use, but not for diving; and that the crew provided by the Admiralty were entitled to believe that the "Thetis" and her apparatus were to this extent in order. Accepting for the moment this limitation of their duty, I do not think they can be said to have performed it. Although they had at their disposal a highly qualified engineering staff well fitted for the purpose, they sent none of them to see that the painting by their sub-contractors was so done as to leave the safety devices on the rear doors of the torpedo tubes in order,

And the result was that these torpedo tubes; Nos. 4 and 5, were as much a danger as would be a sporting gun, the safety catch of which was defective, so as to appear to be at safe, when in fact the gun could be discharged by pulling the trigger. These two tubes 5 and 6 were submerged even when the submarine was on the surface, so it did not need that she should dive in order to make these safety devices important. Quite apart from any admission by Cammell Lairds, it appears to me that they were in the circumstances under the same liability as was the occupier in *Indermaur v. Dames* (9). They were in control of the property right down to the moment she proceeded to sea. Under their contract with the Admiralty, they were charged with the liability of seeing that she was fit to go to sea, and so far as skill and care could provide it to go through her diving trials. To those who were to proceed in her to the diving trials they were, therefore, under a duty to see that they were not exposed to any unusual danger, the existence of which they ought to have known. The exercise of reasonable care in preparing her for her trials would have disclosed that their sub-contractor had put the safety catches on torpedo tubes 4 and 5 out of order. By their failure to exercise this care, they exposed the whole ship's company to unusual danger because an apparent safety device on this rear door was in fact nothing of the kind.

Finally on this head the doctrine of common employment fails because the failure was not or was not merely that of their master painter. The failure was on the part of the management in not calling on one of their engineering staff to inspect the appliance after the painting. In this connection much emphasis has been laid on the observations of GODDARD, L.J., in *Haseldine v. Daw* (10), at p. 374 ([1941] 3 All E.R. at pp. 181,182), to the effect that a person who employs a competent contractor, such as the Bitumastic company, to perform the maintenance of plant which, if not properly maintained, may become a danger, has done all that in reason he can do: having done so much he cannot be blamed if the person contracted with is careless. The short answer to that argument in this case is that in respect of a submarine Cammell Lairds are not in the same position as is a landlord of a block of flats in respect of an electric lift. It is, therefore, unnecessary to consider exactly what can be extracted from the various judgments in that case.

In the result, therefore, each of the plaintiffs succeeds in establishing liability on the part of Cammell Lairds for the loss of the wage earner on whom they depended, on the ground of negligence, the negligence being that they failed to discover a defect in the test cock of No. 5 torpedo tube caused by their sub-contractor's servant and which they would have detected had they caused proper supervision to be exercised of the painting, or else a proper inspection of the painting by someone with engineering experience after it had been done. As against the other defendants the claims of each of the plaintiffs fails.

Judgment for the plaintiffs against Cammell Laird & Co., Ltd., with costs, the costs of other defendants to be paid by Cammell Laird & Co., Ltd.

Solicitors: *Evill & Coleman* (for the plaintiffs); *Carpenters* agents for *Laces & Co.*, Liverpool (for the defendants Cammell Laird & Co., Ltd.); *Radford Frankland & Mercer* agents for *Maughan & Hall*, Newcastle-upon-Tyne (for the defendants Wailes Dove Bitumastic, Ltd.); *The Treasury Solicitor* (for the defendants Lieut. Woods and the personal representatives of Captain Bolus and Hambrook).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

RICKETTS v. ERITH BOROUGH COUNCIL AND ANOTHER.

[KING'S BENCH DIVISION (Tucker, J.), **October 28, 1943.**]*Negligence—Dangerous article—Sale of bow and arrow to boy of 10 years—Injury to schoolchild.*

The Erith Borough Council was the education authority for a school which the infant plaintiff, aged 6 years, attended. During the midday break the plaintiff and some 50 other children were playing in the playground which formed part of the school premises. There was an unlocked gate which led to the street and, if given permission, children could leave the playground by this gate to go home for lunch or to buy sweets or toys. From time to time one of the teachers would go into the playground to see that all was well; but there was no continuous supervision. On the day in question one of the pupils, a boy aged 10, left the playground and went across to a nearby shop and purchased some blunted pieces of bamboo made up in the form of a bow and arrow. Returning to the playground and unseen by the teachers, he discharged the arrow in close proximity to the infant plaintiff, the arrow struck the plaintiff's spectacles splintering the glass and it was necessary to remove one eye. The infant plaintiff suing by her father as next friend brought an action for damages against (i) the Erith Borough Council on the ground that they were negligent by their servants in failing to maintain adequate supervision over the pupils in the playground; and (ii) the owner of the shop on the ground that he had been negligent in selling to an infant of apparent age articles which he knew or ought reasonably to have known would be dangerous in such hands, and that he knew or ought to have known that the boy was a pupil of the school and that he allowed him to take the bow and arrow into the playground without warning him of the danger of playing with the articles in the presence of other children of tender years:—

HELD: (i) taking into consideration all the circumstances, it was not incumbent upon the council to have a teacher continuously present in the yard throughout the break, and the supervision had been adequate.

(ii) the bow and arrow was not in itself a dangerous thing to put into the hands of the particular purchaser, therefore, there was no duty of care resting on the seller, either towards the boy or any other person.

[EDITORIAL NOTE. Liability for dangerous objects and for things which may in certain circumstances become dangerous has been much discussed recently. In the present case it was not shown that the seller knew or ought to have known that the so-called bow and arrow was to be taken into a crowded playground. The boy, too, was ten years of age and intelligent so that he might be supposed sufficiently advanced to make a proper use of the toy. The question of supervision by teachers again arises and it is held that the visit of a teacher from time to time during the playtime was sufficient supervision.

AS TO SALE OF DANGEROUS GOODS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 631, 632, para. 886; and FOR CASES, see DIGEST, Vol. 36, pp. 56-58, Nos. 353-364.] Case referred to:

**(1) Burfitt v. Kille (A. & E.), [1939] 2 K.B. 743; [1939] 2 All E.R. 372; Digest Supp.; 108 L.J.K.B. 669; 160 L.T. 481.*

ACTION for damages for negligence. The facts are fully set out in the judgment. *Percy Lamb* for the plaintiff.

S. Richards Edgedale for the education authority.

The second defendant appeared in person.

TUCKER, J.: This is an action brought by an infant plaintiff aged 6 years, Anne Elizabeth Ricketts, by her father as next friend, claiming damages for personal injuries suffered by the infant plaintiff and certain out-of-pocket expenses incurred by the father. The action is brought against the Erith Borough Council and Reginald Frederick Browne, the second defendant. The first defendants are sued as the education authority for the area in which the St. Fidelis Catholic School, West Street, Erith, is situate, and the second defendant is sued as the proprietor of a shop which sold a bow and arrow to a small boy who was a pupil at this school.

The small boy in question was one, Thomas Fitzgerald, who is now 11 years old, and who, at the time of this accident, which happened on June 9, 1942, was 10 years old. This little boy, Thomas Fitzgerald, bought what is called this bow and arrow for a penny at Browne's shop, he shot it off in the playground

of the school, and unfortunately it struck the spectacles worn by this little girl, Anne Ricketts, with the result that the spectacles were broken, a piece of glass got into her right eye, and she unfortunately had to have an operation removing the eye.

This action is brought in respect of that accident against the education authority and against Browne. It is said that the first defendants were negligent by their servants or agents in that they failed to maintain supervision over pupils in the playground of the school, they allowed the little boy, Thomas Fitzgerald, to leave the playground whilst he was under their care at the school, they failed to prevent him bringing into the playground a bow and arrow, they failed to prevent him playing with the bow and arrow, and they allowed the pupils to play in the playground without one of their number being present. In substance, that is an allegation of lack of supervision.

As against the second defendant, it is alleged that he was negligent because he sold to Thomas Fitzgerald, an infant of the apparent age of 10 years, articles, namely, a bow and arrow, which he knew or ought reasonably to have known, were dangerous in the hands of such a purchaser. Furthermore, though he knew, or ought to have known, that the said Thomas Fitzgerald was a pupil at the said school, he allowed him to take the bow and arrow into the playground where he knew, or ought to have known, other children of tender years were playing, and without issuing any warning to Thomas Fitzgerald of the danger of playing with the said articles in the presence of other children of tender years.

The facts are these. This is a Roman Catholic School. There were in all at this school some 70 pupils of ages ranging between 5 and 10. The staff, at the material time, who were dealing with these children, were Sister Bailey, a certificated teacher, Sister Murphy, the headmistress, and another younger uncertificated teacher. This accident happened during the midday break. At 12 o'clock the lessons end, and a number of the children have lunch at the canteen on the school premises. On the day in question some 40 of these children, including Anne Ricketts, the infant plaintiff, had their lunch at the canteen. After that, she and a number of others, went and got their second bottle of milk in a classroom where Sister Bailey supervised the distribution, and as each child finished its milk it went out into the playground to play with the other children, and it would be about 1 o'clock by the time this batch of children had finished having their milk and had gone out into the playground. There, they would be playing for another half an hour or so, and then it would be time to resume school. Not all the children of the school stayed for lunch; some went home. Some children, with permission, who lived nearby, stayed for lunch and went home after lunch for a few minutes and did not play in the playground. Of the children that did play in the playground, some, from time to time, were given permission, if they asked for it, in suitable cases, to leave the playground and go out and purchase sweets or things of that kind; but, of course, they had to ask for permission.

The playground was situate in a lane off the main road, West Street. The entrance to the playground was up the lane off that street—about the length of this court was the description of the headmistress. During this time, after the children had had their milk, and before school was resumed, that is to say, during this period of about half an hour, with the staff that I have described, the practice at this school was for one of these teachers from time to time to go out into the playground to see that all was well; but there was no teacher continuously in the playground throughout the whole period of time, and the gate to the playground was not locked; these children could get out if they were so minded, and, as I have already said, some of them actually went home and others were allowed to go out into the street and buy sweets. Thus they were not locked into this playground, nor was there a teacher continuously present throughout the whole time while these children were playing about in the playground.

During the time when Sister Bailey was not actually present in the playground, this little boy, Thomas Fitzgerald, got out and went across the road to Browne's shop, Browne having a shop at which he sells confectionery, tobacco, toys, medicines and fruit. He is much patronised by the little children who go to this school and a number of other children who go to other schools in the locality; and Thomas Fitzgerald purchased there, for the sum of one penny, two pieces

of bamboo—for that is what they are. One of them serves the purpose of an arrow; it is a blunted piece of bamboo; it is not sharpened at either end; it is about 14 ins. in length. The bow is another piece of bamboo, one of the ends of which is rather sharp, at any rate, the ends of the bow are considerably sharper than the end of the arrow; and with a bit of string attached to each end of this pliable piece of bamboo, it constitutes a bow and arrow. Armed with this toy—for that is what it is—he went into the playground, and unfortunately discharged it in very close proximity to this little girl, and broke her spectacles. He says that it went off because he slipped as he was pointing it to the ground. However that may be, he shot it off very close to the little girl, and broke her spectacles.

A It is agreed by the teachers that, if they had seen this little boy armed with this bow and arrow and about to discharge it in this rather congested playground, where at any rate there were some 50 children playing 'about, no doubt all running about in all directions, they would not have allowed him to go on playing with it or using it in those circumstances at that particular time. But there was nobody there who saw him use it, and the whole thing was over and done before they became aware that he had got it.

B The infant plaintiff was brought to school and fetched away again by her parents; she was very young, and she stayed to lunch; but a number of the other children, as I have already said, found their way backwards and forwards to the school, and some of them went home to their lunch during the break.

C Those are the facts with regard to the school, and it is said that they indicate negligence, and that this accident was the result of that negligence—that lack of supervision enabled the small boy to get out of the playground, to arm himself with something which it is said was dangerous or might be dangerous if he used it in that particular place, and that as a result this accident happened.

D The duty of the defendants is that of a reasonably careful parent, and I have come to the conclusion that they were not guilty of any failure to exercise that degree of care which may be expected from a reasonably careful parent. Incidentally, in considering the facts of a case like this, one has to visualise a parent with a very large family, because 50 children playing about in a yard is, of course, a different thing from four or five children playing about together in a garden. That is perfectly true, and it has to be remembered. None the less, I find it impossible to hold that it was incumbent to have a teacher, even tender as were the years of these children and bearing in mind the locality of this school, continuously present in that yard throughout the whole of this break; and nothing short of that would suffice. Unless that is their duty, nothing less is any good, because small children, or any child, can get up to mischief if the parents or teacher's back is turned for a short period of time. I think the evidence in this case shows that the system which prevailed at this school, and that the degree of supervision which was exercised, was in fact reasonably sufficient and adequate, having regard to all the circumstances of the case. I, therefore, hold that the claim against the corporation of Erith as the education authority (whose responsibility, if there was negligence, is not in issue in this case) fails.

E With regard to the claim against Browne, I am satisfied that, when he sold this toy to this little boy, he did not apply his mind to the question, and had not got it in his mind whether or not this little boy came from this particular school or from any other school; nor had he got it in mind that the little boy was going back to play in a congested playground. He simply sold this toy to a little boy aged 10, without knowing or thinking whether he was on the way home or on the way to school or where he was going or what he was doing. He sold it to an intelligent, bright looking little boy, 10 years old, for a penny. In those circumstances is he liable for the consequences which followed? Incidentally, the evidence before me is that these bamboo sticks, which are called bows and arrows, have been sold by him for a number of years in considerable quantities to children of all ages, and I have had evidence from the wholesalers that they also have supplied great quantities of them for some years, without any ill effects brought to their knowledge, at any rate.

H Of course, any article can be a danger handled by young children in close proximity to other young children, and there can be no doubt, as the teachers have said, that they would not have allowed one of these little boys or girls to go shooting this thing near a whole lot of other little children running hither

and thither. But I have to consider whether it is an article of such a nature that this shopkeeper was failing in his duty to the public at large in putting such a thing into the hands of an ordinary intelligent little boy of 10 years without knowing the particular use that he was going to make of it or where he was going to take it in the immediate future.

The case that has been much relied on is a decision of ATKINSON, J., *Burfitt v. A. and E. Kille* (1). In that case the defendants were the proprietors of a shop and they sold to a little boy aged 12 what was called a "safety pistol" with 50 blank cartridges; and, in dealing with the evidence in the course of his judgment, ATKINSON, J., described, at p. 750, the nature of this pistol and ammunition. He pointed out that it did not come within the prohibition contained in the Fire Arms Act, 1937. He said, at p. 749 ([1939] 2 All E.R. at p. 376):

This pistol is designed so as to be outside the definition of these prohibited firearms. They are real firearms specially adapted to be used with blank cartridges and so designed that no ready-made bulleted ammunition can be used in them. Despite this, they are dangerous and capable of inflicting serious injuries at close quarters. To describe them as "safety" pistols is to mislead and to encourage ignorant users to regard them as toys, which they are not.

Then he dealt with the expert evidence that had been called, of a Major Pollard, with regard to this pistol, and he said, at p. 750 ([1939] 2 All E.R. at p. 378):

I think that Major Pollard's summary is well-founded, and I find that the pistol is very dangerous, that the accumulation of fouling in an inaccessible horizontal chamber means a cumulative increase of danger invisible to the owner, that it becomes more dangerous with wear, and that serious wounds can be caused with such a pistol, even when new and in perfect order. Major Pollard added that it was totally unsuitable for sale to schoolboys or young people; that no boy would be aware that the pistol was not functioning normally; and that instructions ought to be given that the fouling should be cleaned out after every five shots. He pointed out that there is no cleaning apparatus supplied with the pistol at all. Therefore, in my view, the pistol sold along with the ammunition did constitute a thing dangerous in itself in the hands of Alexander, a boy of twelve.

Those are the facts that ATKINSON, J., found with regard to the instrument that had caused the damage in that particular case; and dealing with the law which, of course, I accept, he states it as follows, at p. 746 ([1939] 2 All E.R. at p. 374):

The question when a seller of a chattel owes a duty of care to persons other than the purchaser has been repeatedly debated, and no one can pretend that the law is clearly settled. It is clear in the present case that there was no duty based on contract, but, in my opinion, the cases establish the following propositions: Firstly, if A places in the hands of B a chattel which belongs to a class of things dangerous in themselves in the hands of such a person as B, as distinguished from a chattel which is dangerous only because of some defect peculiar to the particular chattel handed over, a duty of care rests on A not only towards the recipient, but also towards all such persons as may reasonably be contemplated as likely to be endangered.

That being the law and those being the facts in the case cited to me, I respectfully accept the law, and the question is whether the facts in the present case are anything like the facts in that case, and I think they are not. I think that these two pieces of bamboo, with the piece of string attached, cannot possibly be put into the same category as the pistol and ammunition which were there described by ATKINSON, J. I find it quite impossible to say that this is a thing dangerous in itself in the hands of this particular purchaser. Of course, anything is capable, as I have already said, of becoming dangerous in certain circumstances in the hands of children, and this is certainly not a thing that a parent would allow his child to discharge all over the place in a confined space where there were a number of children together; but it might be a very suitable toy to use in a garden where there were only a few children about. I find it quite impossible to say that it is a thing dangerous in itself, even in the hands of a child of 10, so as to bring it within the class of article with which ATKINSON, J., was dealing in that case, and for these reasons, regretting as one does this lamentable accident, I find it quite impossible to say that it has been established that either of these defendants is responsible, in law, for what happened. Therefore, there will be judgment with costs for both defendants.

Judgment with costs for the defendants.

Solicitors: *G. B. Hemming & Son* (for the plaintiff); *William Charles Crocker* (for the education authority).

[Reported by R. BOSWELL, Esq., Barrister-at-Law.]

R. v. NATIONAL ARBITRATION TRIBUNAL, *Ex parte* KEABLE PRESS, LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.),
October 29, November 1, 1943.]

Trade and Trade Unions—Settlement of trade differences and disputes—Reference to National Arbitration Tribunal—“Trade dispute”—Conditions of Employment and National Arbitration Order, 1940 (S.R. & O., 1940, No. 1305).

A A member of a trade union had formerly been employed by a newspaper. The newspaper was for a time ordered to cease publication. When this ban on publication was lifted, the newspaper, according to the custom of the trade, applied to the union for suitable workmen. The union sent the former employee in question, but the newspaper refused to accept him in any position on their staff. The union insisted on his re-instatement and called a strike in consequence. It was contended that this was not a trade dispute within the meaning of the Conditions of Employment and National Arbitration Order, 1940, since it was a dispute between the employers and the union and not between the employers and their employees:—

B HELD: (i) in the circumstances the dispute was between the appellants and their workmen and the National Arbitration Tribunal had jurisdiction to entertain the reference.

C (ii) a party served with notice of motion is entitled to recover costs from an unsuccessful party who has served him with the notice.

[EDITORIAL NOTE. The suggestion here was that the union had gone off on a frolic of its own, but the Court of Appeal have rejected this view because the men adopted the dispute by coming out on strike.

D AS TO TRADE DISPUTE, see HALSBURY, Hailsham Edn., Vol. 32, pp. 526-529, paras. 826-828; and FOR CASES, see DIGEST, Vol. 43, pp. 120-122, Nos. 1237-1246.]

Cases referred to:

* (1) *National Association of Local Government Officers v. Bolton Corporation*, [1943]

A.C. 166; [1942] 2 All E.R. 425; Digest Supp.

(2) *de Haber v. Queen of Portugal*, *Wadsworth v. Queen of Spain* (1851), 17 Q.B. 171; 38 Digest 12, 63; 20 L.J.Q.B. 488; 18 L.T.O.S. 39.

E APPEAL by the applicants, the proprietors of the Daily Worker, from a judgment of the Divisional Court of the King's Bench Division (CHARLES. TUCKER and CROOM-JOHNSON, JJ.), dated Apr. 19, 1943. The facts are fully stated in the judgment of LORD GREENE, M.R.

D. H. Pritt, K.C., and Stephen Murray for the appellants.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), and Arthur Davies for the Minister of Labour and National Service.

F A. S. Diamond for the National Society of Operative Printers and Assistants.

LORD GREENE, M.R.: The principal question raised by this appeal relates to the jurisdiction of the National Arbitration Tribunal to entertain a dispute which has been referred to it by the Minister of Labour and National Service. The National Arbitration Tribunal does not appear before us; the Minister appears, and also the trade union concerned.

G It is not disputed that the particular dispute in question relates to a subject-matter of the kind which is referable to the tribunal. The controversy is as to the parties to the dispute. Are they employer and workmen or employer and trade union? The point of distinction appears from the definition of "trade dispute" in the Conditions of Employment and National Arbitration Order, 1940. That definition is as follows:

H "Trade dispute" means any dispute or difference between employers and workmen, or between workmen and workmen connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour of any person.

It is conceded that the present dispute is one connected with the employment or non-employment of a particular ex-employee of the appellants, he being a person who comes within that definition.

The dispute having been so referred, I should read the precise language of the reference signed on behalf of the Minister on Dec. 9, 1942. The first schedule sets out the parties to the trade dispute: the employers are the present appellants Keable Press Limited, and the workmen are described as follows:

Members of the National Society of Operative Printers and Assistants employed by the above-named employers as printing machine room operators in the production of the *Daily Worker*.

That Union there mentioned is conveniently referred to as "Natsopa." Then in the second schedule come particulars of the trade dispute as follows :

The dispute arises out of a claim made by the workmen mentioned in the first schedule that the Keable Press, Ltd., had no reasonable grounds for refusing to accept Mr. Howard in any capacity as part of the staff offered by the Society, and that he should accordingly be reinstated in his former position as machine-room overseer of the *Daily Worker*.

The merits or demerits of Howard have nothing to do with this case, and nothing that has happened in this case or is decided in this case involves the slightest reflection or criticism upon him. It is quite irrelevant. He had been employed by the appellants before the *Daily Worker* was suppressed, and, when the ban was removed and the appellants contemplated production again, they looked round for a staff, and they dealt with the trade union, which acts apparently as a sort of employment agency for its members.

I do not propose to go into all the facts of this case, which have been analysed with great care by counsel for the appellant. It is, I think, quite sufficient to call attention to one or two points which appear to me to be quite conclusive. Counsel for the appellant says that, when the facts are looked at, no dispute between any workmen employed by his clients will be discovered; all that will be discovered will be a dispute started and carried on by the union, as he put it in answer to a question of mine, acting on a frolic of its own without reference to the wishes or the interests of his clients' employees. Of course, it is possible to imagine a case where a trade union, acting quite unconstitutionally according to its constitution, purports to start some dispute which it has no power conferred upon it by its members to start and then endeavours to say that that is a dispute between the men and the employer. Such a case might very well be imagined, although I suppose it is not very likely to happen in practice; but such cases are far removed from the present case. Not only is it sworn here that the union, in insisting on the reinstatement of Howard, was acting on behalf of or with the approval of its members, but let me add this fact, that, when the day came when the production of the paper was going to begin and the employers had refused to reinstate Howard, the union called a strike. That strike, counsel for the appellants contends—I have no reason to doubt that he asserts correctly, but there is no reason to go into that point—was not only against the law of the land but was unconstitutional having regard to the constitution of the union. So be it. We are not concerned with the illegality of the strike in this case; that is not the point. The point is: Is there a dispute between the workmen and the employer? What better proof of the existence of a dispute in relation to the reinstatement of Howard one can have than the fact that the men come out on strike because he has not been reinstated I really do not know. Let me for the moment assume it to be the case that none of the workmen belonging to this union in the employment of the appellants at the relevant dates took the slightest interest in Howard or cared the least little bit about his reinstatement—let me assume that; nevertheless, the union, acting in what it conceives to be the best interests of all its members and desiring to establish a principle, proceeds to insist on the reinstatement of Howard, and when that is refused, they call the men out on strike and the men obey. Now, what does that mean? It means surely that the men are recognising and adopting as their own the action of the union taken on their behalf and in their name and are obeying the order of the union to back them up and support them in this dispute; and, even if the matter before the strike is to be regarded as a pure piece of intermeddling by the union without reference to the wishes and interests of the men, as soon as the men back up the union by supporting the union's demands for this reinstatement, in those circumstances I frankly cannot see how it can be said for a moment that no dispute existed. There is no need to go into the subsequent history of this case because the dispute has not been settled and long after those events the union referred the matter to the Minister under the Order and he ultimately referred it to the National Arbitration Tribunal.

It appears to me that, on the facts of the present case, it is indisputable that

the dispute referred to in the second schedule to the reference is accurately described as "a claim made by the workmen" and so forth and would not be accurately described as a claim made merely by the union alone. That being so, there is unquestionably jurisdiction in the National Arbitration Tribunal to entertain this reference, and this appeal fails.

- There is one minor point which is taken by counsel for the appellants, and it arises in this way. When the application for leave to serve the notice of motion asking for an order of prohibition was made, counsel making the application wished to elicit from the court that granted leave an indication of the persons who should be parties to the proceedings or who should be given notice of them, and counsel asked the court whether they would direct him to give notice to the union or merely to tell them informally of the proceedings, because the applicants did not want to recognise the union in connection with the dispute. Counsel then said this: "I think it is necessary to give them notice and I think it would be a sensible thing to do, but I do not want to be ordered to do it." Then we are told there was some further argument, as a result of which counsel was directed to give notice to the union. Having obtained that direction, the applicants proceeded to issue their notice of motion. There is no mystery about a notice of motion of this kind under the present practice. It is a process just like any other process. It is an originating process, that is to say, not in an action, but it can only be issued by leave, and there are respondents to it just like any other process. The notice of motion is directed to the National Arbitration Tribunal, to the Ministry of Labour and National Service, and to the union concerned. That is a perfectly clear-cut case: those three parties were parties to this particular proceeding. Counsel for the appellants endeavoured to suggest that the union were here in some sort of halfway capacity—not as a party, not as a respondent to the motion, but somebody who were given a chance of coming or not coming as they liked, who were given a friendly intimation and were given notice that an application was being made by the applicants on this motion. In my opinion, there is no justification for that argument. They were given notice in the ordinary way that persons are given notice who are made respondents to a motion. In my view, under the present practice there is no sort of halfway house between being a party and not being a party to a motion. The person who has obtained leave to serve the notice of motion must bring the proper parties before the court. If he does not he may find that the application may have to be adjourned and he will be directed to add some further party and have that party there or at any rate give him an opportunity of coming. It is, no doubt, convenient that the views of the court should be given at the time that leave is applied for, but it is not to be supposed, when the court directs certain people to be served, that that takes away from the person applying for the order the responsibility of bringing the proper parties before the court. It is his responsibility, and he has carried out his responsibility in this case by making this union a party by his notice of motion. Incidentally, it is to be observed that in the notice of motion the applicants themselves ask that the costs of and occasioned by this motion be paid by such of the persons directed to be served with this notice of motion as the court thinks fit. Counsel for the appellants suggests that those words do not apply to the union although they are made parties. With all respect to him, I think that is a false distinction. Under the present practice, serving a notice of motion on a person means making him a party to the motion and once he is made a party he is a party for all purposes. This is quite different from merely giving an intimation that a motion is going to be heard. In my opinion, the order of the divisional court directing the appellants to pay the costs of the motion was perfectly correct.
- Having regard to the view I take of the situation, I need scarcely add that R.S.C., Ord. 59, r. 7, has no application to the facts of this case. That rule provides that on the hearing of a motion any person who desires to be heard in opposition—putting it shortly—can with the leave of the court or judge be heard notwithstanding that he has not been served with the notice of motion. That does not apply to the present case because unquestionably the union were served with the notice, and, therefore, the question whether, having regard to the concluding words of that rule, the court has power to award costs to a person heard by virtue of its provisions, does not arise. The appeal, therefore,

on that point also must fail.

MACKINNON, L.J. : I agree, and I do not think I need add anything.

DU PARCQ, L.J. : I agree, and there is very little that I wish to add. I confess I have been somewhat mystified throughout the greater part of the argument of counsel for the appellants and have wondered whether I understood the word "dispute" in the same sense as he did. It seems to me that the appellants' argument has very little relation to the realities of the situation here. Generally speaking, as counsel himself insisted, if men who are members of a trade union are told by their trade union that they are not to work but are to strike, they are likely to obey that injunction. Sometimes they will refuse, as some of them did in this case, because they think the injunction is illegal as being either against the law of the land or contrary to the rules of the trade union itself, but, as a general rule, they will do what the trade union advises them to do. The situation here was this. On Sept. 6, some of the appellants' workmen refused to work for their employer ; they not only refused to work but, in so doing, on that particular day they broke their contracts with their employer. It seems to me there is nothing in the evidence to make one doubt that the inference may properly be drawn, with regard to the subsequent period, that there was a real danger, if the employers did not fall in with the views of the trade union and re-engage the man whom they had dismissed, there would be another strike, and then again it was likely that the men would follow the advice of the trade union. Was there in those circumstances a dispute or difference, within the meaning of the definition in the rules, between some of the workmen in the employment of the appellants and themselves ? It seems to me too plain for argument that there was. That there was a dispute nobody can doubt. The first people who wanted this matter referred to the tribunal were the appellants. It was obviously in their interest that the matter should be disposed of by some method of conciliation or by judicial decision ; they were only anxious not to call it a dispute between themselves and their workmen for reasons which I can understand. The union also wanted the dispute settled, and I am very much disposed to think that all the workmen employed in this trade by the appellants wanted the dispute settled. That there was a dispute, as I have said, seems to me to be quite beyond doubt, and I am at a loss to understand an argument which says that the workmen were not parties to it, because, if persons are really in agreement in their hearts and minds, there cannot be within the meaning of this definition a "difference" between them. I cannot believe that such an argument would ever be thought worthy of much consideration if there were an arbitration clause in a contract and a stay were applied for on the ground that there was no dispute or difference between the parties. If a difference arose under a contract containing an arbitration clause, in the sense that one party, an employee, was refusing to carry out the terms of his contract with his employer, and it were said, "Oh, but he really would like to keep his contract : he cannot do so because somebody else is preventing him, but he really sympathises entirely with the employer and in his heart he would like the employer to win his case," and, if the judge were then asked to stay proceedings on the ground that there was no dispute, I think that such a pretext for suggesting that there was no dispute would be regarded as almost laughable. In this case, it seems to me beyond doubt, on the facts before us, that there was jurisdiction in the tribunal and that there was a dispute.

I wish to add this with reference to a matter to which I referred during the argument. I am not going to express any opinion about it, but I do suggest that, if, in the future cases of this kind arise, it is a matter which will deserve very careful consideration not only from the point of view of the parties, but also from the point of view of the tribunal itself. I am referring to what LORD WRIGHT said in *National Association of Local Government Officers v. Bolton Corporation* (1), at p. 189 ([1942] 2 All E.R., at p. 435) :

Prohibition is a remedy at least generally intended to prevent an excess of jurisdiction, not the risk of its being erroneously exercised, particularly where considerations of fact may be material.

In some cases there may be a doubt whether there is a dispute between employer and workmen. If the matter came before the tribunal and it became clear that there was no dispute, then I suppose everybody would go away happy

- and that would be an end of the matter. If the facts are in doubt and prohibition is applied for before the tribunal has begun its investigation, I am not at all sure that it is the right view that the King's Bench Division, or other Division of the High Court, should go into the question of fact with a view to granting an order for prohibition if the court is satisfied that there is no dispute. I am not at all sure that the tribunal would be right in saying, as soon as the question is raised whether there is in fact a dispute: "We are not going to decide that, you must go to the courts." It is, of course, the National Arbitration Tribunal and not the Minister against whom the order is asked here. I will refer, without reading it, to the passage in *SHORT & MELLOR, CROWN OFFICE PRACTICE*, 2nd Edn., pp. 263-265. I may summarise it as follows. Normally an applicant for prohibition is entitled to wait until something is done by the inferior court which is an excess of jurisdiction. Cases in which application is properly made to the High Court before the inferior tribunal has begun the hearing seem to be the exception rather than the rule. The matter was discussed in *de Haber v. Queen of Portugal, Wadsworth v. Queen of Spain* (2). Those were cases in which proceedings were taken against the Queen of Portugal and the Queen of Spain, and were obviously very unusual cases. There the application was properly made before the case had been heard in the inferior court. But, normally, it is never too late to apply for prohibition "so long as there is something to operate upon." It is always possible to wait until the inferior court has done something which is in itself an excess of jurisdiction. These, I think, are the considerations which LORD WRIGHT had in mind in the *Bolton* case (1). I am expressing no concluded view on the point, particularly as LORD WRIGHT expressed no concluded view about it in that case. I only mention it because it may have to be borne in mind in later cases.

- I agree with the judgment of my Lord in all respects.

Appeal dismissed with costs.

Solicitors : *William Sedley & Co.* (for the appellants) ; *Solicitor to the Ministry of Labour and National Service* (for the Minister of Labour and National Service) ; *Shaen, Roscoe & Co.* (for the National Society of Operative Printers and Assistants).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

B.A. COLLIERIES, LTD. v. LONDON AND NORTH EASTERN RY. CO.

- F [CHANCERY DIVISION (Morton, J.), July 30, 1943.]

Mines—Coal mine—Seam passing under railway—Notice of intention to work—Counter-notice—Assessment of compensation—Allowance for damage to railway if worked—Discount—Mines (Working Facilities and Support) Act, 1923 (c. 20), s. 15.

- The plaintiff company was the owner of a coal mine and part of the coal lay under certain works of the defendant railway company. The plaintiffs gave notice of their intention to work this coal, but the defendant company by a counter-notice given under the Mines (Working Facilities and Support) Act, 1923, s. 15 sterilised the coal, that is, for the protection of railway, the coal was not to be worked but compensation was to be paid. On this two points arose (a) whether the compensation was to be reduced by taking into account the fact that, if the coal had been worked, damages would have been payable to the railway company for injury to the railway, and (b) whether the compensation was assessable at once, and, if so, whether, considering that the coal owner was getting an immediate payment in place of a future profit, a proper rate of discount ought to be applied :—

HELD : (i) the compensation should be reduced by the estimated amount that would be payable for damage to the railway if the coal had been worked.

(ii) the compensation should be assessed at once and a proper rate of discount applied.

[EDITORIAL NOTE.] The Mines (Working Facilities and Support) Act, 1923, s. 15, substituted new provisions for the Railways Clauses Consolidated Act, 1845, ss. 78-85. These provide for the sterling of coal under railway undertakings and the question here discussed is the assessment of compensation to the coal owner where the railway insists on the coal being left unworked for the protection of its works.

AS TO COMPENSATION IN CASE OF RAILWAYS, see HALSBURY, Hailsham Edn., Vol. 22, pp. 649, 650, para. 1399; and FOR CASES, see DIGEST, Vol. 11, pp. 156-158, Nos. 371-381.]

Cases referred to :

- (1) *Howley Park Coal and Cannel Co. v. London and North Western Ry. Co.*, [1913] A.C. 11; 11 Digest 153, 353; 82 L.J.Ch. 76; 107 L.T. 625.
- * (2) *Eden v. North Eastern Ry.*, [1907] A.C. 400; 11 Digest 157, 374; 76 L.J.K.B. 940; 97 L.T. 254.
- (3) *Smith v. Great Western Ry. Co.* (1877), 3 App. Cas. 165; 11 Digest 156, 368; 47 L.J.Ch. 97; 37 L.T. 645.
- * (4) *Bwlfa and Merthyr Dare Steam Collieries (1891), Ltd. v. Pontypridd Waterworks Co.*, [1903] A.C. 426; 11 Digest 129, 186; 72 L.J.K.B. 805; 89 L.T. 280.
- (5) *Richard v. Great Western Ry. Co.*, [1905] 1 K.B. 68; 11 Digest 156, 367; 74 L.J.K.B. 9; 91 L.T. 724.

SUMMONS by the colliery company asking certain questions concerning the construction of the Mines (Working Facilities and Support) Act, 1923, s. 15. The facts and the relevant sections are fully set out in the judgment.

C. Harman, K.C., and *Wilfrid M. Hunt* for the colliery company.

David Bowen, K.C., and *J. B. Herbert* for the railway company.

MORTON, J. : The plaintiffs are mine owners within the definition in the Mines (Working Facilities and Support) Act, 1923, s. 85D. The questions asked by the summons are as follows :

(1) Whether upon the true construction of the Mines (Working Facilities and Support) Act, 1923, s. 15, and in particular sects. 78 and 78A included in sect. 15 aforesaid in assessing the compensation payable by the defendants to the plaintiffs under the counter-notice dated Dec. 30, 1940, given by the defendants to the plaintiffs any account ought to be taken of the possible contribution for which the plaintiffs might in the future have become liable under sect. 79A if the coal covered by such counter-notice had been actually worked and damage to the railway and works of the defendants had been caused by such working.

(2) Whether on the true construction of sect. 15 of the said Act the aforesaid compensation ought to be assessed and paid now or whether the assessment and payment thereof ought to be deferred until such time or times as the coal covered by the said counter-notice would in the ordinary course have been worked or for some and what other period and if the said assessment ought to be made now whether or not in assessing the same a proper rate of discount ought to be applied to the estimated figures of the plaintiff's loss per ton of coal by reason of such coal being sterilised.

I wish to make it quite clear at the outset that I am not determining any question as to the compensation payable to the royalty owner. The Coal Commission are, I am told, aware of these proceedings and they have intimated that they do not wish to take part in them. I am dealing only with the compensation payable to a mine owner as defined in sect. 85D of the Act. I am further told by the parties that there have been certain agreements made as to the figures on the hypothesis that my answers to the questions asked are in a certain form. Therefore, all the parties desire to have determined by the court is the question of principle which I have already stated.

As regards the facts they can be stated very shortly. The plaintiffs are mine owners in respect of a colliery called the Gedling Colliery, and they work a seam called the Low Hazel Seam. Towards the end of 1939 the plaintiffs were approaching by their workings a tunnel called the Mapperley Tunnel. On Jan. 24, 1940, the plaintiffs gave to the defendants a notice in the following terms :

We hereby give notice, under and by virtue of the Mines (Working Facilities and Support) Act, 1923, Pt. 11, s. 78 (1) that we intend, at the expiration of thirty days from the service of this notice, to work the coal, of which we are the lessees in part and owners in part, in the seam known as the Low Hazel Seam at Gedling Colliery, lying in the area of protection comprising your railway and works shown on the plan hereto annexed, situate in the parishes of Arnold and Carlton in the county of Nottingham.

There is no need, I think, for me to refer in detail to the plan. The defendants, no doubt after giving the matter due thought, served a counter-notice on Dec.

30, 1940, in respect of part of the railway and works which were comprised in the notice. The coal which was sterilised under the Act by the counter-notice is shown on the accompanying plan and is edged green.

I must now refer to certain provisions of the Mines (Working Facilities and Support) Act, 1923. Sect. 15 provides as follows :

A The Railways Clauses Consolidation Act, 1845, as incorporated in any Act, order, or other instrument relating to a railway company passed or made after the passing of this Act, shall, except as otherwise expressly provided in that Act, order, or instrument, have effect as if for sects. 78 to 85 thereof, inclusive, the following provisions were substituted, and as if the first, second, and third Schedules to this Act were inserted in that Act as the first, second and third Schedules thereto.

By that section there is substituted a new code for the code which appears in the Railways Clauses Consolidation Act, 1845. Sect. 78 (1) is as follows :

B If the mine owner of minerals lying under an area of protection as hereinafter defined is desirous of working any such minerals, he shall give to the company and also to the royalty owner (if any) notice of his intention so to do at least thirty days before the commencement of the working and on the receipt of such notice the company and the royalty owner respectively may cause the minerals to be inspected by any person appointed for the purpose by the company or royalty owner as the case may be.

C The area of protection referred to in that subsection is defined in subsect. 5 of the same section, which is as follows :

The area of protection in relation to any seam of minerals shall be the area comprising any railway or works of the company and such a lateral distance therefrom, on all or both sides thereof, as is equal at each point along the railway to one-half of the depth of the seam at that point or forty yards, whichever be the greater ; and, when the said lateral distance exceeds forty yards, the area of protection shall be divided into two areas.

D Subsect. (2) is in the following terms :

E If it appears to the company that the working of any of the minerals to which such notice relates will be likely to damage the railway or works or any part thereof, the company may, at any time after the receipt of such notice, give a counter-notice to the mine owner requiring him to leave unworked all or any part of such minerals, and the counter-notice shall specify the minerals (hereinafter referred to as the specified minerals) so required to be left unworked and the particular portion of the railway or works (hereinafter referred to as the protected works) for the support of which the specified minerals are required to be unworked.

The result of the counter-notice which has been served in the present case is, therefore, that the minerals within the green verge line on the plan annexed to the counter-notice are to be left unworked. Subsect. (4) is in the following terms :

F Where any such counter-notice has been served on the mine owner, the specified minerals shall not be worked or got after the service of the counter-notice, and the company shall pay compensation to the mine owner and the royalty owner (if any) for the loss caused by the specified minerals being left unworked.

The words " for the loss caused by the specified minerals being left unworked " are of considerable importance in the present case.

Section 78A (1) provides as follows :

G The compensation payable by the company to the mine owner and the royalty owner respectively for the loss caused by the specified minerals being left unworked shall, in default of agreement, be determined by arbitration : Provided that so far as such compensation is payable in respect of the value of specified minerals (i) the compensation payable to the mine owner and to the royalty owner shall be separately assessed ; (ii) the compensation payable to the mine owner shall be a sum for each ton of the specified minerals, the rate per ton in the case of minerals lying under the outer area of protection being one-third of the rate which is or would be awarded in the case of minerals lying under the inner area of protection.

H It is quite manifest that the difference between the rate which is to be paid in the case of minerals lying under the outer area of protection and the rate which is to be paid in the case of minerals lying under the inner area of protection is a purely arbitrary difference. As a matter of history, I understand this is the result of a compromise which was arrived at between the railway companies, on the one hand, and the mine owners, on the other hand, after the decision of the House of Lords in the well-known *Howley Park* case (1). But it does not give rise to this difficulty in the present case. The mine owner

is to receive compensation for the loss caused by the specified minerals being left unworked. *Prima facie*, and in the absence of the provision which I have just read, one would have thought that in the case of all the specified minerals you would have ascertained what had been the loss caused to the mine owner by reason of the counter-notice. But clearly that cannot be so. I think one must further ascertain, disregarding this proviso about the outer and inner areas, what is the loss caused to the mine owner, and then one must bear in mind the fact, when you have ascertained that, that you must award, not compensation at that rate in the case of the outer area, but compensation at one-third of that rate, that, as I have said, being a purely arbitrary provision in the Act. A

Para. (iii) deals with the compensation payable to the royalty owner, with which I am not concerned, but I think I should read it :

The compensation payable to the royalty owner shall be based on the amount which would have been received from time to time by way of royalty in respect of the specified minerals if they had been worked out in the ordinary course, and the royalties payable had been (a) in the case of such of the specified minerals as lie under the inner area of protection, the same as those reserved by and payable under the lease comprising the minerals and subsisting at the date of the counter-notice; and (b) in the case of such of the specified minerals as lie under the outer area of protection, one-third of the royalties so reserved and payable with the addition to such one-third of one penny per ton . . . B

Para. (iv) provides as follows :

. . . in every case the arbitrator shall state in his award the tonnage of the specified minerals on which his award is based. C

So far the proviso to subsect. (1), which I have just read, is dealing with the compensation, so far as it is payable, in respect of the value of specified minerals. Subsect. (2) passes to another heading of compensation, and is as follows : D

The mine owner shall also be entitled to be paid by the company the amount of any increase in the cost of working any part of his minerals (other than the specified minerals) which may have been caused by the failure of the company to give the counter-notice within such a reasonable time as would have enabled the mine owner to avoid such increase in cost, and, in default of agreement, the amount so payable by the company shall be determined by arbitration.

That is a matter apart from the question of the loss caused by the specified minerals being left unworked, the value of the specified minerals, with which I have to deal in this case. E

Sect. 79 (1) is in the following terms :

If within thirty days from the service by a mine owner on the company of a notice of intention to work any minerals no counter-notice is served by the company, the mine owner may, after the expiration of those thirty days, and until a counter-notice is served, work any minerals to which the notice relates, so, nevertheless, that the same be done in the manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such minerals in the district where the same shall be situated. Where a counter-notice is served, whether before or after the expiration of the said thirty days, and the counter-notice does not require the mine owner to leave unworked the whole of the minerals to which the notice relates, the foregoing provisions shall apply to any minerals to which the notice relates which are specified minerals in like manner as if no such counter-notice had been served. F

The result is that, if the counter-notice is not served, the mine owner is left free to work the minerals after the expiration of the thirty days period specified and he can continue working those minerals unless and until a counter-notice is served. I think subsect. (2) is immaterial. G

Section 79A (1) on which the controversy on the first question in the summons turns, is as follows :

If a mine owner works any minerals lying under any part of the area of protection in the manner authorised by this Act, he shall nevertheless become liable on demand by the company (subject as hereinafter provided) to contribute towards the expenses properly incurred, or to be incurred, by the company from time to time thereafter in making good any damage caused by such working to the railway or works of the company (not being protected works comprised in any counter-notice relating to such area of protection) the appropriate percentage (if any) of those expenses, the appropriate percentage being such as is specified in the First Schedule to this Act according to the depth of the minerals being so worked. H

It is to be observed that the liability imposed on the mine owner is a liability "to contribute towards the expenses properly incurred, or to be incurred, by the company from time to time thereafter" in the manner specified in the section.

Subsect. (2) states a maximum which the liability of the mine owner is not to exceed and it is in the following terms :

A The liability of a mine owner under this section in respect of any part of the railway or work on which such expenditure has been incurred shall not exceed an aggregate sum equivalent to sixpence for each ton of the commercially workable minerals, gotten or ungotten, in such part of any seams as lies under the area ascertained as respects the several seams in accordance with the rules contained in the Second Schedule to this Act, being seams which have been or are being worked under such area as aforesaid : Provided that, in ascertaining such aggregate sum as aforesaid, minerals gotten more than six years before the date on which a contribution shall have been demanded by the company under this section shall not be reckoned.

B Subsect. (3) is as follows :

(i) Any mine owner making a contribution under this section, who is a lessee, shall be entitled to deduct from any royalties then or thereafter becoming due from him to the royalty owner under the lease, one-third part of the amount which he has so contributed as aforesaid, subject, however, to this limitation : that if the royalty payable by the mine owner under his lease is at the rate of less than sixpence per ton, the amount C deducted shall not exceed the amount produced by multiplying one-third of such rate per ton by the tonnage of the minerals with reference to the aggregate amount of which the maximum liability of the mine owner is to be so calculated as aforesaid ; and, where the mine owner is entitled to make such a deduction, the sum reserved by and payable under the lease shall be deemed to be the net amount arrived at after making the deduction : Provided that no such deduction shall be allowed when the liability of the mine owner to the company is a liability arising out of an arrangement D between the mine owner and the company with respect to the working of minerals under or near the railway or works.

Subsect. (4) imposes a further limitation on the liability of a mine owner and it is in the following terms :

The liability of a mine owner under this section shall be subject to the following further limitation as respects damage done by workings in any single mine, that is to say, that when the aggregate of the sums paid by the mine owner in satisfaction of E such liability amounts to a sum equivalent to sixpence for each ton of commercially workable minerals, gotten or ungotten, in such part of any seams as lies within the mine and under an area extending laterally on both sides of the railway or works to a distance ascertained in accordance with r. 1 of the said Second Schedule and extending longitudinally to a distance co-extensive with the portion of the railway lying over or adjacent to the mine, being seams which have been or are being worked under such area as F aforesaid, the mine owner shall not be liable to make any further contribution under this section towards the expenses of making good any damage caused to any part of the railway or works by the working of such seams as aforesaid in that mine. For the purposes of this provision, all the minerals which the mine owner is entitled to work, and which have been, or would in the ordinary course of events and in accordance with good mining practice be, worked from the same shafts or adits shall be deemed to be a single mine. Where the liability of a mine owner under subsect (2) of this section is reduced by the operation of this subsection, the right of the mine owner under subsect. (3) G thereof to make deductions from royalties shall be proportionately reduced.

G The result is that a stage may be reached at which the mine owner is not liable to make any further contribution under the section. Subsect. (5) is not, I think, material for the present purpose. Subsect. (6) provides :

If any dispute arises as to the amount of the expenses towards which a mine owner is liable to contribute under this section, or the amount of his contribution, or the amount to be deducted as between a mine owner and a royalty owner, it shall be settled by arbitration, and, where any such arbitration between a company and a mine owner H is to be held, the royalty owner (if any) shall be entitled to have notice of the intended arbitration, and to appear and be heard at the arbitration proceedings.

Sect. 79B is in the following terms :

(1) When and so far as reasonable and practicable, the company shall give notice to the mine owner and the royalty owner (if any) affected specifying particulars of : (i) the railway or works to which damage has been caused or to which damage is apprehended from the working of any minerals under the area of protection sufficient to enable the same to be identified ; (ii) the nature of the damage or apprehended damage ; and (iii) the nature of the works intended to be carried out for the purpose of making

good or preventing the damage. (2) The company shall keep separate accounts differentiating the cost of the ordinary maintenance of the railway or works from the cost of making good any damage caused to the railway or works by the working of any minerals under the area of protection, and such accounts shall, at all reasonable times, be open for inspection by or on behalf of a mine owner working minerals under or near to such railway or works and the royalty owner (if any) of such minerals.

That section obviously imposes upon the railway company certain duties which may involve a certain amount of trouble and expense. Sect. 81 provides for the payment by the company to the mine owner of a percentage of certain additional expense in cases where the counter-notice has been given by the company to the mine owner, and in subsect. (3) there is a provision for referring any question of dispute on this subject to arbitration. I think the only other section in this group of sections which is or may be material is sect. 85A, which gives power to the mine owner, the royalty owner and the company or any two of them to enter into an agreement altering or extending or varying their respective rights under the provisions of the Act with a proviso which I need not read.

Apart from authority, I should have thought that, as the mine owner is to get compensation for the loss caused by the specified minerals being left unworked, the sum for each ton which is mentioned in the second paragraph of the proviso to sect. 78A should be the price which the mine owner would have got for the coal if he had worked it less the expenses which he had incurred in working it. In saying that I have not overlooked the qualification which I have already mentioned as to the inner area and, in order to save unnecessary repetition, I shall say that I have borne that in mind throughout, that in the case of the outer area the sum per ton when ascertained must be divided by one-third.

There are two further points in regard to the view which I should have formed apart from authority. First of all, it seems to me that in considering the loss caused the court has to look, and look only, at the particular minerals which are left unworked as a result of the counter-notice. I think that is made quite clear by the words of sect. 78A, "compensation for the loss caused by the specified minerals being left unworked." The second point is that, in arriving at the loss caused, I think it is necessary to imagine the mine owner working out the specified minerals. That must plainly be a hypothetical working out, because the minerals have been sterilised by the serving of the counter-notice. But I think one should consider that hypothetical working out on the footing that no counter-notice has been served and that the mine owner proceeds to work the specified minerals as he is permitted to do by sect. 79. I think that view is supported by the observations of the House of Lords in *Eden v. North Eastern Railway* (2). At p. 407 LORD MACNAGHTEN, quoting from LORD PENZANCE in the case of *Smith v. Great Western Railway Co.* (3), says this:

The full value of the coal, and nothing less than the full value of the coal, deducting of course, the cost of getting it, must be the measure of the compensation which would be due to the lessee.

Again in the same case LORD ATKINSON, at p. 412 says:

If, as in this case, there be no physical difficulty in the way which would render the working, mining, and raising of them not reasonably practicable, then a fair test of that value would be the price the minerals would fetch as and when won and raised, less the cost of working the mine, winning and raising them.

It is said by counsel for the plaintiffs that, in ascertaining what is the expense of getting the specified minerals, the court should disregard the provisions of sect. 79A and the arbitrator should treat these provisions as if they did not exist for the purposes of his award. It seems to me that that would be a surprising conclusion. I think that the liability in respect of authorised workings which is set out in sect. 79A is one element in the cost of working the specified minerals which happen to be under or near a railway. I think it is just as much an element in the cost of working as wages which are paid to the miners who get the coal. No doubt, as the whole process of working is a hypothetical one, the arbitrator must make estimates of one kind or another. He has got to estimate, for example, what the cost of wages is likely to be. Similarly I see no reason why he should not have also to estimate what is the contribution which the mine owner would be likely to have to make to the expenses under sect. 79A if the specified minerals falling within this green verge line were worked out. I do not say that the calculation would be an easy one, but I can see no reason

why that element which I have just mentioned should be left out of account altogether.

There are, however, several reasons put forward by counsel for the plaintiffs why this element should not be taken into account at all. Before I come to them, however, it seems to me that the arbitrator is bound in making his award to assume, contrary to the fact, that there is working and he has to assume, I should have thought, that there is working in precisely the same way as there would have been working had there been no counter-notice served. Of course, if the mine owners did not choose to work the mines, they would have made no profit, but, if there is working, it seems to me sect. 79A must operate.

It is said by counsel for the plaintiffs that sects. 78 and 78A are one code which is to apply where the counter-notice is served and sect. 79 and the following sections are another code which is to apply where the counter-notice is not served and that those two bundles of sections cannot be married. It seems to me that that taken by itself is quite true. Sects. 78 and 78A do deal with the one case and sects. 79 and the following sections do deal with the other case, but, in order to arrive at the compensation, it seems to me necessary to assume that no counter-notice has been served and that the mines have been worked in order to see what loss has been caused to the mine owner by the fact that the counter-notice was in fact served.

Then counsel for the plaintiffs points out quite truly that the figure to be awarded cannot be to the full extent a compensation figure because there is the arbitrary difference between the inner area and the outer area. That, again, is quite true, but it seems to me that I must apply some test in deciding what the rate per ton is to be and that the only test that I can apply is the test which I have already endeavoured to state, a test which I think is in accordance with the rule of the House of Lords in *Eden's* case (2), although they were in fact dealing with a different Act. I think that, having applied that test, one must do then an arbitrary division sum in the case of the outer area.

Then it is said by counsel for the plaintiffs that it is irrelevant for the purpose of assessing the compensation that there happens to be a railway over the specified minerals. I cannot accept that contention. The question is what loss has been caused by the mine owners being prevented from working these specified minerals which happen to be under a railway, and I do not see why the arbitrator should disregard that fact in assessing the loss caused to the mine owner in respect of these specified minerals. Counsel admits that the damage may never happen, and that, if the arbitrator is going to embark upon this inquiry, he will have to determine the amount of the damage which will be caused to the railway company's works, and the amount of the contribution which would have to be made by the mine owner. It is said that that is imposing upon the arbitrator under sects. 78 and 78A a task which has only to be discharged if there is an actual determination by the arbitrator under sect. 79 and the following sections.

I am disposed to agree that it may be necessary for the arbitrator in the present case to enter into these matters and form some judgment upon them. In saying that I am not seeking to impose any sort of limitation upon the arbitrator in his task, but it seems to me that the mine owners would have to establish their loss of profit, and it would be open to the railway company to establish that, if the specified minerals were worked, there would be damage to their works and a contribution would have to be paid. It seems to me that the arbitrator would have to take those matters into account in arriving at a proper estimate of the compensation.

It may be that he might take into account the possible contribution under sect. 79A, and having taken it into account he might think that it was a matter of very small moment, and that a very small sum should be allowed in respect of it. That all depends upon the circumstances, I imagine, but that seems to me to afford no reason why he should not take it into account, and that is what I have to determine in the present case.

Another point which was stressed by counsel for the plaintiffs was this. They said that, if the liability under sect. 79A was to be taken into account, it would be impossible for the mine owner to take advantage of subsect. (3) of that section and to deduct the one-third of the contribution from the payments made by way of royalty to the royalty owner. This they said could not be done,

because there was no actual working and no actual contribution, and, therefore, the deductions could not be made as against the royalty owner. Here again, without imposing any shackles on the arbitrator, I think the answer is reasonably clear. The arbitrator would no doubt take into account in assessing what estimate should be placed upon the liability of the mine owner under sect. 79A the fact that one-third of that liability would be passed on to the royalty owner by deduction; and, therefore, it seems to me, assuming that the deduction would otherwise have been sixpence, the arbitrator might well conclude that the deduction ought to be fourpence, but I can see nothing unfair to the mine owner in that. A

It was pointed out that sect. 79B imposes certain obligations upon the railway company, and that they will be saved all those obligations if, as in the present case, a counter-notice has been served. They will be saved a certain amount of trouble and expense. That may be very true, but I have to deal with the Act as I find it, and I am not dealing with any compensation payable to the railway company, but with compensation payable to the mine owner. From that aspect of the matter it seems to me to be irrelevant to consider that the railway company might be saved a certain amount of trouble and expense. What I am considering is what the mine owner has suffered and not what the railway company have gained. B

Counsel draws attention to sect. 79A (4), that is to say, the limitation of liability section, and they say that in that subsection you might arrive at a point where no sum whatever was payable to the mine owners by reason of their having worked some other seam, and it is not in accordance with the Act to put that task upon the arbitrator under sect. 78 and sect. 78A. I think the answer is that that again is a matter which no doubt the arbitrator would take into account, and, if he has to take into account sect. 79A, he must, of course, take it into account as a whole, and that is one of the matters which would operate. The result is that, having carefully considered the arguments put forward to the contrary, I have arrived at the conclusion that question (1) of the summons ought to be answered in the affirmative, and that an account ought to be taken of the matter there mentioned. C

I pass to question (2) of the summons, and upon this question I have arrived at a conclusion in favour of the plaintiffs. I am told that there is no authority one way or the other upon this matter, and that it is a novel point; but the wording of sect. 78 (4) is: "The company shall pay compensation," and there is no indication there that the payment of compensation is to be delayed, and I think that the natural meaning of the words would be that compensation is to be paid once and for all. I think that any other interpretation of the words would give rise to difficulty. D

For example, if that is not the true meaning of the words, one might have to have a series of arbitrations every two or three years during what is of course a hypothetical period, during which the mines might have been worked out. That would, I think, have been a very complicated matter, and I think sect. 78A contemplates an immediate arbitration. E

It is to be observed that para. (iii) of the proviso shows that in the case of the royalty owner there is to be one compensation based upon the sums which he would have received in the future, and it is to be observed, further, that the arbitrator has to state in his award the tonnage of the specified minerals upon which his award is based. Having regard to the definition of "the specified minerals" in sect. 78 (2), I do not think that this specifying in his award has anything to do with specifying the minerals worked out from time to time. That assists me in coming to the conclusion that the compensation is to be assessed once and for all. F

Further, in *Bullfa & Merthyr Dare Steam Collieries (1891), Ltd. v. Pontypridd Waterworks Co.* (4), a decision under the Waterworks Clauses Act, 1847, LORD ROBERTSON said this on p. 432: G

I do not mean that the proper course in awarding compensation is to wait for the expiry of the period required for working out the coal. On the contrary, it is natural that the compensation should be assessed once for all and by estimate. Although that was a provision of a different Act. I think the observations of LORD ROBERTSON apply equally in the present case, and they fortify me in the conclusion at which I should have arrived on the wording of the Act itself H

which is now before me.

A I now come to the second part of question (2), and I have to consider whether in assessing the compensation a proper rate of discount ought to be applied to the estimated figure which the plaintiffs have lost per ton of coal by reason of the coal being sterilised. It is true to say, as counsel for the plaintiffs says, that the Act says nothing about such a discount; but it seems to me that, when one is arriving at compensation for "the loss caused by the specified minerals being left unworked," it would be quite wrong to give compensation on the basis that all the specified minerals are worked out at one blow and at the same moment. If the contention of counsel for the plaintiffs were right, the assessed compensation would be equal to the aggregate of all the assumed future profits—for the moment I am disregarding the difference between the outer and the inner area—and that sum, if it were invested, would produce at the end of the hypothetical period of working out the minerals, considerably more than the mine owner would in fact have got in pounds, shillings and pence if he had worked out the minerals year by year. I am not asked to state the precise footing upon which the discount should be calculated, but that there should be a discount I think is reasonably clear when one bears in mind that the object in view is to estimate the loss caused by the minerals being left unworked.

B Counsel for the plaintiffs pointed out that under sect. 78A, proviso (ii), the compensation is to be "a sum for each ton of the specified minerals," and then there is a reference to the rate per ton in the case of minerals under the outer and inner area respectively. I do not think that these words indicate that there must be no discounting. I think that you must first work out your rate per ton, you must divide it by three in the case of the minerals in the outer area, and you must then consider what on that basis is the fair compensation to be given, bearing in mind that the minerals will be worked out year by year over a considerable period in the course of working. I think to fail to give discount would be to disregard the fact that the minerals have to be worked out over a considerable period.

C Counsel for the plaintiffs suggest that the minerals have already been sterilised for some time, and the award has not yet been made, and no interest is payable to his clients in respect of that period, because no debt has arisen so far, from the railway company to the plaintiffs. He refers to *Richard v. Great Western Ry. Co.* (5). That may well be so. I think it is conceded that no interest will in fact be payable during that period. Counsel then says that it would be rough justice if there is no interest, that there should also be no discount. It may be that the absence of interest involves a certain amount of hardship to the mine owner, but I do not myself think that it would be rough justice to do as counsel suggests. Again, one has got to get back to the first point of all, which is that compensation is to be paid for the loss caused by the specified minerals being left unworked. The claim which the mine owners are making is a claim under the Act, and the compensation which they are to obtain as a result of that claim must be compensation ascertained under the Act; and in my view, on the true construction of the Act, there is no reason why a proper rate of discount ought not to be applied, and there is I think every reason why it should be applied, having regard to the object which is desired to be attained.

D For those reasons I declare upon question (2) of the summons that the compensation ought to be assessed now, and that a proper rate of discount ought to be applied for the purpose of making that assessment.

E Order accordingly.

F Solicitors: *Gregory Rowcliffe & Co.* (for the plaintiffs); *W. H. Hanscombe* (for the defendants).

G

H [Reported by HUBERT B. FIGG, ESQ., Barrister-at-Law.]

BRYANSTON PROPERTIES CO., LTD. v, EDWARDS.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.),
November 8, 10, 1943.]

Landlord and Tenant—Rent Restriction—Standard rent—Tenancy agreement allowing deduction from contractual rent during temporary period—Agreement determined by notice—Statutory tenancy—Incorporation of provision for reduction as term of statutory tenancy—Whether deduction permissible in fixing standard rent—Progressive rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, (c. 17), ss. 12, 15. A

An agreement for a quarterly tenancy provided for payment of a rent of £275 per annum payable quarterly in advance, but that, so long as the war between Great Britain and Germany continued, the lessee could deduct the sum of £85 per annum from the rent, such deductions to be made by equal quarterly amounts. The effect of that was to reduce the rent payable to £190 per annum. On June 24, 1942, notice to quit was given by the landlords and that notice expired on September 29, 1942. The respondent held over as statutory tenant and in Nov., 1942, the landlords served a notice to increase the rent to £275, the increase to take effect on Dec. 25, 1942. It was contended for the tenant that (i) the standard rent was the lower figure of £190 or, alternatively, (ii) the provision for a reduction in the rent was a term of the contractual tenancy which by the Rent Acts was incorporated in the statutory tenancy as a term thereof :— B C

HELD : (i) on the true construction of the agreement the standard rent was £275.

(ii) the provision whereby the lessee could satisfy his obligation by paying a lower rent was a term of the tenancy and accordingly his right to make the deduction from the standard rent under the statutory tenancy was maintained and preserved. D

(iii) *Semble* : a progressive rent can be a rent which is increased in one step only and that increase may take effect at a time which is uncertain, as, for example, at the end of the war.

[EDITORIAL NOTE. The decision in this case can be sufficiently based on the holding that a term that a lower rent shall be paid is such a term as is incorporated into the statutory tenancy by the provisions of sect. 15 of the 1920 Act ; and on this point it would seem that the court has drawn a distinction between this case and *Phillips v. Copping* (1). The remarks upon "progressive rent" must it is apprehended be treated as *obiter* and, important as they are at the present time, it is not possible to say definitely that a progressive rent is one in which the rent increases by irregular steps. As a matter of caution it has generally been assumed that the word "progressive" implied regular increases, but, if the *dicta* in this case are eventually adopted, it seems that a rent increasing by only one step or by several irregular steps is still a progressive rent. The importance of the matter is that in the case of a progressive rent the highest rent is the standard rent and it provides a means which has commonly been adopted of securing a high standard rent which can be exacted whenever circumstances permit or (and this is more usually its object) can be used as a lever to obtain possession. This artifice, as the words "progressive rent" are construed in this judgment, will place a powerful weapon in the hands of landlords and would seem to tend to much evasion of the restrictions imposed by the Acts. E F

AS TO STANDARD RENT, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 312-314, para. 369 ; and FOR CASES, see DIGEST, Vol. 31, pp. 564-566, Nos. 7117-7132.] G

Cases referred to :

- *(1) *Phillips v. Copping*, [1935] 1 K.B. 15 ; Digest Supp. ; 104 L.J.K.B. 78 ; 152 L.T. 175.
- (2) *Wheeler v. Wirral Estates, Ltd.*, [1935] 1 K.B. 294 ; Digest Supp. ; 104 L.J.K.B. 30 ; 152 L.T. 111.
- (3) *Goldsmith v. Orr* (1920), 89 L.J.K.B. 901 ; 31 Digest 567, 7136 ; 123 L.T. 614.
- (4) *White v. Southend Hotel Co.*, [1897] 1 Ch. 767 ; 31 Digest 111, 2460 ; 66 L.J.Ch. 387 ; 76 L.T. 273.

APPEAL by the plaintiffs from an order of His Honour JUDGE LILLEY, at Marylebone County Court, dated Apr. 20, 1943. The facts are fully set out in the judgment of LORD GREENE, M.R.

F. W. Beney, K.C., and *G. D. Squibb* for the appellants.

A. T. Denning, K.C., and *M. Stranderson* for the respondent. H

Beney, K.C. : The present case is covered by the decision of the Court of Appeal in *Phillips v. Copping* (1). The standard rent, in the present case, is £275, notwithstanding that the tenant has been able to discharge that liability by the payment of a smaller sum by reason of a term in the tenancy agreement. Having regard to the proper construction of the lease in the present case, the premises were let at a rent of £275 per annum. There can only be one standard rent for a house. The fact that the tenant could deduct £85 each year does not make the tenancy agreement inconsistent with the provisions of the Rent Restrictions Acts. [Counsel referred to *Wheeler v. Wirral Estates, Ltd.* (2) and *Goldsmith v. Orr* (3).]

Denning, K.C. : Viewing the agreement as a whole, the rent at which the premises in question were first let was £190 per annum, and that is the standard rent. If, however, that is wrong and the standard rent is £275, it is quite consistent with the Rent Restrictions Acts to provide that a lower rent should be payable during the period of the war. All terms and conditions of a tenancy would continue to apply to a statutory tenancy. [Counsel referred to *Phillips v. Copping* (1), *White v. Southend Hotel Co.* (4), *Goldsmith v. Orr* (3) and *Wheeler v. Wirral Estates, Ltd.* (2).]

Stranders followed on the same side.

Beney, K.C., in reply.

LORD GREENE, M.R. : The appellants are the lessors and the respondent is the lessee under a tenancy agreement dated Mar. 6, 1941. That agreement related to Flat No. 46 in a building called Stourcliffe Close, Stourcliffe Street, Bryanston Square, and the term of the lease was from Feb. 8, 1941, to Mar. 25, 1941, and thereafter from quarter to quarter until either party should determine the tenancy on any of the usual quarter days by one quarter's notice. There was a special provision for the case of the respondent, who is a civil servant, being ordered to move by his department. On June 24, 1942, notice to quit was given by the appellants, expiring on Sept. 29, 1942. The respondent held over as statutory tenant, as it is called, under the Rent Restriction Acts, and in November a notice to increase his rent to £275 was served, the notice to take effect on Dec. 25, 1942.

The provisions as to rent contained in the agreement are of a special nature. The covenant to pay rent is to pay :

... the rents hereinbefore reserved on the days and in manner aforesaid clear of all deductions whatsoever subject, however, to the provisions of cl. 4 (1) hereof.

The *reddendum* specified a yearly rent of £275 by equal quarterly payments in advance.

Cl. 4 (1) was in the following terms :

So long as the present state of war shall exist between Great Britain and Germany and for three months after the quarter day next following an armistice the landlord will allow the tenant to deduct from the rent hereby made payable a sum of £85 per annum by equal quarterly payments, the first deduction to be made from the rent payable on the said February 8, 1941, and a proportionate deduction to be made from the subsequent quarterly instalments of rent as and when they shall fall to be paid.

The effect of the deduction of £85 is to reduce the rent of £275 to £190, and the respondent claims that as statutory tenant he is entitled to remain in occupation at a rent of £190, whereas the appellants maintain that their notice to put up the rent to £275 was effective, and the present litigation is concerned with the difference between those two sums in respect of one quarter's rent.

Two questions arise. The first question is : What is the standard rent within the meaning of the Rent Restriction Acts ? The flat was first let after Sept. 1, 1939, and, accordingly, under the Act of that year the standard rent is the rent at which the flat was first let. This question falls under two heads. First, it is said that on the true construction of this agreement the rent payable during the war is £190, and that is the standard rent. The appellants, on the other hand, say that the rent is £275 and that this provision for deduction during the war does not affect that fact. If the language of the lease is examined in a rather technical manner, it is true to say that all that the deduction clause provides is a liberty to the tenant, by the process of deduction but not otherwise, to satisfy by payment of a smaller sum the obligation to pay a larger one, and on that basis it is argued that the larger sum of £275 is the rent. I think, not without hesitation, that that argument ought not to prevail. The actual

amount of cash which the tenant is bound to pay under this agreement is £190 and no more. There is no distinction between the £190 and the £275 drawn in the other clauses of the agreement which relate to rent. The proviso for re-entry, for instance, runs "if the said yearly or other rents hereby reserved shall be in arrears and unpaid," and so forth. Nevertheless, in applying an Act like the Rent Restriction Act to a document of this kind I do not think that too much attention must be paid to technical argument. I think the Act is contemplating rather the substance of the obligations of the tenant, and here the tenant is to pay £190 and no more. I accordingly think that so far as that argument is concerned the respondent is in the right. A

The next branch of the case in relation to standard rent arises in this way. After the statutory definition of standard rent there appears in sect. 12 of the 1920 Act, as applied in the 1939 Act, a proviso which was first introduced into the legislation in 1919. It is in the following terms, so far as relevant :

Provided that, in the case of any dwelling house let at a progressive rent payable under a tenancy agreement or lease, the maximum rent payable under such tenancy agreement or lease shall be the standard rent . . . B

It is said on behalf of the appellants that this is a case of a progressive rent, and the maximum rent payable under the agreement is, therefore, £275. Various arguments are put forward on behalf of the respondent against this view. I will say a word about the principal argument, but first of all I should say that the phrase "progressive rent" is not a term of art. It suggests to my mind a rent which varies by way of increase either by reference to fixed and ascertained periods or by reference to the happening of contingencies. I can see no reason for cutting down the scope of the phrase "progressive rent" in the sort of way in which the respondent would cut it down. It is said, for instance, on broad grounds, that, if the phrase covers such a case as we have here, the object of the Act will be defeated, because it would enable a landlord letting his premises for the first time after Sept. 1, 1939, to fix a small rent for part of the term, for example, by reference to the continuation of hostilities, and then provide that, when hostilities were over, the rent payable should be increased to a very high figure. That, it is said, would enable a landlord, so to speak, to exploit the post-war tenant by requiring payment from him, when the landlord comes to let the premises after the war, of a very high rent by reason of the fact that in the first lease made, the rent of which is to be the standard rent, the maximum figure was of that amount. I can very well see that such a manoeuvre would be possible, but it is to be observed that the phrase has stood ever since 1919 and that a similar manoeuvre would always have been possible. Whether or not it has occurred in practice I do not know. If the legislature is concerned with that possibility it is, I think, for the legislature to take steps to prevent it; but, as the Act stands at present, I do not see how that result will be avoided. I do not think it would be right to cut down so comprehensive a phrase, "progressive rent," merely because in certain circumstances it might lead to a result which would appear to be contrary to the policy of the legislature. So much for that general argument. C D E F

Particular arguments were adduced. The first one was that you cannot have a progressive rent which progresses by one step only; in other words, there must be at least two steps of progression before it can be a progressive rent. There, again, I see no justification for introducing that into the language used. G

Then it is said that, under the proviso which I have read, the phrase used is "the maximum rent payable." The word "payable", it is said, must mean payable in any event; that is to say, the tenant must by his contract be bound to pay it as and when the increase in the rent becomes effective. Here, it is said, there is no such fixed obligation on the tenant, because it is always possible for him by giving notice to avoid payment of the higher rent; in other words, he can get out of his tenancy when the war comes to an end, without incurring any liability for the higher rent. I do not think that argument ought to prevail. It seems to me that, if the tenancy agreement provides that in certain circumstances the rent is to be raised, the fact that, if the tenant chooses to give notice, he can avoid coming under that liability does not prevent the rent from being a progressive rent. If he does not give notice the rent will be payable, and I H

think that the word "payable" means payable in accordance with and subject to the provisions of the lease.

A Then it is said that you could not have a progressive rent when the time when it is to come into force is uncertain, as it is in the present case. There again, there seems to me to be no justification for writing any such qualifications into the language of the section. Progressive rent under tenancy agreements and leases may take a variety of forms according to circumstances. For instance, a landlord may agree that a tenant shall pay a lower rent while the landlord is doing certain repairs or alterations and that, as soon as those repairs or alterations are finished, the rent shall be at a higher rate, and the date when that higher rate is to come into force may be made to depend upon the time when the work is completed. That, of course, will be quite uncertain; nevertheless, it seems to me that such a case would be a true case of a progressive rent within the section.

B In my opinion, therefore, the standard rent under this agreement is £275, that being the maximum rent payable under these provisions as to progressive rent.

The second part of the case depends on the application of sect. 15 of the 1920 Act. It was upon the provisions of that section that the county court judge based his judgment. The section, so far as relevant, provides as follows:

C A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy so far as the same are consistent with the provisions of this Act.

D Starting on the basis that £275 is the standard rent, the county court judge held that the provisions of cl. 4 (1) enabling the tenant to deduct £85 a year during the war was a term or condition of the original contract of tenancy which is imported by virtue of the section into the statutory tenancy, and he held, accordingly, that the respondent was entitled, so long as he remained statutory tenant, to remain in at that lower rent. In my opinion, he came to the right conclusion. Looking at the language of the section apart from authority, it seems to me to be reasonably clear that the provision with regard to deduction from rent during the war is a term or condition of the original contract. The phrase "terms and conditions," it is to be observed, is, again, not a very technical phrase. It does not use the word "covenant," but the word "term" must, I think, subject to what I have to say about authority in a moment, include covenants in the agreement. For instance, I apprehend that, if the original contract of tenancy contained repairing covenants by the tenant, those covenants would be imported into the statutory tenancy when the contractual tenancy came to an end. In the present case, what we have is not a covenant, but what I think is quite aptly described as a term of the agreement, namely, that although the covenanted rent is £275, a provision is inserted in favour of the tenant enabling him, in certain circumstances, to satisfy that obligation by payment of a lower sum. That I should have thought was, beyond question, a term of the tenancy agreement.

Is there anything in decided authority to compel us to take a different view?

G It is said that the matter is decided by authority in this court in *Phillips v. Copping* (1). The county court judge was of opinion that there was nothing in that case which constrained him to decide in favour of the appellants, and, in my opinion, he was right. That was a case which raised the question whether, when a house had been let at a rent lower than the standard rent, a landlord was entitled, when the tenancy came to an end, to increase the rent payable by the tenant, who had thus become a statutory tenant, up to an amount not exceeding the standard rent. It was held that he was entitled to do so. Sect. 15 came into the argument in this way. It was said on behalf of the tenant that the covenant in the lease with regard to rent was a covenant for a specific sum which was in fact lower than the standard rent of the house. That, it was said, is a term of the original contract of tenancy; there is nothing in it inconsistent with the provisions of the Act, therefore that covenant for payment of that lower rent is, by virtue of the section, imported into the statutory tenancy. That was the argument, and that argument was rejected. All the members of the court took the view that there was nothing in the Act, apart from this

section, which deprived the landlord of his common law right to fix the rent, provided that in doing so he did not exceed the limit laid down by the Act, namely, the standard rent. That, it was said, was the effect of the Act, and that view was taken by all three members of the court. SCRUTTON, L.J., did not refer to sect. 15. It was referred to by GREER and MAUGHAM, L.J.J., and, as MAUGHAM, L.J., deals more fully with it, I will take his language first. On p. 24 he said this :

Then comes sect. 15 as to the effect of which different opinions have been expressed. The section created a statutory tenancy and defends the possession of the statutory tenant, saying that he shall "so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act." What does that mean ? To my mind the phrase is not so framed as to extend to the case of the payment of rent. It is not dealing with rent. The tenant is to observe and be entitled to the benefit of certain terms and conditions. It does not say that he will observe the covenant to pay rent, and the words are not apt to describe the events which have happened since the Act came into force, for example, an increase of rent permitted by sect. 2, nor does it say anything about the landlord's right to recover rent. However that may be, and whatever may be the solution of the doubtful questions as to the original tenancy which are to apply by virtue of that section to the statutory tenancy, the argument based upon the first three sections of the Act is unaffected by it. They cannot mean that a tenant is entitled to hold the premises at a rent lower than the standard rent. If that had been intended it would have been easy to express it in clear terms, and I think sects. 1, 2 and 3 indicate the contrary. In my opinion this right of a landlord on the expiration of a legal tenancy to raise the rent to the standard rate was his right at common law and it has not been interfered with by the Act.

It is to be observed that MAUGHAM, L.J., as I read his judgment, did not find it necessary to express a concluded opinion as to the limitation on sect. 15, because he says : "However that may be and whatever may be the solution of the doubtful questions as to the original tenancy which are to apply by virtue of that section to the statutory tenancy." He bases his conclusion really upon the construction of sects. 1, 2 and 3, which he says do not take away the common law right to put up the rent to the standard rent. It seems to me that he is really regarding those sections as by implication saying that nothing in the Act is to take away the right of the landlord to raise the contractual rent up to the level of the standard rent. Taking what I think is truly a dictum, namely, that sect. 15 is not so framed as to extend to the case of the payment of rent—"it is not dealing with rent"—it is, I think, abundantly clear that MAUGHAM, L.J., was thinking of what was relevant in that case, namely, the covenant to pay the rent. He is saying the effect of the section is not to import into the statutory tenancy the covenant to pay rent which was to be found in the contractual tenancy, and that is all he means.

In the judgment of GREER, L.J., the matter was dealt with quite shortly. He said on p. 22 :

An argument was based on sect. 15 of the Act of 1920 suggesting that the tenant was entitled to retain possession of the house at a rent which she had been paying. The section has not that effect. I think it was meant to preserve the terms of the existing lease subject to the provisions of the Act as to the rent, and restricting ejection.

There, again, those observations must be, I think, limited to the particular matter then in hand, namely, whether the section had the effect of carrying the contractual obligation to pay rent over into the statutory tenancy. The present case is very different from that. This is not a case of carrying the covenant to pay rent into the statutory tenancy at all. The landlord puts up the rent to £275. That rent, as I have already said, in my opinion is the standard rent. The question then arises whether, that being the standard rent, the right which had existed in relation to precisely the same rent under the tenancy agreement is imported into the statutory tenancy by virtue of the section. It seems to me that a provision whereby the tenant can satisfy his obligation to pay the higher rent by paying a lower rent, is truly a term of his tenancy, and, accordingly, that his right to make that deduction as against what has now become the standard rent under the statutory tenancy is maintained and preserved. It seems to me that that conclusion is not merely in accordance with the language of the section, but is an eminently just result.

In my opinion, the decision appealed against was right on that ground, and the appeal should be dismissed with costs.

MACKINNON, L.J. : I agree. I think there can be no doubt that rider A, as it is called, is a term or condition of the original contract of tenancy of which the statutory tenant is entitled to the benefit unless it is inconsistent with the provisions of the Act. I cannot find that it is in any way so inconsistent and, therefore, I think the judge was right in deciding this case in favour of the tenant by reason of the provisions of sect. 15 of the 1920 Act.

A DU PARCQ, L.J. : I agree that this appeal should be dismissed and that the county court judge came to the right conclusion. I must add a few words because so far as the first point is concerned I have arrived at my conclusion for a reason different from that of LORD GREENE, M.R. I agree with him entirely, if I may say so, that one ought not to be too technical in construing this Act. LORD HALSBURY once said, I think of the Workmen's Compensation Act, that the draftsman had distinctly avoided technology and that is probably true also of the Rent Acts.

B If a tenancy agreement merely said that the rent was, I will take the figure from the present case, £275, but that the tenant was to be entitled to deduct £85 from that sum of £275, then I should have no doubt that the rent under that tenancy agreement was £190. If the agreement went on to say that after the expiration, let me say of one year, the deduction which the tenant would be entitled to make should be only £50 and not £85, then I should have no doubt that in effect after the expiration of one year the rent was to be increased, and I should say that that was an instance of a progressive rent. Here there is something more. It is agreed that while a certain state of affairs exists, which is temporary, the tenant shall be permitted to make a deduction of £85 per annum from the rent of £275 which has been quite clearly fixed in the first clause of the tenancy agreement. The existence of the present state of war is, I suppose, only a temporary state of affairs, and the case would be the same if, for instance, D a deduction from the rent was permitted while the landlord was doing repairs to the house, and until those repairs were completed. I think then one would say, as I think one must say here, that the rent for which the premises are let is the larger sum.

E We know now that when this agreement was entered into the then existing state of war was destined to go on for over two years, and it may go on for all we know for some considerable time, but nevertheless, it is a temporary state of affairs. Deduction is, therefore, permitted for a period which may be long or short, but temporary only, and I think, without being unduly technical, it is right to construe the agreement as fixing a rent of £275 subject to a temporary deduction. For these reasons, I think that the standard rent is £275. I feel a difficulty about saying that there is any question here of a progressive rent.

F These differences of opinion will not affect the result of the case at all and I have nothing whatever to add to what has been said by my Lord and MAC-KINNON, L.J., as to sect. 15 of the Act and the proper application of it to these facts. I agree that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Allen & Overy* (for the appellants); *Curwen, Carter & Evans* (for the respondent).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

G

THE YORKSHIRE ELECTRIC POWER CO. v. THE CENTRAL ELECTRICITY BOARD.

[KING'S BENCH DIVISION (Tucker, J.), **October 18, 1943.**]

H *Electricity—Electricity supplied to undertaking—Calculation of price—“Share and loan capital”—Electricity Supply Act, 1926 (c. 51), Sched. II, para. (e) (ii).*

The company were the owners of a selected station (within the meaning of the Electricity (Supply) Act, 1926,) which generated electricity. The price to be paid for electricity supplied by a selected station to the Central Electricity Board was to be calculated in accordance with Sched. II of the Act, and one of the items, set out in para. (e) (ii), to be taken into consideration in that calculation was “the average rate of dividends and interest paid by the company on their share and loan capital during the preceding

year." The board contended that the words "share and loan capital" meant moneys raised by means of the issue of shares or loans, account being taken of any premium or discount received or allowed by the company on the issue thereof; whilst the company argued that the words meant the nominal amount of the share and loan capital of the company:—

HELD: upon the true construction of Sched. II, para. (e) (ii) of the Act, the words "share and loan capital" meant the nominal amount of the share and loan capital of the company.

[EDITORIAL NOTE. The question here is purely one of the construction of the schedule to the Act of 1926. Apparently, share and loan capital ordinarily mean nominal share and loan capital without taking into account any arrangement for amortisation, but this meaning is, like all such questions of construction, amenable to a context.

FOR THE ELECTRICITY SUPPLY ACT, 1926, Sched. II, para. (e) (ii), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 7, p. 823.]

APPEAL by way of special case by the Central Electricity Board from an award of an arbitrator under the Arbitration Acts, 1889-1934. The facts are fully set out in the judgment.

W. Craig Henderson, K.C., Sir Walter T. Monckton, K.C., and C. Erskine W. Simes for the Central Electricity Board.

Sydney Turner, K.C., and E. J. C. Neep for the company.

TUCKER, J.: This is a case stated in the form of a special case for the opinion of the court by the auditor appointed by the Minister of Fuel and Power under the Electricity (Supply) Act, 1926, s. 7 (6).

The matter arises in this way. The Yorkshire Electric Power Co. were the owners of what is called a selected station for the purposes of this Act. By sect. 7 (3) of the Act provision is made for calculating the price which shall be paid by the Board for electricity supplied from what is called a selected station to the owners of that station. It provides that:

The price to be paid by the board to the owners of a selected station for electricity generated thereat shall, unless otherwise agreed, be the cost of production to be ascertained in accordance with the rules contained in Sched. II to this Act.

At a later stage it is possible for the owners of the selected station to buy back from the Board the electricity which has been generated there; and for the purpose of ascertaining the price at which it may be bought back the cost of production has, again, to be ascertained, but, of course, the quantity in which the electricity is brought back may differ (and I am told that generally it differs considerably) from the quantity supplied from the selected station to the Board.

The question which arises in this case is as to the proper method of ascertaining one of the items which go to make up the cost of production which has to be ascertained for the purpose of settling the price.

I think that it will be convenient if I read some of the material parts of the award, which explain the point at issue between the parties. After reciting how the matter arises, the award says:

The Yorkshire Electric Power Co. are the owners of selected stations within the meaning of the Act and are entitled to be paid by the Board for electricity generated thereat and sold to the Board during the years 1936, 1937, 1938, 1939 and 1940, and a question has arisen between the Board and the company as to what is the average rate of dividends and interest paid by the company on their share and loan capital which should be used in calculating interest as aforesaid to arrive at the cost of production of the electricity so sold.

The arbitrator goes on to refer to sect. 7 (6) of the Act, which provides for arbitration, and says:

It is contended by the Board that, upon the true construction of sub-para. (e) (ii) of the said schedule the average rate of dividends and interest paid on share and loan capital must be ascertained by reference to the actual aggregate amount received by the company in respect of the issue of their share and loan capital account being taken of any premium or discount received or allowed by the company on the issue thereof and that, in arriving at the average rate of dividends and interest paid on share and loan capital there should be taken into account in addition to such dividends and interest annual sums required to amortise discount on redemption of debenture stocks and that the rates of interest to be used as aforesaid are . . .

and then follow certain percentages.

The award continues :

It is contended by the company, on the other hand, that the average rate of dividends and interest paid by the company on their share and loan capital must be ascertained by reference to the nominal amount of such share and loan capital without taking into account any premium or discount received or allowed by the company on the issue thereof.

A The remaining words of that paragraph are all governed by the opening words : "It is contended by the company"; but counsel on each side agree that in fact the remaining words of that paragraph were not part of the contention of counsel for the claimants, but represent what he conceded for the purposes of this case, and, therefore, the remaining part of the paragraph should really read :

B . . . and it was conceded by the company that, in arriving at the average rate of dividends and interest paid on share and loan capital no account shall be taken of annual sums required to amortise discount on redemption of debenture stocks. It is agreed between the parties that, if the contention of the company be upheld by the court, the rates of interest to be used as aforesaid are . . .

and then he sets out the rates of interest in that case.

C The arbitrator then states the question for the opinion of the court and he makes an award stating that, in his opinion, the contention of the company is correct. He accordingly awards and determines "that the rates of interest to be used as aforesaid are as follows," and then he sets out the rates of interest applicable, having regard to the fact that he has accepted the contention of the company.

Sched. II to the Act is as follows :

D The cost of production of electricity at any selected station shall be ascertained by calculating the following costs, charges and allowances in respect of the year of account: (a) the sums expended for fuel, oil . . . (b) sums paid as rents, rates and taxes (other than taxes on profits) and for insurance, in respect of the station; (c) the proper proportion of management and general establishment charges attributable to the station; (d) any other expenses on revenue account attributable to the station; (e) interest (exclusive of interest payable out of capital) on money properly expended for capital purposes (whether defrayed out of capital or revenue) and attributable to the generating station and the plant suitable to and used for the purpose of generating electricity therein, and interest on working capital properly attributable to the station and the production of electricity therein. The rate of interest for the purposes of this paragraph shall be (i) where the owners of a selected station are a joint electricity authority or a local authority, the average rate payable on the money raised by the authority for the purpose; (ii) where the owners of the station are a company, the average rate of dividends and interest paid by the company on their share and loan capital during the preceding year; so, however, that the rate shall in no case be less than 5 nor more than $6\frac{1}{2}$ per cent. per annum.

E It will be observed that all these matters which go to make up the cost of production are set out in detail. The one with which we are concerned is interest—interest going to make up the cost of production. The only question is: How is the rate of interest to be arrived at? The schedule provides in different language for two different kinds of cases: first, where the owners of the selected station are a joint electricity authority or a local authority and, secondly, where the owners of the station are a company. In this case the owners of the station are a company; so that it is para. (e) (ii) with which we are concerned.

G Counsel for the Board contends that in sub-para. (ii) the words "share and loan capital" mean the moneys raised by means of the issue of shares or loans. Counsel for the company, the owners, contends that the words "share and loan capital" mean the nominal amount of the share and loan capital of the company. That is the issue between the parties.

H In this case it appears that shares have been issued at a premium and money has been obtained on loan at a discount. There is, therefore, a difference between the actual money raised in those two different ways and the nominal value of the capital as it appears in the accounts of the company.

Counsel for the Board says that these words are ambiguous, that there is no clear, obvious and well-known meaning of the words "share and loan capital," and that it is, therefore, necessary to look at the context in which the words are used to see what is the scheme of the Act and the scheme of the schedule.

He says that, when you contrast paras. (e) (i) and (e) (ii), the proper inference to be drawn is that the legislature was endeavouring to provide for the ascertainment, so far as possible, of the amount of money that had been raised by the authority or company, and the cost of raising that money was to be one of the matters going to make up the total cost of production. He says that, in para. (e) (i), where you are dealing with a joint electricity authority or a local authority, the legislature clearly shows what has to be ascertained, namely, the money raised, and the money raised for a particular purpose. It is common ground that, when you are dealing with a joint electricity authority or local authority, that is easily ascertainable. You can find out what they have raised. You can find out the purpose for which it is raised, because they have to get the necessary sanctions for particular purposes; and you can find out what the rate of interest in fact has been. Counsel for the Board says that para. (e) (ii) must have been intended similarly, in the case of a company, to ascertain actual facts and figures applicable to the selected station in question, so far as possible; at any rate, it was intended to deal with actual capital sums of money which had been raised by the company, and, having regard to the intention of the Act, to be ascertained from references to other parts of it, he says that the words "share and loan capital" should be read as meaning the sum raised by way of the issue of shares or loans.

It is to be observed that, although there is that difference between the parties as to the meaning of the words "share and loan capital," what has to be ascertained, according to para. (e) (ii), is "the average rate of dividends and interest paid by the company on their share and loan capital during the preceding year." That is a fact which has to be ascertained: what are the sums paid by way of dividends and interest by the company on the average, on X, which is either the nominal value of their capital or the actual capital in fact raised; but, in any event, the rate has to be the average of dividends and interest that have been paid by the company, and it must have been paid by the company during the preceding year.

Counsel for the company submits, first, that the words are so plain and unambiguous on their face that, according to the ordinary rules of construction, there is no need to look further than the words of the sub-paragraph. If that is done, he says the matter is plain; "capital" may be an ambiguous word, but, when it is preceded by the adjectives "share" and "loan," the meaning which would be conveyed by those words, not to the first man that one meets in the street, but to a commercial man dealing with matters of this sort, would be the nominal capital of the company as expressed in shares or loans. He says that "loan" means the amount of the indebtedness, and that "share" indicates a right to participate in the distribution. If, however, there is an element of ambiguity, he relies upon the general context in which the words appear to support his reading of the sub-paragraph. On that branch of his argument he says that, where you are dealing with a joint electricity authority or a local authority, it is quite easy to ascertain the actual sum raised, the rate payable and the purpose for which it was raised; but where you are dealing with a company you cannot arrive at those results, and, therefore, the legislature has been bound to take a purely arbitrary method of arriving at a figure. There are limits in both directions. The rate shall in no case be less than 5 per cent. nor more than $6\frac{1}{2}$ per cent., and he says that, within those limits the Act has for convenience provided a quite arbitrary method of arriving at the rate of interest, and that method involves no kind of complex calculations at all; you have merely to ascertain that which is quite easy to be found out, namely, what is the total sum in "dividends and interest paid by the company." He says that that means paid by the company to the people who have lent the money or to the people who have invested the money in the company; that that must be calculated on the nominal capital of the company and that, in that way, by a quite arbitrary method, you arrive at the result, limited between 5 per cent. and $6\frac{1}{2}$ per cent.

I have come to the conclusion that counsel for the company is right about this. I come to that view for this reason. I do not think that he is right in saying that the words are so plain and unambiguous that there is no need to look at the surrounding circumstances for the purpose of the Act or to refer to other parts of the schedule or sections in order to ascertain the meaning. I think that it is

necessary, especially in a matter of this kind; dealing with a subject-matter of this sort, to look beyond the mere words of this sub-paragraph; but, none the less, looking at the matter as a whole, I have come to the conclusion that his contention is correct. In coming to that conclusion, I am very much influenced by this: that it seems to me that the interpretation of counsel for the Board necessarily involves certain calculations and investigations which do not appear to be envisaged by the words of the sub-paragraph. Attractive as is the argument that he puts forward in support of what I may call the common sense basis of his argument, that what the Act was really looking at was the money that has been raised, it seems to me that he is at once confronted with this difficulty: that, where loans have been obtained at a discount, some provision has to be made with regard to the money that is lost by giving that discount. Therefore, if his interpretation is right, it follows that some provision has to be made as to the calculations to be used and applied to moneys obtained at a discount. He says that calculations must be made as to the creation of a sinking fund in order to provide for the repayment of the loans when they become due, and then calculations have to be made and questions arise, as appears on the face of this case, as to the correct method of arriving at the necessary result by way of provision for amortisation. The arbitrator in fact took a different figure, I am told, from that contended for by counsel for the Board; but, in any event, that involves calculations and matters of that kind which do not seem to me to be within the meaning of those words.

I think, therefore, that the contention of counsel for the company represents the interpretation which is the most natural one for that sub-paragraph. Under his interpretation there is no need to worry about amortisation, making provisions for loans at a discount or anything of that kind, because the section has quite arbitrarily, but quite clearly, provided for ascertaining the rate of interest by reference to the average rate of dividends and interest which have been paid during the preceding year on the share and loan capital, namely, the nominal capital of the company.

I think that the argument of counsel for the company is further reinforced by the emphasis that he puts upon the words "paid during the preceding year." In order to give effect to those words, counsel for the Board has to say that the provision of a sinking fund and what he calls the payment to that fund of interest during the previous year in order to provide the sinking fund, is a payment within the meaning of this sub-paragraph. Of course, it is only an entry in the books of the company and possibly in the accounts of the company at the bank, and I do not think that the words "paid by the company during the preceding year" are applicable to the transfer of annual sums for the purpose of creating a sinking fund. I think that the words "dividends and interest paid by the company . . . during the preceding year" refer to moneys paid to people who have lent money or invested money in the company during that year.

If that is the correct interpretation, no question arises with regard to the proper way of arriving at the figure in order to make provision for the amortisation, and, in that case, the award of the arbitrator under para. 1, in which he accepts the contentions of the company, must stand, and my answer to the special case is that the award as made by the arbitrator under para. 1 of his finding is correct.

Order accordingly.

Solicitors: *Richard H. Fox* (for the Central Electricity Board); *Ward, Bowie & Co.*, agents for *Booth, Wade, Lomas-Walker & Colbeck*, Leeds (for the company).

[Reported by R. BOSWELL, ESQ., Barrister-at-Law.]

656 [Nov. 27, 1943] ALL ENGLAND LAW REPORTS ANNOTATED [Vol. 2
Re DALZIEL, MIDLAND BANK EXECUTOR & TRUSTEE CO.,
LTD. AND OTHERS *v.* GOVERNORS OF ST. BARTHOLOMEW'S
HOSPITAL AND OTHERS.

[CHANCERY DIVISION (Cohen, J.). **June 3, 4, 29, 1943.**]

Charities—Maintenance of tomb—Mausoleum—Gift to hospital to be added to existing fund—Existing fund not wholly applicable to charitable purposes.

By her will the testatrix gave the governors of a hospital a sum of £20,000 free of duties to be added to an existing fund but subject to the condition that the income arising from the gift should be used as far as necessary for the upkeep of a mausoleum. The mausoleum and the garden surrounding it were to be kept in repair, and, if necessary, the mausoleum was to be rebuilt. Upon failure to comply with the condition, the sum of £20,000 was to go to such charities as the trustees of the will should select. The existing fund was not wholly applicable to charitable purposes :—

HELD : since the gift was to be added to a gift which itself was not wholly applicable to charitable purposes, the gift failed and the gift over to selected charities failed with it.

[EDITORIAL NOTE.] It is said here that a gift for the upkeep of a tomb has been supported only where the original gift to the charity to which it was attached was an absolute gift which the governors of the charity could dispose of as they liked. It is also said that such gifts have in general been of trifling amount. In the present case the upkeep of the mausoleum was considerable and the trusts required that, if necessary, it should be rebuilt. Further, the courts have in many cases treated the obligation to maintain the tomb as a moral obligation only and not as a binding trust.

AS TO MAINTENANCE OF TOMB, see HALSBURY, *Hailsham Edn.*, Vol. 4, pp. 129, 130, para. 171 ; and FOR CASES, see DIGEST, Vol. 8, pp. 260, 261, Nos. 218-239.]

Cases referred to :

- * (1) *Re Tyler, Tyler v. Tyler*, [1891] 3 Ch. 252 ; 8 Digest 327, 1100 ; 60 L.J.Ch. 686 ; 65 L.T. 367.
- (2) *Wilkinson v. Wilkinson* (1857), L.R. 12 Eq. 604 ; 8 Digest 496, 618.
- (3) *Chamberlayne v. Brockett* (1872), 8 Ch. App. 206 ; 8 Digest 326, 1095 ; 42 L.J.Ch. 368 ; 28 L.T. 248.
- (4) *Re Rogerson, Bird v. Lee*, [1901] 1 Ch. 715 ; 8 Digest 300, 777 ; 70 L.J.Ch. 444 ; 84 L.T. 200.
- (5) *Dawson v. Small* (1874), L.R. 18 Eq. 114 ; 8 Digest 300, 774 ; 43 L.J.Ch. 406 ; 30 L.T. 252.
- (6) *Fisk v. Attorney-General* (1867), L.R. 4 Eq. Cas. 521 ; 8 Digest 300, 772 ; 17 L.T. 27.
- * (7) *Re Porter, Porter v. Porter*, [1925] Ch. 746 ; Digest Supp. ; 95 L.J.Ch. 46 ; 133 L.T. 812.
- (8) *Re Birkett* (1878), 9 Ch.D. 576 ; 8 Digest 300, 776 ; 47 L.J.Ch. 846 ; 39 L.T. 418.
- (9) *Chapman v. Brown* (1801), 6 Ves. 404 ; 8 Digest 275, 429.

SUMMONS to determine the validity of a gift for the maintenance of a mausoleum. The facts are fully set out in the judgment.

Wilfrid M. Hunt for the executors.

J. A. Reid for the Governors of St. Bartholomew's Hospital.

E. M. Winterbotham for an annuitant.

A. P. Vanneck for a legatee.

C. V. Rawlence for the residuary legatees.

H. O. Danckwerts for the Attorney-General.

COHEN, J. : By her will dated Nov. 14, 1935, Lady Dalziel of Wooler appointed the plaintiffs to be her executors and trustees and in para. 4 expressed a desire to be buried in the family mausoleum in Highgate Cemetery. As will be seen hereafter, this mausoleum is closely connected with the question I have to determine.

After giving directions as to the disposal of her papers and personal chattels not otherwise disposed of and explaining that she had already distributed large sums among the relations and friends of her husband and herself and also to various charitable institutions, the testatrix gave a number of specific legacies and bequests, and then by cl. 9 bequeathed a number of pecuniary legacies and annuities including a legacy of £5,000 to the defendant Lionel Guy Trafford and a legacy of £200 and an annuity of £156 per annum to the defendant Ula Mary Fletcher. By cl. 11 she gave to the Governors of St. Bartholomew's Hospital the sum of £20,000 in terms which give rise to doubt as to the validity

of the bequest. By cl. 12 and 13 the testatrix established two trust funds of £10,000 each for the benefit of named persons and their children. By cl. 14 she directed that all the legacies and bequests given by her will should be paid free of duty and that the duty thereon and any death duties payable in respect of any gifts by her in her lifetime should be paid out of her residuary estate. The trusts affecting the residue are to be found in cl. 16 and 17, and it will be seen therefrom that the defendants King Edward's Hospital Fund for London are the residuary legatees. According to the Inland Revenue affidavit, the gross value of the testatrix's estate was over £465,000 and the net value of the personal estate amounted to over £460,000. The total pecuniary bequests under the will, including the settled trust legacies and the legacy of £20,000 to the hospital, amounted to £258,802.

As I have already said, the death duties on these legacies and any death duties payable in respect of gifts by her in her lifetime and interest on such duties have also to be paid out of her estate. In view of these and other liabilities the plaintiffs consider that it is practically certain that there will be no ultimate residuary estate and that there will not be sufficient to discharge the pecuniary bequests in full and set aside a fund to answer the said annuities and probably there will not be sufficient to discharge the pecuniary bequests in full and sums equal to valuations of the annuities. The plaintiffs have paid a legacy of £4,000 which was given priority by the will, and have made distributions or retentions amounting in all to $82\frac{1}{2}$ per cent. of the other pecuniary bequests. They have also made certain payments to the annuitants, but do not feel at liberty to make any further payments to pecuniary legatees or annuitants until the validity of the bequest in favour of the defendant hospital has been determined.

The bequest in favour of the hospital is in the following terms :

I give to the Governors of St. Bartholomew's Hospital the sum of £20,000 free of all death duties to be added to and form part of the existing Dalziel of Wooler Discretionary Fund and I give this legacy upon and subject to the condition that the said Governors of St. Bartholomew's Hospital shall use the income to arise from this legacy as far as is necessary for the upkeep of the said mausoleum in Highgate Cemetery and the garden surrounding the same that they shall keep the same in good repair and the inscriptions thereon legible and to rebuild the same when requisite and if they shall fail to carry out this request I give the said sum of £20,000 to such other of the charities named in this my will as my trustees may select and as shall be willing to accept the legacy subject to the above conditions.

Counsel for the hospital argued that, upon the true construction of the will, the gift is absolute, and the hospital is free to expend capital and income for whatever purposes it thinks fit. This seems difficult to reconcile with the gift over, but in any event this cannot be the position, unless the hospital had a similar right over the original fund. The testatrix, when she made her will, can hardly have thought that the hospital had such a right, for, if it had, the fund to which the £20,000 was to be added might well have ceased to exist before her death. I must, however, turn to the evidence as to the fund, for further elucidation of this position.

On Oct. 4, 1935, there is a letter from Lord Stanmore, the treasurer of St. Bartholomew's Hospital, to Lady Dalziel in these terms :

We should like to take this opportunity to thank you for the interest you have shown in the welfare of our hospital and for the generous contributions you have made from time to time to our funds. Mr. Stanley Adams tells me that you are very anxious to make arrangements for the permanent upkeep of your family mausoleum in Highgate Cemetery. We should like, as a gesture of our appreciation of your generosity and goodwill, to offer to undertake this work permanently, and to defray out of the discretionary funds of the hospital the cost on your behalf of the upkeep of the small garden surrounding the mausoleum, and generally to maintain the structure in good repair and the interior clean. We should look upon our obligation to do this as binding for all time, and such a minute as the law permits to give effect to our intention and to bind the officials of the hospital hereafter to carry on the said work would be submitted to the governors for their approval and ultimately be recorded in the minutes of the hospital.

The next letter is a further letter from Lord Stanmore to Lady Dalziel, dated Oct. 17, 1935, and it says :

Since my previous letter I understand it is your intention to give the sum of £2,000 towards the discretionary funds of the hospital, and in these circumstances it would

be our intention to invest this sum, to be known as "The Dalziel of Wooler Discretionary Fund," and a first charge on the fund would be such a sum as was necessary to defray the cost of the upkeep of your mausoleum, as outlined in my previous letter.

Finally, there is a letter of Oct. 18 from Mr. Stanley Adams to Mr. Stanley Christopherson, which is in these terms :

Referring to the conversations we have had and the correspondence which has passed on the subject of the upkeep of the Dalziel of Wooler Mausoleum at Highgate Cemetery, I am now glad to inform you that Lady Dalziel has asked me to make the necessary arrangements to transfer into the names of the trustees of the St. Bartholomew's Hospital Discretionary Fund an amount of $2\frac{1}{2}$ per cent. Consols, free of all charges, equivalent in value at to-day's price to £2,000. This security is to form a special fund to be known as "The Dalziel of Wooler Discretionary Fund," a first charge on which is the cost of the upkeep of the Dalziel of Wooler Mausoleum, as outlined in Lord Stanmore's letter dated Oct. 4.

If the matter had rested on the letters, it might have been argued that, particularly in view of the expression "such a minute as the law permits" in the letter of Oct. 4, the testatrix was being warned that a minute imposing a legal obligation to maintain the mausoleum was not possible or intended. The matter did not, however, rest there, for, on Nov. 28, the General Court of Governors passed this resolution :

The Treasurer and Almoners reported the receipt of a gift of £2,439 0s. 6d. $2\frac{1}{2}$ per cent. Consolidated Stock, such stock to be retained as a permanent investment, the income therefrom to be credited to the "Discretionary Fund," subject to a first charge of such sum or sums as may from time to time be necessary to defray the cost of the upkeep of the "Dalziel of Wooler Mausoleum" in Highgate Cemetery.

This resolution undoubtedly purported to create a permanent fund, and I observe from p. 40 of the hospital report for 1941 that the Lady Dalziel of Wooler Fund is treated as a capital account. The resolution also purports to subject the fund to a charge for the upkeep of the mausoleum. Such a charge would *prima facie* involve an infringement of the rule against perpetuities. It is said, however, that this resolution is a purely internal matter and that the arrangement between the hospital and the testatrix is to be found only in the exhibited correspondence. I doubt if this argument is well founded, but I will assume in favour of the hospital that it is sound. Even so, it is clear that the intention was that the capital of the fund, subject to the "charge" for the upkeep of the mausoleum, was to be retained intact. The income, in so far as not required for that purpose, was to form part of the "discretionary funds of the hospital." The income was in fact so dealt with. Even assuming that the so-called charge for the upkeep of the mausoleum created only a moral obligation and did not, therefore, offend against the rule against perpetuities, there would not be a valid charitable gift, unless the purpose of the discretionary funds of the hospital were charitable. What were these purposes? The discretionary fund (or funds) of the hospital is as the name suggests a fund built up from the contributions for the purpose of private individuals the capital and income of which are applicable in the discretion of the governors for the purposes of the hospital, whether or not those purposes may be purposes for which the general funds of the hospital could appropriately be applied.

This gives no guidance as to the purposes of the hospital to which the discretionary funds could, but the general funds could not, be applied. It was said that the purposes of a hospital are necessarily charitable, and in a general sense this is true, for the ordinary objects of a hospital such as the erection, maintenance and upkeep of a hospital and the after-care of patients therein, are clearly charitable purposes, but I think the purposes of the discretionary fund must have been purposes outside the ordinary objects of a hospital. I derive assistance from Lord Stanmore's letter of Oct. 4, 1935. In that letter he offers on behalf of the hospital "to defray out of the discretionary funds of the hospital the cost on your behalf of the upkeep of the small garden surrounding the mausoleum, and generally to maintain the structure in good repair and the interior clean." Now this letter makes it clear that, in Lord Stanmore's view, which I must, I think, accept as correct, the governing body of the hospital was free to direct such an application of the discretionary funds. If this be so, the discretionary funds are applicable to the maintenance of the Dalziel Mausoleum or of any other tomb, where the expenditure is considered necessary in order to secure financial support for the hospital. This is clearly not a charitable object, for, if it were, it would not have been necessary in the "tomb cases,"

to which I shall later refer, to construe the direction as to maintenance of the tomb of testators in question in those cases as imposing only a moral obligation. In this connection I would refer to *Re Tyler* (1), a case in many respects comparable to the case before me. The headnote in that case is in the following terms :

A A testator gave a fund to the trustees of charity A, and committed the keys of his family vault in H cemetery to their care and charge, "the same to be kept in good repair, and name legible, and to rebuild when it shall require : failing to comply with this request, the money to go to " charity B : Held (affirming STIRLING, J.), that the condition for the repair, etc., of the family vault was valid, and binding on charity A, and that the gift over, on failure to comply with the condition, to charity B was good, on the principle that the rule against perpetuities has no application to a transfer, in a certain event, of property from one charity to another.

The passage to which I wish to refer at the moment is a passage in the judgment of STIRLING, J., in the court of first instance, in which he says :

B It is said that the condition tends to produce or bring about a misapplication of funds devoted to charitable purposes, and *Wilkinson v. Wilkinson* (2) was referred to as showing that the gift must, therefore, be held to be bad. I am, however, unable to see that the condition imposed here tends necessarily to a breach of trust on the part of the trustees of the society. Such societies depend largely on the voluntary contributions of their supporters ; and the funds required for keeping the family vault in repair may readily, I doubt not, be obtained from persons willing to subscribe for the purpose of retaining the administration of this large fund in the hands of the society, and without in the least trenching on any funds devoted to charitable purposes.

C This judgment, which was approved by the Court of Appeal, makes it clear that, while there is no objection to a body formed for charitable purposes receiving and applying funds given to it absolutely in paying for the upkeep of a tomb, the upkeep is not a charitable object. It follows, therefore, that I must hold that the gift of £20,000 to the hospital "to be added to and form part of the existing Dalziel Wooler Discretionary Fund " fails.

D Counsel for the Attorney-General, who argued the case on behalf of the charities to be selected by the trustees in the event of a breach by the hospital of the condition as to upkeep of the mausoleum, admitted that, if I came to this conclusion, the gift over also failed. He called my attention to a passage in *Chamberlayne v. Brockett* (3), at p. 211, in these terms :

E On the other hand, if the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises ; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*.

The principle there laid down clearly applies, and I must, therefore, declare that the whole gift contained in cl. 11 fails.

F In view of the conclusion to which I have come on this point, the question as to the effect of the imposition of the condition as to the upkeep of the tomb and of the gift over do not really arise ; but as it was fully argued and the case may go to a higher court, it is right that I should state shortly the conclusions to which I have come on this point. The portion of the will which contains the condition is as follows :

G I give this legacy upon and subject to the condition that the said Governors of St. Bartholomew's Hospital shall use the income to arise from this legacy as far as is necessary for the upkeep of the said mausoleum in Highgate Cemetery and the garden surrounding the same that they shall keep the same in good repair and the inscriptions thereon legible and to rebuild the same when requisite and if they shall fail to carry out this request I give the said sum of £20,000 to [other charities named in the will to be selected by the trustees].

H As I construe this part of the clause, it does not merely impose a condition. If this were all it did, Mr. Reid's argument, based on a passage in JARMAN ON WILLS, 7th Edn., p. 1443, that it is a condition subsequent and, being void, the bequest is absolute, might be well founded. On the contrary, I think that it amounts to a direction that the income of the fund shall be applied in the first instance to the purposes therein defined in connection with the tomb. Unless, therefore, I can construe the clause as imposing only a moral obligation, I must find that the trusts, at any rate so far as they relate to the upkeep of the tomb, are bad. In support of the validity of the gift, counsel for the Attorney-General invited my attention to *Re Rogerson* (4), the last of the tomb cases, where

JOYCE, J., said, at p. 719 :

Where, however, there is a trust for a tomb, as here, then, as BACON, V.-C., pointed out in *Dawson v. Small* (5)—a similar case—the “ obligation to keep up the tombstones is merely honorary, but the obligation to give all that is not applied for the purposes first mentioned in favour of these poor people is by no means honorary ; it is a trust that must be executed.” Testators who make bequests of this nature, if they know the law, really mean the legacy to go to the objects of the charitable bequest with a moral obligation to keep up the tomb.

The effect of these cases is summarised in TUDOR ON CHARITIES, 5th Edn., A at p. 62, as follows :

A number of cases, in which there have been gifts upon trust to keep up tombs not forming part of the fabric of a church, with a gift of the particular residue to charity, may be regarded as establishing this special rule of law : “ Where a fund has been given to trustees upon trust to apply the income in keeping a tomb in repair, and as to the remainder of the income for valid charitable purposes, it has been held that the result of the failure of the trust for the repair of the tomb is that the whole of the income becomes applicable for the charitable purpose.” B

Counsel for Mrs. Fletcher, a party interested to dispute the validity of the gift, made a careful analysis of these cases and pointed out that they appear all to have been based either upon the trifling amount involved, as in *Fisk v. A.-G.* (6), or upon the view that the testator intended to impose a moral obligation as in *Re Rogerson* (4). He pointed out that that class of case was distinguishable from the present case in that (a) the upkeep of this tomb costing over £20,000 with a possible liability to rebuild it, necessarily involved more than a trifling amount, and (b) none of the wills considered in the tomb cases contained a gift over in the event of failure to maintain the tomb. C

The last distinction seems to me vital. I think that the real foundation of the tomb cases is that the court felt itself able to construe the provision in the various wills as to the upkeep of the tombs as imposing only a moral obligation. Now a gift over to take effect in the event of failure to maintain the mausoleum in good repair is only consistent with the view that the obligation to maintain the mausoleum was not to be a mere moral obligation. This view is supported by the observations of FRY, L.J., in *Re Tyler* (1), at p. 259 : D

In this case the testator has given a sum of money to one charity with a gift over to another charity upon the happening of a certain event. That event, no doubt, is such as to create an inducement or motive on the part of the first donee, the London Missionary Society, to repair the family tomb of the testator. Inasmuch as both the donees of this fund, the first donee and the second, are charitable bodies, and are created for the purposes of charity, the rule of law against perpetuities has nothing whatever to do with the donees. Does the rule of law against perpetuities create any objection to the nature of the condition ? If the testator had required the first donee, the London Missionary Society, to apply any portions of the fund towards the repair of the family tomb, that would, in all probability, at any rate, to the extent of the sum required, have been void as a perpetuity which was not charity. But he has done nothing of the sort. He has given the first donee no power to apply any part of the money. E

As I have already said, as I construe this bequest in this case, Lady Dalziel has not only given power, but directed the trustees to apply part of this gift, or, if necessary, the whole of this gift, in the maintenance of the tomb. I should be bound, therefore, if necessary, to hold that the trusts, so far as they are for the upkeep and repair of the mausoleum and surrounding garden and for rebuilding the mausoleum if necessary, fail. F

Is the consequence that the whole gift must fail ? I think it is. The principles to be applied are stated in TUDOR ON CHARITIES, 5th Edn., p. 51. I must read that passage : G

If the gift to charity is residuary upon a void gift, the general rule is that it fails if the court finds that the precedent gift is of unascertainable amount. But the charitable gift is valid if the subject matter needed for the precedent gift can be reduced to certainty by means of an enquiry. The court will not direct an enquiry, and the gift to charity will fail, if it is manifestly impossible to determine the amount needed for the primary gift, or if it is clear that there would be nothing left over after satisfying it. H

I do not think it can be said here that the subject-matter needed for the precedent “ void gift ” can be reduced to a certainty by means of the inquiry, and I am fortified in this view by the decision of EVE, J., in *Re Porter* (7), where a testator had bequeathed to the trustees of a masonic temple £10,000, the interest of which was to be applied by the trustees in their full and absolute discretion for the maintenance and upkeep of the temple, and the balance, if any, was to be applied

in favour of masonic charities. EVE, J., after deciding that the tomb cases did not apply, went on to consider the argument that an inquiry should be directed as to the maximum required for the void trust for the maintenance of the temple, and that the sum thus ascertained should be deducted from the £10,000, the balance being held upon trust for the charities. EVE, J., rejected this argument, for the reasons which he gives on pp. 751 and 752 as follows :

- A Then the question is, can I arrive at any conclusion, either on the evidence before me, or by an inquiry in chambers, as to the amount of the income necessary to be applied for maintenance and upkeep and which the trustees, in the exercise of their discretion, ought not to exceed, and treating that as all that was intended for the maintenance and upkeep of the temple and therefore invalid, declare the surplus to be well settled for charitable purposes ? I feel very great difficulty in adopting any such course. In my opinion, the test to be applied for the solution of this question is whether the gift of the surplus to charity is a gift of the whole income, or a gift of what (if anything) will remain after the void gift has been satisfied. Is the extent or amount of the primary gift sufficiently defined to enable the court to ascertain what was intended to be expended on it ? If it is, then although the primary gift fails the corpus is not affected, and the whole income is applicable for charitable purposes, but, if, on the other hand, the first object has not been so defined that the court can fix the amount required for it, then the whole must fail, because the whole income might be applied for the first object. Nor do I think it is open to me, as Mr. Vaisey suggests, to ascertain how much is required for the void object and to declare the gift of the balance valid.
- B In *Re Birkett* (8), SIR GEORGE JESSEL, after stating that the case was a singular illustration of the way in which our law gets altered, proceeds as follows : " I have no hesitation in saying that, if there were no authorities, I should feel very little difficulty in deciding quite in a different way from that in which I am about to decide. If there were no authorities, I should hold, where there is a gift of money upon trust to apply a portion of the income for a definite purpose, and then to apply the surplus for another purpose, that, if the first purpose were sufficiently defined to enable you to ascertain the amount of the income that would be required for it, and that purpose failed through the gift being invalid, the gift of the surplus would be unaffected beyond the amount so ascertained." Then as an instance, he says that, if a man were to give the income of £10,000 a year in trust in the first place to keep a tombstone in repair, which could not exceed £20, and directed the residue of the £10,000 a year to go to a charity, he should assume, that good law and common sense would concur in saying that the £20 gift was void, and that the £9,980 was well given to charity. That is what Mr. Vaisey is asking me to do here, to hold that the gift of what is required for the masonic temple is void, but that the rest is well given to the charities. But the Master of the Rolls adds :
- C " If the first object is not so defined that you can reasonably ascertain the amount required, the whole must fail, because you might then apply the whole of the gift to the first object ; and, therefore, if you could apply the whole of the income properly and fairly to the first object, there would, of course, be no ascertainable residue." Authority for that proposition is to be found in *Chapman v. Brown* (9), *Fisk v. A.-G.* (6), and *Re Taylor* (1). On which side of the line does this particular case fall ? The primary purpose of the gift is the maintenance and upkeep of the temple, and the whole income is charged with that trust, and as the expenditure is at the sole discretion of the trustees, they may properly apply the whole. Is the court entitled to control this discretion and to define the limits within which the expenditure ought to be kept ? Could it in fact ascertain with any certainty whether there would be any surplus or not after providing for this primary object ? I do not think it would be possible. The whole income might be properly so applied, and, if so, there would be no available surplus. It is clear that the testator contemplated that the whole might be required.
- D I think the facts of this case are more like those in *Re Porter* (7) than those in the hypothetical case put by SIR GEORGE JESSEL, M.R., in *Re Birkett* (8). The obligation as to rebuilding the tomb is not limited to rebuilding out of income, but would require the hospital, if necessary, to have recourse to capital. The void trust might, therefore, involve not only the whole income, but even the corpus. In my judgment, therefore, the gift fails *in toto*, for it is clear that, on the basis of the conclusion to which I have come, the event in which the gift over was to take effect, namely, the breach of an obligation by the hospital, can never occur.
- E
- F
- G
- H

Order accordingly.

Solicitors : *Ashurst, Morris, Crisp & Co.* (for the executors, the annuitant and the legatee) ; *Wilde, Sapte & Co.* (for the Governors of St. Bartholomew's Hospital) ; *E. F. Turner & Sons* (for the residuary legatees) ; *Treasury Solicitor* (for the Attorney-General).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law.]

Re BARON, DEBTOR v. PETITIONING CREDITORS AND OFFICIAL RECEIVER.

[CHANCERY DIVISION (Morton and Uthwatt, JJ.), April 5, 1943.]

Bankruptcy—Appeal—Appeal against adjudication—Right of creditors to be heard—"Person aggrieved"—Bankruptcy Act, 1914 (c. 59), ss. 18, 108 (2).

A receiving order was made against the debtor on July 8, 1942, and at a meeting of the creditors on Feb. 24, 1943, it was resolved that the debtor should be adjudged bankrupt. On the application for the adjudication certain creditors appeared and argued against the order being made, but the order was in fact made. From that order the debtor appealed and the creditors asked to be heard on the appeal :—

HELD : once the general body of creditors have resolved that an application for an adjudication order shall be made, it is not open to any creditor to intervene in the proceedings and the creditors were not entitled to be heard on the appeal. In such circumstances, a creditor is not a "person aggrieved" within the Bankruptcy Act, 1914, s. 108 (2).

[EDITORIAL NOTE.] Where the creditors at their meeting have passed a resolution that an application shall be made for an adjudication order, the matter then passes out of their hands, and creditors who have opposed that resolution cannot be heard on the application for the order nor on any appeal from the order. This applies to the petitioning creditors as well as the ordinary creditors.

AS TO MAKING OF ADJUDICATION ORDER, see HALSBURY, Hailsham Edn., Vol. 2, pp. 120, 121, para. 148; and FOR CASES, see DIGEST, Vol. 4, pp. 180-182, Nos. 1666-1692.]

Cases referred to :

- *(1) *Re Pinfold*, [1892] 1 Q.B. 73; 4 Digest 170, 1590; 61 L.J.Q.B. 161; 65 L.T. 683.
- *(2) *Re Sidebotham, Ex p. Sidebotham* (1880), 14 Ch.D. 458; 4 Digest 225, 2114; 49 L.J.Bey.; 42 L.T. 783.

APPEAL from a decision of the registrar of the Rochdale County Court given on Mar. 1, 1943. The facts are fully stated in the judgment of MORTON, J.

The debtor in person.

V. R. Aronson for the Official Receiver.

Constantine Gallop for the petitioning creditors.

N. H. Lever for other creditors.

MORTON, J. : The petition in this case was filed on Feb. 5, 1942, by two creditors. The receiving order was made on July 8, 1942. There followed certain delays by reason of certain applications made by the debtor, and the first meeting of creditors was held on Jan. 13, 1943, and adjourned to Feb. 24, 1943. The adjourned first meeting was held on Feb. 24, 1943, when a resolution was passed that the debtor should be adjudged bankrupt and that the Official Receiver should apply to the court to make the adjudication order. The Official Receiver did apply to the court to make the order for adjudication and the application was heard on Mar. 1, 1943, by the registrar in the Rochdale County Court. At the hearing counsel appeared representing not the petitioning creditors, but certain creditors who desired to oppose the adjudication, and the registrar allowed that counsel to address him; but the only respondent to the application was the debtor, who appeared in person. The order of adjudication was made. From that order the debtor now appeals.

We have already intimated that we intend to adjourn the hearing of this appeal until the next sittings of this divisional court; but counsel for the Official Receiver has submitted that individual creditors are not entitled to be heard on the hearing of this appeal. Counsel who attended for the purpose of representing a number of creditors who were against adjudication did not submit that he had a right to be heard but he did submit that, in the circumstances of the present case, the court ought to hear him. As I understood him, he said that the majority who passed the resolution largely consisted of creditors who had security on other property, not the property of the debtor, and that the majority of the unsecured creditors were against adjudication. He also pointed out that the debtor was appearing in person and he asked the court to allow him to address the court without making any claim as of right. On the other hand, counsel for the petitioning creditors has submitted that he has a right to be heard and he has argued that on an appeal of this kind any creditor has a right to be heard.

Let me deal, first of all, with one question in order to dispose of it. It is the fact that the petitioning creditors were made respondents to the appeal in the notice of appeal which the debtor issued, but it is common ground amongst all the counsel who addressed us that that cannot affect the matter from any point of view of substance. The debtor cannot, by the action which he has taken, make the petitioning creditors proper respondents and entitle them to address the court if they are not in fact proper respondents.

A The Bankruptcy Act, 1914, s. 18 (1), enacts as follows, in so far as it is material for the present purpose :

Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt . . . the court shall adjudge the debtor bankrupt ; and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee.

B The definition of " ordinary resolution " is contained in sect. 167, where it is defined as follows :

" Ordinary resolution " means a resolution decided by a majority in value of the creditors present, personally or by proxy, at a meeting of creditors and voting on the resolution.

C As regards the proceedings at the meeting, I think I should refer to certain of the rules in the First Schedule to the Act. R. 7 provides :

The official receiver or some person nominated by him shall be the chairman at the first meeting. The chairman at subsequent meetings shall be such person as the meeting by resolution appoint.

Rules 8, 9 and 10 deal with voting at the meeting. R. 14 is as follows :

D The chairman of a meeting shall have power to admit or reject a proof for the purpose of voting but his decision shall be subject to appeal to the court. If he is in doubt whether the proof of a creditor should be admitted or rejected he shall mark the proof as objected to and shall allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained.

That gives certain rights of appeal to the creditors in case their proofs have been rejected for the purpose of voting, but once the creditors, by the necessary majority to pass an ordinary resolution, have resolved that the debtor be adjudged bankrupt, the next stage is that the court shall adjudge the debtor bankrupt. I shall have to return briefly to those words later.

E As regards the application which was made by the Official Receiver, the form adopted is Form No. 98, which is in the following terms :

F The Official Receiver of the estate of the above named debtor hereby reports to the court : that, at the first meeting of the creditors of the said debtor . . . held at . . . on the . . . day of . . . the following resolution was passed ; " that . . . the above named debtor shall be adjudged bankrupt and that the official receiver do apply to the court to make the adjudication." The Official Receiver accordingly, by pursuance of the provisions of sect. 18 of the Act, makes application to the court to adjudge the said debtor . . . bankrupt.

G That form was adopted pursuant to rules made under sect. 132 of the Act. The material rule is the Bankruptcy Rules, 1915, r. 5, which, so far as material, is as follows :

The forms in the Appendix, where applicable, and where they are not applicable forms of the like character, with such variations as circumstances may require, shall be used.

H In spite of the words " the court shall adjudge the debtor bankrupt," it is established by authority that the court is not bound in every case immediately to make an order of adjudication ; and I think it is helpful for the present purpose to refer to *Re Pinfold* (1). VAUGHAN WILLIAMS, J., as he then was, said this, at p. 75 :

In my opinion we ought to support the order of the county court judge. It has been contended that he acted upon the view that the word " shall " in sect. 20 [the present sect. 18] was a word which took away from him in all cases all discretion and left him no choice but to order an adjudication when once it had been proved to him that there had been a failure to accept the composition in pursuance of the Act. If that were the construction which he put upon the section, I should certainly hesitate before I adopted it. But I do not think that he meant to go that length ; and even

if he did, it is not necessary for us here to decide whether that construction of the section was the true one.

He then went on to point out that the question before the court was whether the county court judge had any discretion, in the circumstances of that case, to refuse adjudication ; and he proceeded as follows, at the bottom of the page :

The scheme of the Bankruptcy Act seems to be this : where the court has come to the conclusion that the case is a proper one for an adjudication, it is to make a receiving order in the first instance instead of an adjudication, in order that the creditors may have an opportunity of deciding whether they wish for an adjudication or not, but the opportunities which they are given for that purpose are limited to those mentioned in sect. 20 ; and, if they do not avail themselves of them, then an adjudication is to follow as a matter of course. In my opinion, the court has no discretion to give the creditors any further opportunity of considering their position beyond those mentioned in sect. 20 ; it has no discretion to refuse to make the order merely for the purposes of delay.

It seems to me that the scheme of the Act is that the creditors in the present case have resolved that the debtor be adjudged bankrupt and that, that having been done, the matter has passed out of the hands of the creditors ; the general body has made its decision, and it is not for any individual creditor to intervene in the proceedings which have followed as a result of that decision. It seems to me that it would be not only productive of grave inconveniences if individual creditors could demand to be heard in an appeal of this kind, but it would be contrary to the scheme which the legislature has laid down.

Counsel for the petitioning creditors has submitted that each individual creditor was a "person aggrieved," within sect. 108 of the Act, when the order of adjudication was made. I do not take that view. Persons who did not desire the order of adjudication to be made might be persons who were disappointed, but, in my view, they are not "persons aggrieved," within the definition which was given by JAMES, L.J., in *Ex p. Sidebotham* (2), at p. 465, when he said this :

But the words "person aggrieved" do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A "person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.

For my part, I cannot see that either the petitioning creditors or any of the other creditors in this case answer that description. I need not consider the question whether any individual creditor could or could not have applied. In fact, the Official Receiver has applied for the adjudication ; and I cannot see that any person other than the Official Receiver and the debtor is a proper party to this appeal. It is true that, if the court is satisfied in any case that exceptional circumstances exist which render it desirable in the interests of justice that a person who is not a party should be heard, the court may require that person to be brought before the court before deciding the matter. In the present case I cannot see that the interests of justice require that either the petitioning creditors or any other creditor should be brought before the court, and, in my view, neither the petitioning creditors nor any other creditor has the right to be heard by the court at the hearing of this appeal.

UTHWATT, J. : I agree. I see no reason why we require the assistance of counsel for the petitioning creditors or other creditors in the hearing of this appeal. They are not necessary parties and not proper parties.

Solicitors : *Solicitor, Board of Trade* (for the Official Receiver) ; *Woolfe & Woolfe* (for the petitioning creditors) ; *Asher & Banbridge*, Manchester (for the other creditors).

[Reported by HUBERT B. FIGG, Esq., Barrister-at-Law].

Considered. R. v. GERARD. [1948] 1
All E.R. 205.

R. v. LECKEY.

[COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., Charles and Hallett, JJ.), **November 1, 1943.**]

Criminal Law—Misdirection—Comment on silence of accused when charged—Whether jury would have convicted if properly directed—Criminal Appeal Act, 1907 (c. 23), s. 4 (1).

A The appellant was accused of murder. When charged and cautioned in the usual way, he replied: "Well, I have nothing to say until I have seen someone, a solicitor." The judge in summing up referred to this matter and commented that, while it was not necessary for the accused to say anything, one would expect him to say that the deceased was all right when he left her:—

B HELD: this was a misdirection, and, since the court could not say that the jury, if properly directed, would have convicted the appellant, the conviction must be quashed.

[EDITORIAL NOTE.] It is established by authority that the accused when cautioned is entitled to remain silent. This puts the police in a difficulty, since they are unable to inquire into the truth of the story the accused ultimately gives at his trial. It is, however, not to be said that his remaining silent and reserving his defence is to be taken against him and made the basis of a suggestion of guilt. The Court of Criminal Appeal in such a case is put in the difficult position of deciding whether the jury would have convicted if a proper direction had been given. In the present case the court has decided that it could not be said with certainty that the jury would in such circumstances have convicted and the conviction has been quashed.

AS TO THE LAW ON THE POINT, see HALSBURY, Halsham Edn., Vol. 9, pp. 275, 276, para. 402; and FOR CASES, see DIGEST, Vol. 14, pp. 533, 544, Nos. 6040-6055.]

Cases referred to:

D **(1) R. v. Whitehead*, [1929] 1 K.B. 99; Digest Supp.; 98 L.J.K.B. 67; 139 L.T. 640; 21 Cr. App. Rep. 23.

**(2) R. v. Charavanmuthu* (1930), 22 Cr. App. Rep. 1; Digest Supp.

**(3) R. v. Littleboy*, [1934] 2 K.B. 408; Digest Supp.; 103 L.J.K.B. 657; 151 L.T. 570.

**(4) R. v. Naylor*, [1933] 1 K.B. 685; Digest Supp.; 102 L.J.K.B. 561; 147 L.T. 559.

(5) Woolmington v. Director of Public Prosecutions, [1937] A.C. 462; Digest Supp.; 104 L.J.K.B. 433; 153 L.T. 232.

E APPEAL from a conviction of murder before SINGLETON, J., and a jury. The facts are fully set out in the judgment.

J. D. Casswell, K.C., and *Harold Brown* for the appellant.

John Flowers, K.C., and *L. A. Byrne* for the Crown.

F VISCOUNT CALDECOTE, L.C.J.: The appellant was charged with the murder on June 13, 1943, of a young married woman, who lived with her parents at 3, Sussex Road, in Folkestone. She was 18 years of age and, her husband being a soldier, and presumably absent, she obtained employment as what is called an usherette at the Central Cinema in Folkestone.

G On June 13, she left the cinema about 5 minutes to 9, and incidentally there was evidence that when she left the cinema she was at that time wearing what is described as a 2-stone engagement ring. She and the appellant were afterwards seen in the Mechanics Arms, a public house not very far from the deceased's home about 9 o'clock and she and the appellant were also seen to leave the same public house about 10 o'clock, that is to say, at closing time.

H The appellant is a gunner, and that evening, being stationed as he was a few miles from Folkestone, he had come into Folkestone about 9 o'clock with another soldier, Bombardier Knight, in an army lorry or truck. About a quarter past 10, that is to say, a quarter of an hour after the appellant and the deceased had left the public house, a witness saw the deceased and a soldier together. At half past ten a ticket collector saw them in a road, Radnor Park Road, a quite short distance from the deceased's home, and ten minutes or so later another witness, who was a barman, saw the deceased and again a soldier in Devon Road, which is rather nearer Sussex Road than Radnor Park Road where they had been seen by the ticket collector. That was the last that was seen of the deceased.

On June 17, about midday, the body of the deceased was found in the entrance passage to a house which was not at the time occupied, at 94, Foord Road,

in the immediate vicinity of the streets which I have mentioned. Certain steps were properly taken by the police, who photographed the body in the position in which it was found, and steps were taken, which were not immediately effective, to obtain some clue to the person who committed the murder, if murder it was. Medical evidence was called which contained, in our opinion, ample evidence upon which the jury might come to the conclusion that this young woman had been raped, in other words, that somebody had had sexual intercourse with her by force and against her will. The other medical evidence was that she had died of asphyxiation by being strangled and detailed evidence was given as to the marks or signs, wounds, bruises, and so on, showing that some sort of force was used against her. She was found lying upon her face, and signs of the force which was used to strangle her were found upon the back side of her neck, and some importance has been attached to that evidence by counsel for the appellant.

I return to the date the early morning of June 14, that is to say, the night of June 13, 14. The appellant returned to camp late. He told the guard that he had met a Flight Lieutenant of the Women's Auxiliary Air Force, and had walked back with her. He told the sergeant of the guard that he had seen a girl home, and he was made aware of the fact that his late entrance had been noted, but it seems that for some reason or other no report was made of it by the sergeant of the guard.

A few days after June 13, that is to say, on June 17, the appellant asked Gunner Latham a question about a girl who had been "done in," and there was evidence that the same subject had been mentioned by the appellant, in conversation with Gunner Melia. On the following day, June 18, the appellant also told Gunner Melia that he was going home, intimating that he was going without leave. Melia was also going on leave, and the two of them parted about 2 a.m. on the early morning of June 19. There was one additional piece of evidence at this stage which I should mention, and it is an important piece of evidence, and it was not really in dispute. A journalist who was called gave evidence to the effect that no paper was published in Folkestone on Thursday, June 17, or indeed no evening paper at all was published in Folkestone, and that the evening paper containing a report of the discovery of the body could not have reached Folkestone in time for the appellant to know about the finding of the body before he mentioned it, if he did mention it, to the two soldiers Latham and Melia.

When the appellant left his camp without leave he went to his mother-in-law and made the statement, which was quite untrue, that he was on embarkation leave. He then went away from Manchester, and reached another place on Sunday, June 20, the other place being near Stoke-on-Trent. From Stoke-on-Trent he went to Stafford, where he met a Mrs. Woolley, with whom he spent the night, and parted from her the following day; and eventually, after going from hotel to hotel night after night, having only a few shillings left, as he himself said, he was arrested on June 29. The effective charge upon which he was arrested, or first charged, was in connection with an alleged theft which he had committed by stealing the property of some American soldiers, in whose room he had spent the night. He was supposed to have got up before they did and taken their property. However, he was arrested, as I have said, on June 29, and when he was taken to the police station, having first of all given not his true name, but the name of Latham, there was found upon him an army pay book in that name of Latham, and a pad, amongst other documents, of blank army leave forms which had been stamped, and which were missing from the camp at Acrise, near Folkestone, which was the appellant's camp.

On June 30 the appellant was charged with this offence of murder and the usual caution was given. He said in reply to the caution, made in the customary terms—I will read it a little later—that before he made a statement he would like to get advice. At the trial before SINGLETON, J., he gave evidence. His statement was that he had met the girl in the Mechanics Arms, so that was not in dispute; that he had spent some time with her there and left, and a few minutes after they left the public house at 10 o'clock they had sexual intercourse, to which she was an assenting party. He said that he then left her at her own wish because she did not want to be seen with him at that hour, and she gave him some directions how to get back to the place to which he wished

to go. Then there was a certain amount of evidence as to his having taken a great deal of drink and mixed his drinks, and a certain amount of circumstantial detailed evidence on those lines. He explained his visit to Manchester as a visit which he was making in order that he might inform his wife before she learned it from another source that he had been unfaithful to her. As to the stolen leave pad and pay books, his story was that he knew he was absent without leave, and he had taken the books to cover his tracks.

A There was a great body of evidence upon which it was open to the jury, properly directed, to find that this man was the man who murdered the deceased.

It was contended on behalf of the appellant that SINGLETON, J., on at least two occasions, or, I think three occasions, in the course of his summing up made statements to the jury as to the silence of the prisoner so as to make his direction a misdirection. I referred to the fact that one police officer cautioned the prisoner. It in fact happened on two occasions. The witness B named Pierce, a detective inspector of the Kent Constabulary, took him to Folkestone after his arrest and, in answer to a question, Detective Inspector Pierce said: "I cautioned him. I asked him if that was the uniform he was wearing," and so on. Then the witness said he was again cautioned after the charge, and after some hesitation replied: "Well, I have nothing to say until I have seen someone, a solicitor."

C The other occasion upon which the appellant was cautioned was when Detective Inspector Smeed, also of the Kent County Constabulary, saw him on June 30, detained at Marylebone police station. Smeed said he told Leckey who they were, and said they were making inquiries about the death of the deceased, and in answer to the question as to whether the appellant said anything in reply to that, he replied, "I know about it"; that then Smeed said: "She was last seen in company with a soldier and enquiries show that

D she was murdered on Whit Sunday night, June 13." Then the witness said: "I cautioned him and said 'Do you care to give me an account of your movements late that day?' He replied: 'I was with the girl. I want to be fair to you and to myself, and before I make a statement I should like to get advice.'" The references to the caution are, of course, to the well-known formula which is used when police officers caution a person charged; they tell him that, if he cares to make a statement, he may; he need not, but if he does make a statement it will be taken down in writing and may be used in evidence thereafter. E

When the judge came to sum up, he dealt with this matter three times. He said:

On June 30 Detective Inspector Pierce, of the Kent County Constabulary, saw the accused, and he said he found upon him a large number of things. He said on that evening he charged him with this offence, and cautioned the accused, and the accused

F said, "Well, I've nothing to say until I've seen someone, a solicitor." Again, members of the jury, I draw your attention to the fact, as was emphasised by the defence, that this man was apparently always cool and collected. If a man is charged with murder, and is not responsible, if he had not committed murder or anything like murder, what do you expect him to say? Would you expect him to deny it? According to the Inspector, what the accused said was: "Well, I've nothing to say until I've seen somebody, a solicitor." Of course, members of the jury, he is not bound to say anything, but what would you expect?

G A little later on he said, repeating the evidence of Smeed, which I have read:

Again, as I said before, it is not necessary for a man to say anything on such an occasion, but is it not a little difficult to see why, if a man is asked to account for his movements and told what the inquiries were being made for he should not say "I did not murder the girl; when I left her she was all right," if that be the fact?

Lastly, the judge said almost at the end of his summing up:

H It may well be that the coolest and most calculating man ordinarily would get into a panic if he thought he might be charged with murder or thought he might be asked questions, but can you understand how it comes about, if he be innocent of the charge made against him, that he never said, "I did not murder the girl. When I left her she was perfectly all right"?

It is submitted on behalf of the appellant that those statements by the learned judge amounted to misdirection, and such misdirection as should lead this court to quash this conviction. This subject has been dealt with more than once by this court and, as I know, has been recently, though I am not sure whether

the cases have been reported, before the court. But the first reported case to which I will refer is that of *R. v. Whitehead* (1), where LORD HEWART, L.C.J., in dealing with a case of conviction for unlawful carnal knowledge of a girl under the age of 16, said this, at p. 24 :

When the police officer served the summons, he cautioned the appellant in the usual way, and the appellant said : " I do not want to say anything about it now," and the jury were directed that it was for them to decide whether there was corroboration or not according as they thought whether a respectable man would or would not deny such a charge ; if they thought the failure on appellant's part to make a denial when the charge was sprung upon him by the police officer corroborated the girl's evidence then they would probably accept more readily that evidence as being corroborated to that extent. This is a misdirection.

And he goes on to say the conviction must be quashed.

Another case was that of *R. v. Charavanmuttu* (2), which was a case of a charge of indecent conduct towards two boys, and LORD HEWART, L.C.J., in dealing with what had been treated at the trial as evidence of corroboration, said, at p. 4 :

It is quite clear that three matters were treated, if not, indeed, as being evidence of corroboration, as being matters which tended to support the evidence of the boys. One was the silence of the accused at the time when the charge was made—silence amounting to this, at any rate, that at the stage then reached he said that he reserved what he had to say. It is true that this remark was not treated as corroboration under the name of corroboration, but at the close of the summing-up the incident was brought prominently to the attention of the jury as something which might help them on the main question. It would be unfortunate if the jury thought that mere silence of the accused might amount to corroboration, for it is well settled since the decision in *Whitehead* (1) that it could not be.

Those two cases, I observe, were dealing with the question of corroboration, corroboration being needed, or at any rate desirable, in cases of the sort.

The matter came up again in *R. v. Littleboy* (3), but I am reminded that the next case in order of date was that of *R. v. Naylor* (4). There, the appellant had been cautioned, on p. 685, in these words, which I will read :

" Do you wish to say anything in answer to the charge ? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence upon your trial." In reply to that caution the appellant said : " I do not wish to say anything, except that I am innocent."

The recorder in his summing up said :

Imagine a purely innocent man accused of housebreaking and having these words put to him—" Do you wish to say anything in answer to the charge ? " Surely, if he is innocent, one would think he would give some explanation of where he was and what he was doing at the particular time, and would make his defence then and there Of course, what lurks in the background of this sort of hanging back and not disclosing his defence is that he gives the prosecution and the police no time to inquire into any statement he may make, so that it might be possible to show that these statements are not true.

In the judgment of the court, LORD HEWART, L.C.J., said this, at p. 687 :

When one looks at the words of the caution in the Criminal Justice Act, 1925, s. 12 (2), which must be taken to have been framed deliberately, it is obvious that they were intended to convey to the prisoner the information that he is not obliged to say anything unless he desires to do so. We do not think that the words of the caution can properly be construed in the sense that the prisoner remains silent after being cautioned at his peril and may find his silence made a strong point against him at his trial. In our view, the words mean what they say, and a prisoner is entitled to reply to the caution that he does not wish to say anything.

Lastly, I refer to *R. v. Littleboy* (3), where LORD HEWART, L.C.J., on p. 412, made these observations :

The real point urged on behalf of the appellant is that the judge was wrong in making observations upon the fact that the defence of alibi had not been disclosed before the magistrates, and our attention has been directed to *R. v. Naylor* (4). It is important to remember that in that case the fact that the appellant had not disclosed his defence at an earlier date was employed as being evidence against him in corroboration of an alleged accomplice, who had given evidence for the prosecution. The judgment of this court in that case was given with reference to those facts. It is quite true that there are sentences to be found in the report of that judgment which appear to be of universal application. We do not think, however, that it was ever intended to lay

down the proposition that a judge may not, in a proper case, comment on the fact that the defence of alibi has not been disclosed on an earlier occasion. It is one thing to make an observation with regard to the force of an alibi, and to say that it is unfortunate that the defence was not set up at an earlier date so as to afford the opportunity of its being tested; it is another thing to employ that non-disclosure as evidence against an accused person and as corroborating the evidence of an accomplice.

A Having considered those cases, and in particular the clear and emphatic language which was used in *R. v. Naylor* (4), the question is whether or not the passages which I have read amount to a misdirection justifying the quashing of this verdict, subject to one other point, which I will mention. I observe, as has been noticed in the course of the argument, that what the judge said in the third of the three passages I read, was :

B It may well be that the coolest and most calculating man ordinarily would get into a panic if he thought he might be charged with murder or thought he might be asked questions, but can you understand how it comes about, if he be innocent of the charge made against him. *

Those words are very like those used in *R. v. Naylor* (4) and wrongly used. Similarly, in one of the other passages, the judge says :

C . . . but is it not a little difficult to see why, if a man is asked to account for his movements and told what the inquiries were being made for, he should not say, "I did not murder the girl; when I left her she was all right," if that be the fact ?

D So that, three times over, once at the beginning, once a little later on, and a third time just before the end of his summing up, the judge seems to put to the jury the consideration that they might infer or find his guilt by considering the fact of his silence after caution. We think that that amounted to a misdirection, and it is proper ground upon which this verdict, subject to one other question, should be quashed. If it were not so, it must be obvious that a caution may be indeed a trap instead of being a means for finding out the truth, in the interests as much of innocent persons as it is in the interests of justice against guilty persons. An innocent person might well, either from excessive caution or for some other reason, decline to say anything when charged and cautioned, and if it was possible to hold that out to a jury as ground upon which they might find a man guilty, it is obvious that innocent persons might be in great peril. However, that may be, the law seems to us clear, and to have been clearly laid down by this court on more than one occasion, particularly in *R. v. Naylor* (4) to which I have referred.

F The only question that remains is one which has been raised by the counsel for the Crown, who was not really, after some discussion, in a position to dispute the conclusion which we perhaps indicated that we were prepared to reach, that the judge did misdirect the jury in the passage to which I have referred. He, with great propriety, if he will allow me to say so, did not think it proper to contest that question, but what he asked this court to do was to exercise the powers, which it is well-known the court has, set out in the proviso to the Criminal Appeal Act, 1907, s. 4. I need not read the first part of the section, which permits the court to allow the appeal on certain grounds, but the proviso is :

G Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

That passage has been commented on in clear, though brief terms in the case of *Woolmington v. Director of Public Prosecutions* (5), where, on p. 482, VISCOUNT SANKEY, L.C., made these observations :

H We were then asked . . . to apply the proviso . . . There is no doubt that there is ample jurisdiction to apply that proviso in a case of murder. The Act makes no distinction between a capital case and any other case, but we think it impossible to apply it in the present case. We cannot say that if the jury had been properly directed they would have inevitably come to the same conclusion.

That passage finally disposes of any doubt, if there were any doubt, as to whether the powers of the court as set out in the proviso applies to cases of murder just as much as to any other criminal charge. What the Lord Chancellor, giving the opinions of himself and other noble Lords, said was that they could not say that if the jury had been properly directed they would inevitably have come to the same conclusion; in other words, it would not be proper to use

the powers of the proviso unless this court thought that if the jury had been properly directed they would inevitably have come to the same conclusion.

In this case, although evidence which would have justified a verdict of guilty on a proper direction, is to be found in plenty, we feel unable to say that a jury would inevitably have come to the conclusion of guilty. In the first place, I observe that it is not our opinion that is to be invoked nor the opinion of anybody but the jury; before this court can exercise the powers given to it in the proviso, this court must be satisfied that the jury would have inevitably come to the same conclusion. Having regard to the importance which these passages must have had in the scheme of the summing up, and in view of the effect which they seem to us very likely to have had upon the minds of the jury when they were considering their verdict, we are not able to say in this case that the jury would inevitably have found a verdict of guilty. The conclusion, therefore, of the whole matter is that we must quash this conviction.

Appeal allowed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by R. BOSWELL, Esq., *Barrister-at-Law.*]

THE CORPORATION OF FOREIGN BONDHOLDERS v. COMMISSIONERS OF INLAND REVENUE.

[KING'S BENCH DIVISION (Macnaghten, J.), **October 14, 15, 1943.**]

Income Tax—Sched. D—Exemption from tax—Protection of interests of holders in the United Kingdom of foreign bonds—Whether established for “charitable purposes”—Income Tax Act, 1918 (c. 40), s. 37 (1) (b), Sched. D.

The appellant corporation was formed to protect the rights and interests of holders of public securities, especially foreign and colonial securities issued in the United Kingdom. It was contended that the corporation was a body established for charitable purposes only and that it came within the class of charities which are beneficial to the community since its ultimate object was to benefit the country as a whole:—

HELD: the protection of the interests of foreign bondholders was not a charitable purpose and the corporation was, therefore, not entitled to exemption from income tax under the Income Tax Act, 1918, s. 37.

[EDITORIAL NOTE.] Charitable purposes have generally been confined to the advancement of education or religion or the relief of the poor. It was suggested that, in certain cases, purposes have been held to be charitable as being beneficial to the community, but, without developing this point, it is here held that the protection of creditors in England is not a charitable purpose.

AS TO MEANING OF CHARITY FOR INCOME TAX PURPOSES, see HALSBURY, *Hailsham Edn.*, Vol. 17, pp. 310-314, paras. 617-621; and FOR CASES, see DIGEST, *Supp.*, *Income Tax*, Nos. 472a-476k.]

Cases referred to:

- (1) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 8 Digest 241, 1; 61 L.J.Q.B. 265; 65 L.T. 621; 3 Tax Cas. 53.
- *(2) *Inland Revenue Comrs. v. Yorkshire Agricultural Society*, [1928] 1 K.B. 611; Digest Supp.; 97 L.J.K.B. 100; 138 L.T. 192; 13 Tax Cas. 58.
- (3) *Re Macduff, Macduff v. Macduff* [1896], 2 Ch. 451; 8 Digest 296, 731; 65 L.J.Ch. 700; 74 L.T. 706.
- (4) *Re Corbyn, Midland Bank Executor and Trustee Co. v. A.-G.*, [1941] Ch. 400; [1941] 2 All E.R. 160; 110 L.J.Ch. 200; 165 L.T. 373.
- (5) *Peterborough Royal Foxhound Show Society v. Inland Revenue Comrs.*, [1936] 2 K.B. 497; [1936] 1 All E.R. 813; Digest Supp.; 105 L.J.K.B. 427; 155 L.T. 134.
- (6) *Institution of Civil Engineers v. Inland Revenue Comrs.*, [1932] 1 K.B. 149; Digest Supp.; 100 L.J.K.B. 705; 145 L.T. 553; 16 Tax Cas. 158.
- (7) *Royal Choral Society v. Inland Revenue Comrs.*, [1943] 2 All E.R. 101.
- (8) *A.-G. v. National Provincial and Union Bank of England*, [1924] A.C. 262; Digest Supp.; 93 L.J.Ch. 231; 131 L.T. 34.
- (9) *Trustees for the Roll of Voluntary Workers v. Inland Revenue Comrs.*, [1942] S.C. 47.
- (10) *General Medical Council v. Inland Revenue Comrs.*, *English Branch Council of General Medical Council v. Inland Revenue Comrs.* (1928), 97 L.J.K.B. 578; Digest Supp.; 139 L.T. 225; 13 Tax Cas. 819.

- (11) *Geologists' Association v. Inland Revenue Comrs.* (1928), 14 Tax Cas. 271; Digest Supp.
 (12) *Midland Counties Institution of Engineers v. Inland Revenue Comrs.* (1928), 14 Tax Cas. 285; Digest Supp.
 (13) *Honourable Company of Master Mariners v. Inland Revenue Comrs.* (1932), 17 Tax Cas. 298; Digest Supp.
 (14) *R. v. Income Tax Special Comrs., Ex p. Headmasters' Conference, Same v. Same, Ex p. Incorporated Assocn. of Preparatory Schools* (1925), 41 T.L.R. 651; 28 Digest 83, 471; 10 Tax Cas. 73.

A

APPEAL from a decision of the Special Commissioners for the purposes of income tax by way of case stated for the opinion of the King's Bench Division. The facts are fully stated in the judgment.

J. Millard Tucker, K.C., and *J. S. Scrimgeour* for the appellants.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

B

Tucker, K.C.: The appellant corporation falls within the last of the four categories referred to in *Pensel's* case (1): "trusts for other purposes beneficial to the community." Its immediate object is to benefit a substantial section of the community and its ultimate object is to benefit the country as a whole. The corporation, like a hospital, stands ready to assist any members of the public in need of its services. [Counsel referred to *Re Macduff* (3), *Re Corbyn* (4), *Inland Revenue Comrs. v. Yorkshire Agricultural Society* (2), *Peterborough Royal Foxhound Show Society v. Inland Revenue Comrs.* (5), *Institution of Civil Engineers v. Inland Revenue Comrs.* (6), *Royal Choral Society v. Inland Revenue Comrs.* (7), and to TUDOR ON CHARITIES.]

C

The Solicitor-General: The recent trend of the courts in this century has been to return to the preamble to the statute of Elizabeth to find out what is charitable. On the facts this is a commercial protection society. It does not come within

D

the fourth category which comprises charities which deal with the alleviation of the hardships of life and the improvement of the countryside. [Counsel referred to *Re Macduff* (3), *A.-G. v. National Provincial and Union Bank of England* (8), *Peterborough Royal Foxhound Show Society v. Inland Revenue Comrs.* (5), *Trustees for the Roll of Voluntary Workers v. Inland Revenue Comrs.* (9), *General Medical Council v. Inland Revenue Comrs.* (10), *Geologists' Association v. Inland Revenue Comrs.* (11), *Midland Counties Institution of Engineers v. Inland Revenue Comrs.* (12), *Institution of Civil Engineers v. Inland Revenue Comrs.* (6), *Honourable Company of Master Mariners v. Inland Revenue Comrs.* (13), *R. v. Income Tax Special Comrs., Ex p. Headmasters' Conference* (14), and to TUDOR ON CHARITIES.]

E

Tucker, K.C., in reply.

MACNAGHTEN, J.: In this case the Corporation of Foreign Bondholders, which was constituted by a private Act of Parliament (61 and 62 Vict. c. 49), appeals from a decision of the Special Commissioners rejecting its claim for exemption from income tax under the provisions of the Income Tax Act, 1918, s. 37 (1) (b), which provides that exemption shall be granted from tax.

F

... in respect of any yearly interest or other annual payment forming part of the income of any body of persons ... established for charitable purposes only ... and so far as the same are applied to charitable purposes only.

G

In 1868 a number of gentlemen in the City of London formed a voluntary association to protect the rights of foreign bondholders, and in 1873 this association was converted into a company limited by guarantee with the name of the Corporation of Foreign Bondholders. The private Act which constituted the appellant dissolved that company and transferred its assets, which were considerable, to the appellant. The question at issue on this appeal is whether the appellant is "a body of persons established for charitable purposes only." It is necessary, therefore, to see what are the purposes for which the appellant was constituted. They are set out in sect. 4 of the Act. The first object is:

H

... to watch over and protect the rights and interests of holders of public securities wherever issued, but especially of foreign and colonial securities issued in the United Kingdom.

There follow a number of other objects, but they are all incidental and subsidiary to that primary object.

The control of the business and operations of the corporation is vested in a council consisting of 21 members with power to increase their number to 30. Seven of the members of the council retire annually, and of the seven members

to be appointed in their place two are appointed by the Central Association of the Bankers of London, two are appointed by the London Chamber of Commerce and the remaining three are appointed by the council, but of those three members two at least must be *bona fide* holders of foreign bonds to a nominal amount of £5,000.

Counsel for the appellant submitted that the protection of the interests of persons who hold foreign bonds is a charitable purpose; that it comes within the class of charities which, without being for the relief of the poor or the advancement of religion or education are beneficial to the community. He conceded, of course, that the mere fact that the object of a society is beneficial to the community does not necessarily make it a charity, since *Peinzel v. Commissioners of Inland Revenue* (1) established once and for all that the words "charitable purposes" in the Income Tax Acts are not used in a popular sense or in any other sense than that attributed to them by the Court of Chancery. Counsel for the appellant argued that the purpose for which the appellant was constituted is beneficial to the community because it deals mainly with foreign debtors who have defaulted or are likely to default upon their obligations, and for economic and political reasons it is to the interest not only of the bondholders, but also of the whole community that such obligations should be observed. This case was, he said, analogous to the case of the *Commissioners of Inland Revenue v. Yorkshire Agricultural Society* (2). In that case it was held that, although the members of the society did get personal benefits from the operations of the society, that was a purpose subsidiary to its main purpose, which was the advancement of the science of agriculture and the improvement of agriculture throughout England. It seems to me that this present case cannot be described as analogous to the *Yorkshire Agricultural Society* case (2). In that case the primary object was the advancement of agriculture. In this case the primary object is that creditors in England may get payment of their debts.

The Special Commissioners held that the protection of the interests of foreign bondholders is not a charitable purpose within the scope of the preamble of the Statute of Elizabeth or within any of the decided cases. I agree with that decision, and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Slaughter & May* (for the appellants); *Solicitor of Inland Revenue* (for the respondents). [Reported by GWYNEDD LEWIS, Barrister-at-Law.]

LEE v. INLAND REVENUE COMMISSIONERS.

INLAND REVENUE COMMISSIONERS v. LEE.

[KING'S BENCH DIVISION (Macnaghten, J.), **October 15, 18, 19, 1943.**]

Income Tax—Sur-tax—Deductions—Covenants to pay annuities for more than 6 years—Contemporaneous agreements for repayment—Smaller sums repaid—What deductions allowable.

The appellant, by several deeds covenanted to make annual payments to certain beneficiaries for 7 years and to pay an annuity to himself and his wife as trustees for his niece. It was found as a fact that, in respect of 3 of the covenants there were contemporaneous agreements for the repayment of the annuities by the annuitants and that the annuitants did repay a slightly smaller sum in each case. In the case of 2 more covenants, the appellant, having paid the annuities and been repaid an identical sum, subsequently, in 1939, made a second payment. The appellant paid to the joint account of himself and his wife the amount of the annuity payable to them as trustees for his niece and they immediately repaid the amount to the appellant. The appellant claimed to be entitled to deduct the amounts payable under all the covenants in computing his income for the purposes of sur-tax. It was contended by the Crown on the cross-appeal that the deductions allowed to the appellant in respect of the difference between the sums paid by him and the sums repaid by the annuitants, and in respect of the two payments made in 1939 and the annuity held in trust for his niece should be disallowed:—

HELD: (i) in those cases where the annuitants had repaid the covenanted amount to the covenants, no payments had in fact been made in respect of which deductions could be allowed.

(ii) the excess of the amounts paid by the appellant over the amounts repaid to him by the annuitants represented sums paid on account of the annuities in respect of which deductions should be allowed.

(iii) in the case of those covenants in respect of which the appellant had made second and valid payments, the money had been duly paid under the covenant and the payments should be allowed as deductions from the appellant's assessment.

A (iv) in the case of the annuity for the niece, the money repaid to him was still held in trust for the niece and a deduction should be allowed.

EDITORIAL NOTE. This case considers again the question of effective payment where there is a covenant to pay an annuity for the purpose of reducing the tax liability of the covenantor. It is first decided that, where there is a part repayment to the covenantor, he is still entitled to regard the balance as an effective payment under his covenant. The last point, however, is important. Here the covenantor and his wife were the trustees to whom the annuity was paid and they paid it back to the covenantor. B It is held that, since it is still subject to the trust and in the hands of one of the trustees, there has been effective payment of the whole.

AS TO DEDUCTIONS IN COMPUTING TOTAL INCOME, see HALSBURY, Hailsham Edn., Vol. 17, pp. 275, 276, para. 546; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 576b, 576f.]

APPEAL by the taxpayer by way of case stated from a decision of the Special Commissioners confirming additional assessments to sur-tax.

C CROSS-APPEAL by the Crown against a decision of the Special Commissioners allowing certain deductions. The facts are fully set out in the judgment.

Frederick Grant, K.C., for Lee.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), *J. H. Stamp*, and *Reginald P. Hills* for the Inland Revenue Commissioners.

D MACNAGHTEN, J.: The question at issue in this case is whether Albert Lee is entitled in computing his total income for the purposes of sur-tax for the four years ended Apr. 5, 1936, 1938, 1939 and 1940, to deduct annuities payable to (1) Mrs. King, who is his only daughter, (2) Mrs. Brayshaw, and (3) Miss Jackson, who are his wife's sisters, and (4) to himself and his wife as trustees for Miss M. J. Brayshaw, his niece, under certain deeds executed by him in 1935 and 1937. Both Lee and the Crown are dissatisfied with the decision of the Special Commissioners, so there is an appeal and a cross-appeal.

E Albert Lee is a person of considerable means, and, although under no legal obligation to do so, he had for some time before any of the deeds in question were executed been in the habit of giving money to the persons I have mentioned; and he was advised by his accountants that, if he was minded to continue such benefactions, he would find it cheaper to covenant to do so, provided, of course, that he made covenants that were not caught by the provisions of the Finance Act, 1922, s. 20, which provides that:

F (1) Any income . . . (b) which by virtue or in consequence of any disposition made, directly or indirectly, by any person after the first day of May, nineteen hundred and twenty-two (other than a disposition made for valuable and sufficient consideration), is payable to or applicable for the benefit of any other person for a period which cannot exceed six years [should] be deemed for the purposes of the enactments relating to income tax (including super-tax) to be the income . . . of the person, if living, by whom the disposition was made.

G Albert Lee acted upon the advice given him by his accountants. By a deed dated Oct. 3, 1935, he covenanted to pay an annuity of £200 to his sister-in-law, Miss Jackson, by a deed dated Oct. 18, 1935, he covenanted to pay an annuity of £65 to his other sister-in-law, Mrs. Brayshaw, and by a deed dated Oct. 25, 1935, he covenanted to pay £1,700 a year to his daughter, Mrs. King. Two years later, on Nov. 26, 1937, he entered into three further covenants, namely (1) a covenant to pay Mrs. Brayshaw an annuity of £720, (2) a covenant to pay H Miss Jackson an annuity of £300, and (3) a covenant to pay to himself and his wife as trustees for Miss Brayshaw an annuity of £337. The facts of the case are somewhat complicated, though they are considerably simplified by a schedule prepared by counsel for the appellant; the issues to be decided by the court are, however, simple enough.

Counsel for the appellant raised two issues: (1) whether it was necessary for Lee to establish that he had in fact paid the annuities in question. He admitted that I am bound to uphold the decision of the Special Commissioners disallowing any deductions when the payment of the annuity was not established to their

satisfaction; but he took the point in case of an appeal. (2) The second issue raised by counsel for the appellant was this. As to the annuity payable to Mrs. King under the covenant dated Oct. 25, 1935, and the annuities payable to Mrs. Brayshaw and Miss Jackson under the covenants dated Nov. 26, 1937, the Special Commissioners found there was a contemporaneous agreement for repayment of the annuities by the covenantees, and they disallowed the deductions in those cases except to the extent which I will mention later. Counsel for the appellant contended that, in these circumstances, the deduction of the annuities should be allowed and the repayments made by the covenantees should be included as part of the taxable income of Lee. A

In my opinion, this contention cannot be sustained. I think that, where there was an agreement or arrangement that the covenantee should on receipt of the covenanted amount return it to the covenantor and the covenantee in fact did so, the Special Commissioners were right in holding that no payment had in fact been made. B

Those are the only two points arising on the appeal by Lee, and, in my opinion, they both fail.

It now remains to deal with four points raised on the cross-appeal by the Crown. What has actually happened with regard to Mrs. King's annuity under the covenant dated Oct. 25, 1935, is this. The amount due from Albert Lee to his daughter under the deed was £1,317 10s.—that is the annuity of £1,700 after deduction of tax. Mrs. King was told by her father to give him a cheque for £1,217 10s., and she did so on Oct. 29, 1935. She had an account at the Sheffield Moor Branch of the Midland Bank, which was also the bank where her father kept his account, and so Mrs. King, having given her father a cheque for £1,217 10s. on Oct. 29, her father gave her a cheque dated Oct. 30, which was the due date for the payment of the annuity, for £1,317 10s. The Special Commissioners were satisfied, and I do not see how they could have come to any other conclusion, that Lee did in fact pay £100 on account of the annuity to his daughter, and in those circumstances they held, and I think rightly, that he was entitled to a deduction from his total income in respect of that sum. C

There was also a cross-appeal with regard to two other small sums of £1 in respect of Miss Jackson's annuity under the deed of Nov. 26, 1937, and of Mrs. Brayshaw's annuity under the deed of the same date. Lee paid those two sums of £1 each in the same way as in the case of Mrs. King, and they are covered by my decision in her case, and, therefore, I need not say anything more about them except this: the finding of the Special Commissioners was that there was a contemporaneous agreement to repay the covenanted sums which was acted upon. The statement, "which was acted upon," is not consistent with their decision allowing these several deductions; but I think counsel for the appellant is right in saying that the statement must be read as inapplicable to those particular payments, since it is obvious they thought it was acted upon in the case of Mrs. King with the exception of £100, and in the case of the two sisters-in-law with the exception of £1, but that fact has been omitted from para. 24 of the case. D

The second point raised by the Solicitor-General was contained by notice given on Jan. 5 of this year, and is stated thus: This point is that, as in the case of each of the deeds in question the first payment made or purported to be made under the covenant was an ineffective payment owing to the agreement that it should be repaid by the recipient, the subsequent payments made or purported to be made, even if effective annual payments in other respects, fall within the mischief of the Finance Act, 1922, s. 20, as being payments made for a period which could not exceed 6 years. The words of the section are, however, quite plain. The fact that the annuity was not paid does not make the covenant for a period which cannot exceed 6 years. E

A third point is then raised. In 1939, Lee in two of the cases having made what the Commissioners describe as an ineffective payment, that is to say, he gave a cheque to the covenantees and received a cheque for the same amount from them, subsequently made a second payment. The second payment was a real one. He did really pay the money and he paid it in due time. Therefore, the Commissioners held, quite rightly, that not only were the covenants in all respects valid and effective (all these covenants were revocable originally, but F

the power of revocation was released in due time, on Oct. 26, 1938), but also that Lee discharged his obligations thereunder by making these second payments. I see no reason for questioning the correctness of the decision of the Special Commissioners that Lee should be allowed those payments as deductions from his assessment.

A The fourth and last point raised by the Crown relates to the case of Miss Brayshaw, the niece, who is an infant. In Miss Brayshaw's case Lee on the due date paid to a joint account of himself and his wife the amount of the annuity, and then he and his wife paid the amount to himself, Lee. The Commissioners have held that the moment the money was paid to Mr. and Mrs. Lee they became trustees of that money for Miss Brayshaw. It is true that they paid it back immediately to Lee; but that does not absolve them from full responsibility for dealing with the money in accordance with the terms of the trust. They both knew that it was trust money, and, if Lee has used the money for himself B and has not applied it for the benefit of Miss Brayshaw, he and his wife are liable to replace the money, and I apprehend that, if, in such a case, he failed to do so, the court would enforce an order to that effect by committal. In these circumstances, the Special Commissioners have held that that money was duly paid under the covenant. I think they are right. If Lee has misapplied the money and proceedings are taken against him and Mrs. Lee, it will not be open C upon that point, I think also that the decision of the Commissioners was right and the cross-appeal also fails.

The result is that both the appeal and the cross-appeal are dismissed with costs.

Appeal and cross-appeal dismissed with costs.

Solicitors: *Ashurst, Morris, Crisp & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the Inland Revenue Commissioners).

D [Reported by GWYNEDD LEWIS, *Barrister-at-Law.*]

Re PAYNE (deceased), WESTMINSTER BANK, LTD. v. PAYNE AND OTHERS.

[CHANCERY DIVISION (Uthwatt, J.), **October 12, 1943.**]

E *Wills—Construction—Life interest to widow—Sums in consideration of past services payable after testator's death—Whether capital or income.*

Under a service agreement with a company the testator was entitled to a fixed monthly salary and a certain percentage of the annual net profits of the business. The agreement further provided that, in the event of the testator's death, his representatives should be entitled to receive the F testator's fixed salary for six months after his death and the percentage of the profits for five years after his death. By his will the testator devised and bequeathed to his widow a life interest in all his property whatsoever. The question to be determined was whether the sums payable after the death of the testator by virtue of the service agreement were payable to the widow as tenant for life entitled to the income of the estate:—

G HELD: on the true construction of the will the widow was entitled to the fruits arising from the assets of the testator but not the assets themselves. The sums payable after the testator's death were part of his estate and not the income of it and the widow was not entitled to them.

[EDITORIAL NOTE. A life tenant is entitled to the income from the estate. This, however, does not include payments, though of an income nature, which are payments contracted to be made to the testator or, where they are to be made after his death, to his personal representatives. Such payments are in all cases capital of the estate and H the life tenant is entitled only to have them invested and to receive the interest or income arising from them.

AS TO WHERE RESIDUARY ESTATE SETTLED, see HALSBURY, *Hailsham Edn.*, Vol. 14, pp. 368-370, paras. 689-692; and FOR CASES, see DIGEST, Vol. 23, pp. 464-467, Nos. 5358-5374.]

Cases referred to:

* (1) *Re Fisher, Harris v. Fisher* [1943] 2 All E.R. 615.

(2) *Crawley v. Crawley* (1835), 7 Sim. 427; 40 Digest 657, 1961; 4 L.J.Ch. 265.

* (3) *Re Whitehead, Peacock v. Lucas*, [1894] 1 Ch. 678; Digest Supp.; 63 L.J.Ch. 229; 70 L.T. 122.

* (4) *Re O'Hagan, O'Hagan v. Lloyds Bank, Ltd.*, [1932] W.N. 188; Digest Supp.; 174 L.T. Jo. 122.

* (5) *Re Sherry*, [1913] 2 Ch. 508; 40 Digest 685, 2206; 83 L.J.Ch. 126; 109 L.T. 474.

(6) *Re Chesterfield's (Earl) Trusts* (1883), 24 Ch.D. 643; 40 Digest 688, 2238; 52 L.J.Ch. 958; 49 L.T. 261.

SUMMONS by the testator's executors to determine questions arising under the will of the deceased. The facts are fully set out in the judgment.

Wilfrid M. Hunt for the executors.

Geoffrey Cross for the widow.

W. F. Waite for the remaining defendants.

UTHWATT, J.: In this case the testator, Ernest William Payne, who died on July 28, 1941, by his will dated Sept. 14, 1934, after appointing an executor, proceeded by cl. 4 to provide as follows:

I devise and bequeath a life interest in and the use and enjoyment of all my property whatsoever and wheresoever and the beneficial ownership of the income arising therefrom during her life unto my said wife Jessie Amelia Payne free of all death duties which shall be borne by my residuary estate.

Then cl. 5 provides:

After the death of my said wife I direct my trustee to divide my estate into five equal shares and to pay or transfer . . . [certain proportions to certain named brothers and sisters].

The question in this case arises by reason of the payment of a sum of money to which the estate of the testator was entitled under a contract of service dated June 29, 1936, which was subsequently modified in some small respects by a supplemental agreement dated Aug. 20, 1937. The agreement is one between E. W. Payne & Co., Ltd., and the testator and it provides the remuneration payable to the testator in respect of the services agreed by that agreement to be rendered by him to the company. By cl. 4 the testator is entitled to be given by way of partial remuneration for his services a salary at the rate of £600 per annum payable by equal monthly instalments on the last day of each calendar month. That was to begin on July 1, 1933. Under cl. 5 provision is made for further remuneration on the footing that, during the continuance of Payne's appointment and thereafter to the extent thereafter provided, he is to receive by way of additional remuneration a share in a certain percentage of the net profits of the company in each financial year; and it is provided that payments shall be made to the named persons including the testator:

. . . or so many of them as shall for the time being under their respective service agreements be entitled to share therein, with the substitution for each such person of his personal representatives in each case where after the death of such person his personal representatives shall be entitled to share therein in his place, in manner and for the period provided by this agreement.

By cl. 6 it is provided:

In the event of his incapacity or of his death Mr. Payne whilst not engaged in any other remunerated work or employment or his personal representatives if he shall be dead shall be entitled for a period of five years from the date of such incapacity or death as the case may be to what would have been his share of further remuneration under cl. 5 if he had not died or become incapacitated.

Then "incapacity" is defined. At the end of cl. 6 it is provided:

Upon becoming incapacitated or upon his death Mr. Payne or his representatives shall cease to be entitled to receive the fixed salary hereunder as from the last day of the half year ending next after the date upon which he shall have become incapacitated.

There are other provisions dealing with the nature of the services to be rendered by the testator under the agreement and other matters arising under the agreement. Then by the indorsed agreement it is provided, amongst other things, that the words "or on his death" shall be added at the end of cl. 6 of the main agreement; with the result that the fixed salary to Payne, the testator, would continue until the half yearly day next succeeding the date of his death, in this case until Jan. 1, 1942.

The question which I have to decide is whether, upon the true construction of the will, the sums payable after the death of the testator by virtue of this agreement are comprised in the bequest in favour of the widow contained in

cl. 4 of the will. I think it is right to treat all the sums payable under the agreement on the one footing. They are all of them remuneration for past services, services rendered by the testator during his lifetime; and it is a block remuneration although one part and the major part of the sums payable continue for a much longer period than the small part arising under the fixed salary. If the matter be looked at apart from authority, can it be said of these sums payable for a short period (for, after all, five years is not a long period) after the death of the testator that they come within the description of:

A . . . a life interest in and the use and enjoyment of all my property whatsoever and wheresoever and the beneficial ownership of the income arising therefrom during her life unto my said wife Jessie Amelia Payne.

Counsel for the widow suggests that they do. As a matter of English language it appears to me that that clause proceeds upon the footing that the widow is to have the fruit which arises from an asset comprised in the testator's estate: it is the fruit arising from the asset and not the asset itself which in terms is given to her. In that view I am confirmed by the judgment of BENNETT, J., in *Re Fisher* (1). There the judge had to consider the case of an intestate and for his purposes he had to determine whether or not the widow (who, under the Administration of Estates Act, 1925, subject to the payment of £1,000 for her own use, was entitled to a life interest in the estate) was entitled to receive certain sums payable under a policy issued by Boots Co-operative Insurance and Pension Society, Ltd. I do not propose to go into the judgment but merely to refer to the parts of the judgment where he deals with these sums which were payable for a period of 16 years when a final sum of £450 became payable. BENNETT, J., said, at p. 618:

D All the sums become payable after the intestate's death. All of them are payable under the same contract. All of them come from the same source. It is not possible to point to any property of which the intestate was possessed when he died and to predicate of the annual sums that they are income arising from that property since the intestate's death. There was not and is not any tree belonging to the intestate of which the annual payments are the fruit.

I agree with the principle which lies behind the expression there used and I apply it to this case.

E There is a certain amount of earlier authority upon the point at issue. The matter was considered in *Crawley v. Crawley* (2). The report of the arguments is not given in detail and the judgment is not a very long one, but it accords with the view which I have expressed. With regard to *Re Whitehead* (3), in which *Crawley v. Crawley* (2) was approved, the case arose upon a trust for sale with a power to postpone conversion. Similarly in *Re O'Hagan* (4) the question was ultimately a question of construction of a power to postpone conversion. In *Re Sherry* (5) again it was the case of a trust for sale with a power to postpone conversion. It may very well be that it is possible to arrive at the conclusion that, upon the true construction of a common form trust for sale and a common form power to postpone conversion the phrase "income of my estate" in those clauses means "income which happens to be part of my estate" and not "income derived from my estate"; and upon that footing I have no quarrel with the decision in *Re Sherry* (5) or *Re O'Hagan* (4). In this particular case where I have a plain direction which, on its face, deals with income derived from the estate, I fail to see how it is possible to say that these sums payable at various intervals from one source only, E. W. Payne & Co., and given in respect of services rendered during the testator's lifetime are income of the estate. They are part of the estate and not the income of it. The sums should be apportioned on the principle laid down in the case of *Re Chesterfield's Trusts* (6).

H Declaration accordingly. Costs of all parties to be paid out of the estate.

Solicitors: Nordon & Co. (for all parties).

[Reported by R. L. ZIAR, Esq., Barrister-at-Law.]

DUNTHORNE AND SHORE v. WIGGINS.

[COURT OF APPEAL (Lord Greene, M.R., Luxmoore and Goddard, L.JJ.),
November 18, 19, 1943.]

Sale of Land—Agreement for sale—Conveyance on completion of payment of instalments—Instalments based on outgoings—Whether instalments rent—Purchaser let into possession as tenant at will—Default in payment of instalments—Right of landlord to possession.

The appellants, a firm of builders who had built a number of houses at Drayton, entered into an agreement with the respondent for the sale of a freehold house subject to a mortgage to a building society. The purchase price was £445, but, since there was a sum of £328 10s. 5d. outstanding on the mortgage, the terms were that the purchaser was to give a promissory note for £100 and to pay weekly instalments of 25s. which were to be applied to the payment of the monthly sum of £2 7s. due under the mortgage, such sums as should become due for rates, water rates, and insurance, interest at 5 per cent. per annum on the outstanding balance of the £100 secured by the promissory note and the surplus to the reduction of the principal sum of £100 due on the promissory note. When the sum due under the promissory note had been fully discharged, the purchase was to be completed by a conveyance of the property subject to the mortgage. Pending completion the purchaser was to be allowed entry as tenant at will provided the weekly payments were duly made. The agreement provided that, if any of the weekly payments were more than 14 days in arrear, the premises were to be vacated and all interest of the purchaser in the property was to cease. It was contended by the respondent that the weekly payments were rent and, therefore, the respondent was entitled to the benefit of the Rent Restrictions Acts. It was also contended that the agreement to purchase was void for uncertainty.

Held: (i) the weekly payments were not rent but a sum to provide for the discharge of outgoings, including the payments due under the mortgage and part payment in liquidation of the £100, with interest in the meanwhile, and, therefore, the Rent Restrictions Acts had no application.

(ii) the agreement to purchase was not void for uncertainty.

(iii) the Courts (Emergency Powers) Acts had no application to this case which was not an action based on non-payment of rent nor an action by a mortgagee.

Decision of BENNETT, J. ([1943] 1 All E.R. 577) reversed.

[EDITORIAL NOTE.] This case must be read with *Francis Jackson Developments v. Stemp* (1). The two cases turn on the proper construction of the agreement. In *Stemp's* case (1) it was held that the sum to be paid during the occupation of the premises was not based in any way upon the sum due under the contract of purchase and the outgoings of the property, but was a sum paid for use and occupation. That sum was, therefore, held to be rent payable in respect of a tenancy at will. In the present case the sum payable is wholly based on the outgoings of the property and the reduction of the purchase price and the contract is, therefore, one of sale and not of tenancy. There is no tenancy and no rent, although the purchaser is stated in the contract to be a tenant at will and the agreement is stamped as a lease. Having regard to the decision in this case it becomes arguable whether such an agreement attracts stamp duty as a lease. BENNETT, J., in construing the agreement as a tenancy placed some reliance on the fact that the agreement was stamped as a lease. The Court of Appeal has also held that a purchaser in possession in such circumstances in addition to being outside the Rent Acts is also outside the Courts (Emergency Powers) Acts, and that the vendor is entitled to immediate possession in any event.

AS TO THE CREATION OF THE RELATIONSHIP OF LANDLORD AND TENANT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 5-13, paras. 1-8; and FOR CASES, see DIGEST, Vol. 30, pp. 342-344, Nos. 1-28.]

Case referred to:

* (1) *Francis Jackson Developments, Ltd. v. Stemp*, [1943] 2 All E.R. 601.

APPEAL by the plaintiffs from an order of BENNETT, J., dated Apr. 7, 1943, and reported [1943] 1 All E.R. 577. The facts are fully stated in the judgment of LORD GREENE, M.R.

Harold Christie, K.C., and *Hector Hillaby* for the appellants.

J. Platts Mills for the respondent.

LORD GREENE, M.R. : Counsel for the respondent, with an assiduity worthy of a more arguable case, has endeavoured to persuade us that the agreement in suit is either void for uncertainty as a whole, or void for uncertainty in part. In my opinion, that argument is quite unsustainable. The document is not an artistic document ; but its construction presents to my mind no real difficulty at all. The nature of it can be easily summarised. It relates to a house which was subject to a building society mortgage. It is, on the face of it, a contract to sell the house subject to that mortgage. In other words, what was being sold was the equity of redemption. The amount of the mortgage stated in the contract is £345. The equity of redemption is to be paid for by a sum of £100, making a total of £445 as the purchase price. The contract says "£545." It is obviously intended to be nothing more than the addition of £345 and £100, and the document must be construed in that way—the figure should be £445.

The purchase money was to be payable by instalments ; and a promissory note was to be given for the £100. Quite obviously a contract of that kind would be without any business value at all unless the purchaser was let into immediate possession, because completion would not take place for a considerable time, owing to the length of time it would take to pay the instalments. The purchaser was let into possession on the terms set out in the document. The terms, to my mind, are clear, intelligible, and not particularly unbusinesslike. The purchaser was to be let into possession and was to be entitled to remain in possession so long as the weekly sum of 25s. was paid. That 25s. is defined in cl. 2 of the agreement, putting it quite shortly, as a sum intended to provide for the outgoings which the tenant in possession would normally have to pay, such as rates, water rate, insurance, the instalments under the building society mortgage, and the interest on the £100. Any balance remaining was to be put towards the liquidation of the outstanding balance of the £100. That is a transaction which is quite understandable. I can find nothing in this document to suggest that it is in any way void for uncertainty ; or that its effect is other than what I have said.

Turning now a little more in detail to the language of the document, it is to be observed that, in cl. 2 :

... the vendors agree to sell and the purchaser agrees to buy the house. The purchase price shall be the sum of £545 [an obvious mistake for "£445"] to be paid as follows : A building society advance of £345 and a promissory note for £100 signed by the purchaser, as set out below.

That sentence explains how the £445 is made up. It means nothing more than that the purchaser is buying subject to the existing building society mortgage and the purchaser must take over the burdens of that mortgage. If and when completion came to be effected, there would be a conveyance subject to the mortgage and the purchaser would covenant to indemnify the vendor against it and to carry its terms into effect. That would be the proper way to carry this purchase out. After that sentence which I have just read comes this phrase :

In consideration thereof the purchaser will pay weekly to the agents the sum of 25s. The words "in consideration thereof" are completely inaccurate, as they must mean "in satisfaction thereof" or "in part satisfaction thereof." The clause proceeds :

The purchaser will pay weekly ... the sum of 25s. ... in each week ... until the promissory note is redeemed ...

That is to say, until the price set on the equity of redemption has been discharged. Then, out of these payments, the vendors' agents are to retain 5 per cent. on the unredeemed balance of the promissory note, make the due payment to the building society, discharge the rates, water rate and insurances, and credit the balance towards the reduction of the promissory note. The function of the 25s. is defined there quite clearly. It is nothing more nor less than a sum to provide for the discharge of outgoings, including the payments due under the mortgage and part payment in liquidation of the £100, with interest in the meanwhile. That is what the 25s. is. BENNETT, J., has construed this agreement and found that the 25s. is rent. With the greatest possible respect to him, I cannot find any justification, in the language of this document, to support the view that the 25s. is anything more than what I have said it is.

The third clause fixes the date for completion. It is the date when the promissory note is redeemed, that is to say, when the whole of the £100 has been paid off by this machinery of weekly payments. It then goes on to say :

... the purchaser shall be allowed entry as tenant at will provided he pays to the agents the sum of 25s. per week from the date of possession to the actual date of completion.

That quite clearly is the same 25s. as is referred to in the second paragraph. It is not a different one, it is the same one, and is made up of the elements which I have indicated. The clause then goes on to make a rather arbitrary splitting up of that 25s. What it says is this :

Out of the above mentioned sum of 25s. the sum of 18s. shall be retained by the agents on behalf of the vendors, as interest on the outstanding balance of the promissory note and for payment of the building society instalments, rates (except as hereinafter mentioned) water and insurance and the balance subject to cl. 2 hereof, shall be credited as a reduction of the promissory note.

That is merely setting out, in a rather clumsy way, precisely what has been said in cl. 2, with the exception that the 25s. is split up and 7s. out of it is definitely earmarked as an instalment by way of reduction of the £100 to be secured by the promissory note. That is all it is. It does not give the new character of rent to the 25s. The character of that 25s. is fixed quite clearly by the terms of the agreement and is not rent at all.

Then comes cl. 5, which contains this provision :

... if at any time after 12 months' occupation the house is vacated and the keys handed over to the agents on behalf of the vendors and provided that no payments are in arrear, this contract shall be regarded as null and void, the promissory note shall be cancelled and any interest the purchaser might have had apart from this clause in the property shall cease and be extinguished.

That merely means this. After 12 months' occupation the purchaser is given the option to get out of the purchase contract and bring it to an end. In order to do that, provided he is punctual in his payments, he can exercise that option by going out of occupation and handing over the keys. That is the only result of that clause. It is an option to the purchaser in certain circumstances to bring the purchase contract to an end. Then cl. 6 says :

It is also agreed that if any of the said weekly payments is more than fourteen days in arrear of the agreed date, then the purchaser shall forthwith vacate the premises and deliver them up to the agents on behalf of the vendor, and any interest that the purchaser might have had apart from this clause in the property shall cease and be extinguished. All arrears of the said weekly payments shall be recoverable by the agents on behalf of the vendors and on payment of such arrears the promissory note shall be cancelled.

To paraphrase the clause, it amounts to nothing more than this. It is saying that, in certain events, namely, there being 14 days of arrears in the weekly payments, the purchase contract is to be at an end. The tenant must vacate the premises and the contract is at an end, subject to the right of the vendor to recover any arrears up to date. What the effect of that may be as between vendor and purchaser, it is not necessary to consider. In order that it may not be thought that it necessarily has the effect which it appears to have on its face, I say it is possible—I say no more than that, because I am expressing no view about it—that the court would not regard that 14 days, in case of the default of the purchaser, as being of the essence of the contract ; and the purchaser who was 14 days in arrear could nevertheless, in spite of that, claim specific performance of the contract, although he was in arrear. On the face of it, this is a provision for determining the purchaser's rights as a purchaser under the contract if he fails to make punctual payments, or reasonably punctual payments, of the instalments. What the effect of that may be as between vendor and purchaser if the purchaser, being in arrear, nevertheless claims specific performance, as I have said, I need not inquire. I merely mention it in order to show that that point is not affected by our decision in this case. Whatever rights the purchaser may have in respect of holding the vendor to this bargain are not prejudiced by anything we have to decide here.

That is the whole of the case. It was suggested as part of the argument that the contract was in some way void for uncertainty. The point apparently was founded on the argument that the promissory note written at the end of

the contract was not good as a promissory note, because it was not stamped as such and, therefore, must not be looked at. It was said that that introduced an element of uncertainty in the contract. But the contract contains an undertaking to sign a promissory note. If no promissory note, valid as such, is in existence, the purchaser has not carried out her contract, and she could be required to sign a proper promissory note. There is nothing more in the point than that.

A Various other matters were raised by counsel for the respondent. I want to do justice to his argument; but I am not quite sure how to approach it. I have already said what, in my opinion, is the true construction of this document. In my opinion, it is not void for uncertainty. Although the parties have contracted to create a tenancy, what they have contracted to create is not a tenancy at a rent, but a right to possession, which is to remain so long as, and no longer than, the instalments of the purchase price and the outgoings comprised in the 25s. are duly met. As I have said, in my opinion, that is not rent at all, and cannot be so regarded. The result, therefore, is that the Rent Restriction Acts have nothing to do with this case.

B One further point which counsel for the respondent endeavoured to take was that the plaintiffs had no title to maintain this action, because they had not any right to possession. It is sufficient to dispose of that argument to say that, in the pleadings the plaintiffs are not put to proof of their title. The judge never considered it. There is no finding on the subject; and it is not permissible to raise that point in this court.

C Before I conclude, I should say a word about a case decided last month by this court, the members of which were myself, MACKINNON and DU PARCQ, L.JJ., *Francis Jackson Developments, Ltd. v. Stemp* (1). That was a case where the defendant had entered into a contract to buy a house on the footing that the vendors would procure for him (as the judge found they had undertaken to procure) a building society mortgage on certain lines. They failed to procure the mortgage on those terms and the purchase went off. While attempts were being made to secure a mortgage, the purchaser was let into possession under the terms of an entirely separate document. The terms of that document were terms which this court construed as providing for the payment of rent. The purchaser, in consideration of being let into possession as tenant at will, undertook to pay a sum for "occupation and use." The court held that that meant that he was undertaking to pay rent. It is perfectly true that the measure of that rent was $5\frac{1}{2}$ per cent. interest on the purchase money; but it was not a payment of that interest, nor was the $5\frac{1}{2}$ per cent. necessarily the contractual rate of interest on the purchase money. The result, therefore, was that the position in that case, as seen by the court, was that the defendant there was undertaking to pay a separate and independent sum for the use and occupation of the premises. We held that, in those circumstances, that sum was rent and nothing but rent. It is a case which affords no assistance whatsoever in dealing with the present contract, which is different in all material respects.

F In my opinion, this appeal should be allowed and, subject to any question as to leave to proceed, which can be dealt with hereafter, there should be an order for possession. I should add that the order is without prejudice to whatever rights either of the parties may have under the purchase contract. Nothing that we are deciding here prejudices those rights in any way. The contract may or may not be in existence, or there may or may not be any rights under it. I express no opinion on that point.

G LUXMOORE, L.J.: I agree.

GODDARD, L.J.: I agree.

H The court then held that, since the action was not an action to recover possession on the ground of non-payment of rent nor a mortgagee's action, the Courts (Emergency Powers) Acts did not apply.

Appeal allowed with costs.

Solicitors: *Champion & Co.*, agents for *Turberville Smith & Co.*, Uxbridge (for the appellants); *Harold Miller* (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

ISAACS v. BARCLAYS BANK, LTD. AND BARCLAYS BANK (FRANCE), LTD.

[KIN : 'S BENCH DIVISION (Tucker, J.), November 4, 1943.]

Bankers—Business of banking—Branch bank—Deposit of securities—Transfer to head office—Right of customer to delivery of securities without reference to branch—Enemy occupation of country in which branch situated.

The plaintiff, a British subject, resided in France until June, 1940, but left that country before it became enemy-occupied territory and had resided in Lisbon since that time. Prior to the outbreak of war the plaintiff transferred a number of sterling securities then on deposit at the Monte Carlo branch of the defendants to the London and New York branches of the defendants. The bank carried on its business in France and New York by different companies from that carrying on its business in England, and it was admitted all these companies were separated entities. After France became enemy-occupied country, the French business was so far as possible carried on at the head office of the French bank in London, where the interest on the securities was collected. The plaintiff claimed a declaration that he was entitled to have the securities and the accumulated interest handed over to him. It was contended that the head office in London of the French bank held these securities and funds as agents of the Monte Carlo branch and could not deal with them without instructions from that branch :—

HELD : the plaintiff was entitled to the declaration asked subject to the provisions of the Defence (Finance) Regulations and the Trading with the Enemy (Custodian) Order and the law of the United States of America.

[EDITORIAL NOTE.] In the case of modern joint stock banks it is impossible in practice for the head office or any other branch to know the position of an account at one particular branch. For many purposes, therefore, a branch has to be treated as a separate bank. The head office here suggested that they could not deal with certain securities without instructions from their branch in Monaco, which was then in enemy-occupied territory. In the circumstances of this case, however, the securities having been transferred to England before the war, it is held that the head office in England can deal with the securities without reference to Monaco and also that the interest paid in respect of those securities must be paid to the plaintiff.

AS TO POSITION OF BRANCH BANK, see HALSBURY, Halsham Edn., Vol. 1, p. 796, para. 1305; and FOR CASES, see DIGEST, Vol. 3, p. 173, Nos. 299-303.]

Cases referred to :

(1) *Joachimson v. Swiss Bank Corpn.*, [1921] 3 K.B. 110; Digest Supp.; 90 L.J.K.B. 973; 125 L.T. 338.

* (2) *Richardson v. Richardson*, [1927] P. 228; Digest Supp.; 96 L.J.P. 125; 137 L.T. 492.

ACTION for a declaration that the plaintiff was entitled to delivery of his securities without the intervention of the Monte Carlo branch of Barclays Bank (France), Ltd. The facts are fully stated in the judgment.

D. A. Scott Cairns for the plaintiff.

H. G. Robertson for the defendants.

TUCKER, J. : The plaintiff is a British subject, and from 1927 until May 22, 1940, he resided at Nice. He left France on June 21, 1940, and since June 26, 1940, he has resided at Lisbon, Portugal. Nice did not become enemy territory for the purposes of the Trading with the Enemy Act and the war legislation until July 10, 1940, that is to say, some time after he had in fact left Nice; so at all material times from then until to-day he has always been a British subject, never at any moment of time residing in territory which is enemy territory, or deemed to be enemy territory. Before he left France he had had for some years an account at the Monte Carlo branch of Barclays Bank (France), Ltd., to whom I shall refer as the French bank. By an Order made on Aug. 13, 1940 (Statutory Rules and Orders 1476 of 1940) Monaco became enemy territory. That was also some time after he had left France, but that is not material.

Prior to the outbreak of war, namely, in Mar., 1939, the plaintiff for some reason which is quite immaterial to anything I have to decide in this action, decided to send a number of his sterling securities from the Monte Carlo branch (where they had previously been deposited for safe custody and for safe custody

only) to London in order that the interest on them might be collected there, and he had his dollar securities sent to New York. This was done at his request by the Monte Carlo branch of the French bank, and they, in the ordinary and natural course of business, carried out that request by sending the sterling securities to Barelays Bank, Ltd., London, to whom I shall refer as the English bank, and the dollar securities to Barelays (Dominions, Colonial and Overseas) Bank, Ltd., of New York; those two entities being the correspondents, as it is called, of the French bank for such purposes as these; and thereafter the interest on the sterling securities was collected in England, and on the dollar securities in New York.

When France capitulated the manager of the Monte Carlo branch managed to escape from Monte Carlo. He left in the middle of June, 1940, and he arrived in London in July, and from Aug. 13, 1940, onwards, at which date Monaco became enemy territory, it was clear that all relationships between the head office of the French bank in this country and its branch in Monte Carlo had to cease; and thereafter the French bank at their head office in London had to make in difficult circumstances what it thought were the best arrangements for dealing with these branches of theirs from which they had been cut off by the process of war. I am only concerned in this case with the manner in which they dealt with the plaintiff, and the way they dealt with him was this. They had established at their head office a department which was called the London Agency, and Robinson, who had been manager at Monte Carlo, appears to have been put in charge of this agency; and from July, 1940, onwards (and that is the only period with which I am concerned) the French bank at their head office proceeded with the assistance of their correspondents, the English bank, to collect the interest on all these sterling securities, and they credited them to an account, as to which I will say more in a moment.

The plaintiff got into direct communication with them when he ascertained the existence of the department in London, and correspondence followed, which it is not necessary for me to refer to in detail. Summarised, it was to this effect. The plaintiff made inquiries with regard to his securities, and he was told, which was the fact, that the interest was being collected for him and was being credited to an account which was called a suspense account, and income tax was deducted from certain of these securities. He complained about that; he said income tax ought not to have been deducted because he had never been resident in the British Isles or in Northern Ireland for the requisite period; and then the French bank, by its department at its head office, obtained from the Inland Revenue a refund of some of this income tax which had been deducted.

In doing this, and in various other services that they rendered to him in connection with his securities, they from time to time incurred certain small expenses with regard to affidavits and so forth, all of which were duly debited to him in this account at the head office, and he was informed accordingly. Furthermore, when this situation arose with regard to their branches the French bank, by their head office in London, informed their correspondents, the English bank, that, as from July, 1940, all signatures were automatically cancelled, and that meant this. The English bank were informed by the head office that they could no longer act upon the signature of any branch manager who had previously been authorised to sign at any of their branches in France. It follows, if the head office were entitled to give those instructions, and they were entitled to be acted upon, as they were, that thereafter the English bank would be bound to accept any instructions that they received from the head office with regard to any securities which they had previously held at the instance of the branches in France or elsewhere.

On Nov. 28, 1941, the French bank wrote to the cashier of the Bank of England in connection with the Defence (Finance) Regulations, a letter in which they say, after dealing with the securities which had been held by their branches in France and elsewhere, and saying what had been done with them up to the time of the capitulation of France: "... after that date they were taken from the control of our branches in France and Monaco and placed under the control of this office." I think that is a perfectly correct and accurate statement of what the position was, at any rate with regard to the plaintiff's securities which are the only ones with which I am concerned. I think from

the moment of time when they ceased to have any relationship with their Monte Carlo branch they had complete control over his securities in this country deposited with the English bank, and the only persons who could give effective instructions to the English bank were the officials of the French bank who were acting at the head office, and who managed the concern of the French bank at the head office in this country.

That being the state of affairs, there came a time when the plaintiff was minded to get, or make use of, these funds which were accumulating in London to his credit by reason of the collection of these dividends, and to establish his right to have handed over to him these securities; and he took the matter up with the head office of the French bank at their department which was called the London agency. I need not refer to the correspondence, but the attitude adopted by the head office of the French bank was: We are unable to deal with your securities or with the sums collected thereon on your instructions, unless you obtain authority so to do from our Monte Carlo branch. We received these securities from the Monte Carlo branch; they still appear in our books as held on behalf of the Monte Carlo branch, and you must get authority from Monte Carlo before we can do anything about it; and at the same time they pointed out that it was highly improbable that he would be able to get any authority from the Monte Carlo branch unless he also got the consent of the exchange authorities of that country under the law of Monaco. Mr. Robinson was aware of the fact that, by the law of Monaco, which is agreed and has been put before me, and is contained in a decree dated Dec. 17, 1941—and I am told there had been previous decrees to the same effect—it was provided that:

Transactions concerning purchase, sale, assignment, or transfer, actual or by way of guarantee, relating to foreign currency, foreign personal securities (other than French securities) and other foreign titles to property and proofs of debt (other than French titles and proofs) are subject to the same regulations.

One of the regulations is that the consent must be obtained of the exchange authorities with regard to any such transactions. Then the decree goes on to provide that, for infringements of the Order penalties from 100 francs to 100,000 francs may be imposed in addition to imprisonment. The plaintiff was at one time invited to make the appropriate application to Monte Carlo to get the branch at Monte Carlo to obtain from the exchange authorities the requisite permission to have his securities and the proceeds thereof put at his disposal in Lisbon. He misunderstood the instructions in the first instance, and he wrote to Monte Carlo one letter asking them to obtain permission for them to be put at his disposal in New York, and another asking for them to be put at his disposal in London; but eventually the matter was put right, and he wrote, as the people in London had suggested, and asked for permission for them to be put at his disposal in Lisbon; and it is not surprising to find that the authorities at Monaco did not give such permission, and I think everyone would have known pretty well from the commencement that they would not, and that, to do so without permission was contrary to the law of Monaco. So he did not succeed in getting his securities in that way; the chief reason being that he was a British subject, and, being a British subject, and unable to obtain his securities in that way, he endeavoured to obtain them by making a demand in Britain, and by putting the matter to some extent in the hands of an old business friend of his in Manchester, who took up the matter with the bank. But his efforts in this country proved as unsuccessful as they had proved at Lisbon and Monte Carlo, because he was met with this answer: We can only hand over your securities, or your money, pursuant to demand made at the branch where you had your account. If such demand is made it will be refused, or has been refused, and if we handed over anything to you without such consent having been obtained, our officials in Monte Carlo might find themselves under heavy penalties, or possibly imprisonment, because they would be making themselves parties to the transfer of securities and moneys over which they had control, although they were physically situated in this country; and so the plaintiff was not successful in those efforts, and he accordingly brings this action to establish his rights.

The issues raised are these. Counsel for the defendants says that it is well-settled law that it is an implied term of the relationship between banker and customer that, before the customer can demand payment of the balance standing

to his credit on current account he must make a demand at the branch where that current account is kept ; and, if anyone issues a writ and sues the bank, having made a demand at the head office or at some other branch, then the action would not succeed, because he had not made the demand which was required as a term of the contract between himself and the bank. The authorities for that proposition are well-known ; they are to be found principally in *N. Joachimson v. Swiss Bank Corpn.* (1), and more recently in *Richardson v. Richardson* (2), where HILL, J., reviewed the authorities. There is no dispute that that is the law of this country.

A Counsel for the defendants contends that that principle applies not only to current accounts, but it applies to other cases in which a customer has deposited securities for safe custody at any particular branch ; that before he can get those securities back he must make demand at the branch where he deposited them so long as they are under the control of that branch—I think that is the way he would put it—and that demand made at that branch is a condition precedent to his right to recover the securities.

B In my view, it is not necessary or desirable that I should in this case attempt to lay down any general proposition as to what the law may be in all circumstances with regard to the requirement on the part of a customer before he can obtain the securities that he has deposited with a bank ; and for this reason. The facts in this case seem to me to be very special, and, I think, very clear.

C As from the time of the capitulation of France to all intents and purposes the head office in London by this London agency of theirs stepped into the shoes of the Monte Carlo branch for all purposes connected with these securities. They collected the interest on them ; they credited them to the plaintiff in their accounts ; and it is, in my view, quite beside the point that, for their own convenience they called that account a suspense account. They collected money for the customer ; they treated him as their customer in all their correspondence with him ; they had control over his securities ; they had notified the English bank that the Monte Carlo signatures were to be no longer honoured, and in every respect I think there was a direct contractual relationship between the French bank, as there always had been, but through different agents of that bank. I am told that the head office did not, before the war, or after, carry on a banking business at the head office. In a sense, that no doubt may be true, and I will

D assume that no one has a current account at that office ; but I venture to think that what they were doing in connection with, and in relation to, the plaintiff, was rendering to him services such as are very generally and usually rendered to customers by banks. It is quite true there was no current account as between the two of them ; but, they as bankers were collecting the interest on these securities, were crediting them to him, were making claims for return of income tax, and so forth, and I think the relationship of banker and customer did exist between the two. But, at any rate, if I am wrong about that, there was, in my view, certainly a contractual relationship which came into being between the two, whether it was the relationship of banker and customer or not, and a contractual relationship which enables him to claim from the head office of the French bank the return of his securities, or the payment of the interest collected thereon if he is so minded.

E

F In my view, therefore, it is neither necessary nor desirable to attempt to lay down any general proposition of law with regard to what may be the requirements in the normal case where a man has deposited securities at a branch and continues to carry on his account there ; nor is it necessary to consider the case put by counsel for the plaintiff of what the position might be if a man had an account at one branch of a bank and chose to deposit his securities at some other branch. It is unnecessary to decide at which branch in such a case it would be necessary for him to make his demand,

G H My view on the facts of this particular case is quite clear that the plaintiff is entitled to his securities and money without the requirement of any intervention by the Monte Carlo branch, who must be regarded as enemies, and from whom the head office are cut off. It is said that, unless such a term is to be read into the contract between the parties it might involve the bank losing their lien on the securities which they would otherwise have. Well, whether or not that is likely to happen in this case, I do not know. It seems to me highly improbable ; but, in any event, I do not think it would be right, merely because there is a

possibility that the bank may be put in a position of some difficulty owing to the unfortunate events that have happened in France, that that should in any way affect the plaintiff's right to recover his securities and moneys in London.

There are only two other matters with which I need deal. One is the form of the relief asked for. The declarations are set out in the statement of claim, and counsel for the plaintiff makes it clear that he is only asking for those declarations subject to the provisions of the Defence (Finance) Regulations, and, so far as the securities in America are concerned, he only asks, for his declarations subject to the laws of the United States.

I have felt some doubt as to whether it was right and proper to make the declaration in those terms; that is to say, leaving undecided and in the air what the position may be under the Defence (Finance) Regulations, or under the American law; but I have been strongly pressed by both counsel in this case to make a declaration in that form for the convenience of the parties, and, therefore, although with some doubt, I will accede to that request. But there is one further modification which requires to be made. In the defence it is pleaded that:

The first defendants in accordance with the requirements of the Trading with the Enemy (Custodian) Order, 1939, duly made a return to the Custodian of Enemy Property of all the plaintiffs said securities held for the account of the Monte Carlo branch of the second defendants sub-headed with the plaintiff's name. The defendants will refer to the said Order and submit that neither of them can lawfully transfer any of the said securities or dividends to the plaintiff without the consent of the Board of Trade.

That was an issue raised on the pleadings, but it has not figured very prominently, I think, in the argument of the case; and counsel for the defendants is anxious that any declaration I should make should be subject to the provisions of the Trading with the Enemy (Custodian) Order, 1939. I was reluctant to do that. This matter having been pleaded, I felt that it ought to be decided, and that, if there was anything in the Trading with the Enemy (Custodian) Order, 1939, which prevented the plaintiff recovering these securities and moneys I ought to be told what it was. I have been referred to the Order. Then it was said that it would be difficult and inconvenient for me to decide a matter of this kind without the Custodian of Enemy Property having an opportunity of being heard on the matter. I, therefore, considered whether I should not adjourn these proceedings in order that he might be heard on this matter. However, eventually counsel for the plaintiff conceded that he is willing to take the declaration, if he succeeds, subject to that qualification; that is to say, the declarations for which he asks should be subject to the provisions of the Defence (Finance) Regulations, 1939, the Trading with the Enemy (Custodian) Order, 1939, and the law of the United States of America.

I cannot pass from the subject of the Trading with the Enemy (Custodian) Order, 1939, without observing that, although I have not had any full argument on the point, and although I have not heard the Custodian of Enemy Property on the subject, as at present advised I am quite at a loss to understand how the plaintiff, a British subject having, as I have held in this action, these securities situated in this country at his disposal ever since before the war began, with a contractual right as between himself and the French bank to be given the securities and the proceeds thereof, and never at any moment of time having been resident in enemy country, can be affected by the Trading with the Enemy (Custodian) Order, 1939, but, as I have said, I have not had a full argument on that point.

In those circumstances, realising, as I do, the difficulties of banks in dealing with these complicated questions which arise out of the conditions of war and the accounts of customers in these branches, I do not myself feel that, in this particular case there is any real difficulty. I think that it is quite clear that the plaintiff, subject to the provisions of those statutes and orders to which I have referred, is entitled to the declarations for which he asks. Counsel for the defendants has been quite willing if I think the plaintiff is right with regard to his contentions that the declarations should be made as against both defendants; and I accordingly do so as I am invited to do. I think I should have hesitated, had not he so consented, to make any declaration as against Barclays Bank, Ltd.; but, in view of the course taken in this case, in order to get this matter disposed of, I decide that the plaintiff is entitled to

declarations, subject to the qualifications that I have already indicated, and he is entitled to his costs.

Declarations accordingly.

Solicitors: *Gregory Rowcliffe & Co.*, agents for *Addleshaw, Sons & Latham*, Manchester (for the plaintiff); *Cooper, (Durrant) & Hambling* (for the defendants).

[*Reported by R. BOSWELL, Esq., Barrister-at-Law.*]

LANGFORD PROPERTY CO., LTD. v. EMERICH PAJZS.

[KING'S BENCH DIVISION (Lewis, J.), October 22, 29, 1943.]

Landlord and Tenant War damage Short tenancy Liability for rent Whether Act retrospective—Landlord and Tenant (War Damage) (Amendment) Act, 1941 (c. 41), s. 1.

The defendant leased a flat from the plaintiffs in Mar., 1940, for three months and then upon a three monthly tenancy. On Dec. 8, 1940, the premises were damaged by enemy action and rendered unfit for occupation. The defendant, on Dec. 9, 1940, applied to the agents of the plaintiffs to be accommodated elsewhere but was told that nothing could be done for him, and thereupon he handed the keys to the porters in charge of the premises. On Nov. 12, 1941, the plaintiffs claimed £123 6s. as rent in arrear and sued for that sum as rent in this action. The defendant contended that (i) there had been a surrender of the lease and (ii) by virtue of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 1, he was relieved from the liability to pay rent for the premises from the date of the occurrence of the war damage. It was admitted that no rent was payable from the date when the Act came into force:—

Held: (i) in the circumstances there was neither a termination of the tenancy nor a surrender of the lease on Dec. 9, 1940.

(ii) the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 1, is not retrospective and did not bar the claim to the rent before the Act came into force.

[EDITORIAL NOTE. The substantial question in this case is whether the Act of 1941 is retrospective and relieves the tenant in the case of a short tenancy from the liability to pay rent in respect of a period before the passing of the Act. In conformity with the earlier decision in *London Fan & Motor Co., Ltd. v. Silverman* (1), it is held that the Act is not retrospective.

AS TO RETROSPECTIVE OPERATION OF STATUTES, see HALSBURY, Hailsham Edn., Vol. 31, pp. 513-518, paras. 670-673; and FOR CASES, see DIGEST, Vol. 42, pp. 693-697, Nos. 1083-1138.]

Cases referred to:

- * (1) *London Fan & Motor Co., Ltd. v. Silverman*, [1942] 1 All E.R. 307; 167 L.T. 89.
- (2) *Turner v. Stella Bond, Ltd.*, [1941] 1 K.B. 569; [1941] 1 All E.R. 449; 110 L.J.K.B. 385; 164 L.T. 414.
- (3) *Hildebrand v. Lewis*, [1941] 2 K.B. 135; [1941] 2 All E.R. 584; 110 L.J.K.B. 570; 165 L.T. 178.
- (4) *Sawyer & Vincent v. Window Brace, Ltd.*, [1942] 1 K.B. 32; [1942] 2 All E.R. 669; 112 L.J.K.B. 23; 167 L.T. 367.
- (5) *Prudential Assurance Co., Ltd. v. Reville, Ltd.*, [1943] 1 K.B. 448; [1943] 1 All E.R. 573; 112 L.J.K.B. 458; 168 L.T. 302.
- (6) *Lauri v. Renad*, [1892] 3 Ch. 402; 42 Digest 696, 1116; 61 L.J.Ch. 580; 67 L.T. 275.
- (7) *R. v. Chandra Dharma*, [1905] 2 K.B. 335; 42 Digest 699, 1158; 74 L.J.K.B. 450; 92 L.T. 700.

ACTION by the owners of a block of flats against the tenant of one of the flats claiming arrears of rent and electricity charges. The defence was that these sums were not recoverable by reason of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 1. The facts are fully set out in the judgment.

T. F. Davis for the plaintiffs.

V. R. Aronson for the defendants.

Lewis, J.: In this case the plaintiffs bring their action in which, by a statement of claim indorsed on the writ, they claim the sum of £143 17s.:

... arrears of rent and electricity charge due and owing by the defendant to the

plaintiffs under an agreement dated Mar. 14, 1940, whereby the premises known as Flat No. 7, at 59, Weymouth Street, London, W.1., were let to the defendant for a term of three months from Feb. 4, 1940, and thereafter three monthly at the annual rent of £120 payable monthly in advance on the fourth day of every month. There was also an additional monthly rental of 5s. 6d. payable in respect of the electricity charge.

Then they set out particulars from Dec. 4, 1940, to Jan. 4, 1942, fourteen months' rent and electricity charge at £10 5s. 6d. per month, £143 17s.

To that the defendant pleads that he is not indebted to the plaintiffs as alleged. He admits the agreement and says that it was a short tenancy within the meaning of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 1. He then sets out that the flat from Dec. 15, 1940 (which was amended to Dec. 8) was rendered unfit by reason of war damage :

... and has ever since remained and still is so unfit and from that date the said flat has not been occupied either in whole or in part by the defendant. Accordingly, no rent is payable under the said agreement after Dec. 8, 1940, or alternatively after Aug. 7, 1941.

By para. 4 of his defence :

The defendant admits liability for the sum of £3 15s. 4d., being the rent and electricity charge of the said premises from Dec. 4 to Dec. 8, 1940.

He then sets out that he gave notice terminating the tenancy on Dec. 10 or 11, 1940, by handing over the keys of the flat to the plaintiffs' servant or agent who acted as hall porter, and he contends :

... that he is not liable for rent after the expiration of the said notice or alternatively that the delivery of the keys by him and the acceptance thereof by the plaintiffs' agent constituted a surrender of the tenancy.

He then says that the plaintiffs have claimed fourteen months' rent instead of thirteen months, as he says they ought to, and that no electricity has been supplied to the flat since Dec. 11, 1940. The agreement under which the defendant took this flat is dated Mar. 14, 1940, and is a letting of this flat at No. 59, Weymouth Street, flat No. 7, for a term of three months, and thereafter three monthly from Feb. 4, 1940, at a rent of £120 per annum payable monthly in advance. There is no mention in this agreement of any further charge in respect of what are termed electricity charges.

It is now conceded that any rent accruing under that agreement for a period after Aug. 7, 1941—the date of the coming into force of the Landlord and Tenant (War Damage) (Amendment) Act, 1941—is not recoverable, this being a short tenancy within the meaning of that Act, and that the premises in question being unfit by reason of war damage, have not been occupied in whole or in part by the tenant since that date. The claim, including the charge in respect of electricity, therefore, falls to be reduced to £83 3s. 11d., made up as follows : £80 19s. 4d. for rent, and £2 4s. 7d. electricity charges.

The facts are as follows. The defendant, who is a Czechoslovak national, and an engineer by profession, came to this country in 1939. In Mar., 1940, he became the tenant of the flat at No. 59, Weymouth Street on the terms stated in the writ. On Dec. 8, 1940, those premises were damaged by blast as a result of enemy action, and they have been unfit by reason of that damage ever since and have not been occupied by the defendant. When the damage occurred, he and other occupants of this block of flats were cared for in a doctor's house in Harley Street, and in the morning he and other tenants went back to the damaged premises. From there he managed to telephone to Messrs. Knight, the agents and managers of the plaintiffs, and he spoke to a lady in the employ of Messrs. Knight, who answered the telephone. He asked whether they could do anything for him as they had been told by the A.R.P. authorities that they could not return to the flat, and he suggested that Messrs. Knight, who managed other blocks of flats for the plaintiffs, would be able to accommodate him elsewhere. He was told that nothing could be done for him and that he must leave the flat at No. 59, Weymouth Street. Thereupon he deposited the keys of the flat in the porter's box or office. As he was anxious for business reasons that people should know where he was to be found, a week after the premises were damaged the defendant placed on a board at the entrance to No. 59, Weymouth Street, a card stating his new address, namely, 130, Wigmore Street, where he has resided from that date until now. From Dec. 9, 1940—the day after the

damage was done—until the month of November, 1941, he heard nothing whatever from the plaintiffs or Messrs. Knight.

On Nov. 12, 1941, he received a letter from Messrs. Knight in these terms :

We are writing to point out that there is an amount of £123 6s. rent outstanding in connection with your tenancy of the above flat, and we shall be glad to hear from you on this matter by return of post without fail.

To that letter the defendant replied on Nov. 14 :

- A I have received your letter of the 12th November and wish to remind you that I rang you the same day when Flat 7 at 59, Weymouth Street was damaged by enemy action and have asked you whether you could give me another flat in one of your houses. I received the answer that you cannot give me any assistance, and you asked me to leave the flat. I have also asked the porter who was your representative whether the flat will be put in habitable condition in due course, or if I could remain in the flat, but he instructed me—unquestionably on your behalf—that I have to leave the house. Thus the tenancy was terminated by you, and I cannot see that you have any claim whatever on me.

- C After a delay of 11 months it is not surprising that the defendant thought that his liability for rent had ceased. A representative of Messrs. Knight sought to explain the delay in communicating with the defendant by stating that they were unable to find him, but did not explain what steps, if any, had been taken by his firm to do so. In fact the defendant was living at Wigmore Street: his card with his new address had been placed in the damaged premises at Weymouth Street: he was the technical editor, as Messrs. Knight knew, of an engineering journal; he had at the request of Messrs. Knight given them two references when he became the tenant of the flat, one was his bankers and the other a business firm, from either of whom information of the defendant's whereabouts could have been obtained. It is clear that the slightest effort to trace the defendant would have resulted in his being found at his new address.

- D None of the steps provided by the principal Act of 1939, such as serving a notice of disclaimer or notice of retention, was taken in this case, and it was not until Feb. 23, 1942, by letter of that date, that the solicitors for the plaintiffs terminated the tenancy, or purported to do so. No electricity was provided for the flat after Dec. 8, 1940.

- E For the defendant it was argued, as set out in para. 5 of his defence, that the handing over of the keys of the flat and the acceptance of those keys by the porter constituted a termination of the tenancy and a surrender of the lease. In the circumstances of this case, I am unable to find that there was any such surrender or termination, and this contention fails.

- F The only point which was seriously argued in this case by the defendant's counsel was that the sections of the Act of 1941 were retroactive, and that this being a short tenancy, sect. 1 (2) applied as from the date upon which the premises were rendered unfit for occupation by enemy action, namely, Dec. 8, 1940, and that, therefore, no rent was payable from that date, although the Act of Parliament giving such immunity only came into force on Aug. 7, 1941. Counsel for the defendant relied upon the general words of sect. 1, and in particular on the terms of subsects. (1), (2), (7) and (9), as showing that the Act was retroactive.

- G Counsel for the plaintiffs, energetically and strenuously argued to the contrary, relying more particularly on sects. 1 (5) and 15 of the Act.

- H I was referred to certain reported cases, amongst others the *London Fan & Motor Co., Ltd. v. Silverman* (1), in which case STABLE, J., held that sect. 13 of the Act was not retrospective; *Turner v. Stella Bond, Ltd.* (2); *Hildebrand v. Lewis* (3); *Sawyer & Vincent v. Window Brace, Ltd.* (4); and the *Prudential Assurance Co., Ltd. v. Reville, Ltd.* (5). With the exception of the case first referred to above, these cases are not directly in point, and are of little assistance on the point which I have to decide; but the principle to be applied in considering whether or not a statute is retrospective or retroactive has been laid down more than once in no uncertain terms. HALSBURY'S LAWS OF ENGLAND states the principle thus (Hailsham Edn., Vol. 31, pp. 513, 514) :

A statute is *prima facie* prospective, and does not interfere with existing rights, unless it contains express words, or there is the plainest implication to that effect. The fact of a statute being remedial, or designed to protect the public interest, is a matter to which great weight is to be attached, and a different principle prevails where

the statute is one that introduces a new remedy : an appellate court is able, and bound, to give effect to new remedies introduced by an enactment passed after the judgment appealed from was made by the court of first instance.

This statement is, in my view, a correct exposition of the law, and is in accordance with the statement in the judgment in *Lauri v. Renad* (6), where LINDLEY, L.J., said at pp. 420, 421 :

It certainly requires very clear and unmistakeable language in a subsequent Act of Parliament to revive or re-create an expired right. It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction.

This is not a case in which the statute, or the section of the statute in question, deals merely with procedure such as was the position in *R. v. Chandra Dharma* (7) (see particularly the judgment of LORD ALVERSTONE, L.C.J., at p. 338). Attractive as it is to hold the view that it was the intention of the legislature to give retrospective relief to tenants of short tenancies in cases such as the present, I am unable to hold that the language of the statute or the section is such as plainly to require such a construction, and I am, therefore, of opinion that this defence fails.

Counsel for the plaintiffs does not press for the amount said to be due in respect of the charge for electricity, to which there was no reference in the written agreement, and I think that, in the result, there must be judgment for the plaintiffs for the sum of £80 19s. 4d.

Judgment for plaintiffs for £80 19s. 4d. with costs on county court scale.

Solicitors : *Stikeman & Co.* (for the plaintiffs) ; *R. S. Fraser & Co.* (for the defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

BONTEX KNITTING WORKS, LTD. v. ST. JOHNS GARAGE. [KING'S BENCH DIVISION (LEWIS, J.), October 14, 1943.]

Bailment—Private carriers—Clause in contract exempting carriers from liability for loss or damage—Goods lost owing to carriers' negligence—Breach of contract by failure to deliver—Exemption clause only operative in execution of contract. Master and Servant—Loan of servant—Hire of lorry and driver—No control over driver other than directing him where deliveries to be made.

The defendants agreed to hire out to the plaintiffs a van and a driver for the purpose of delivering the plaintiffs' goods forthwith to their customers. The delivery was estimated to take 2½ hours and the charge was to be by the hour. No particular driver was asked for or nominated by the plaintiffs and they did not pay his wages. When the van arrived at their premises they merely instructed the driver as to the parcels to be delivered and as to the addresses, the driver being free to deliver the goods in what order he thought fit. It was an express term of the contract that the defendants should not be liable for loss or damage to the goods whilst on their van. During the journey the driver left the van unattended for an hour whilst he had a meal, the only precaution he took being to remove the ignition key. The van was stolen and when it was recovered the plaintiffs' goods had been removed. The plaintiffs brought an action to recover the value of the goods on the grounds of the defendants' negligence, and, alternatively, breach of contract by the defendants in failing to deliver the goods forthwith or at all. The plaintiffs conceded that the defendants were not common carriers and the defendants contended : (i) that the driver had not been negligent ; (ii) that the driver was for the purposes of the particular journey the servant of the plaintiffs ; (iii) that the exception clause in the agreement excused them from liability for negligence ; and (iv) that there was no breach of contract :—

HELD : (i) on the facts of the case, the driver had been negligent.
(ii) the plaintiffs did not have control of the driver and he was, therefore, the defendants' servant.

(iii) the exception clause was a term in the contract inserted for the purpose of negating the defendants' liability for loss or damage to the goods even as a result of their negligence, they were, therefore, not liable for negligence.

(iv) the defendants had committed a breach of contract by failing to

deliver the goods forthwith and they were not protected by the exception clause because it was only intended to protect the defendants in the due execution of the contract.

[EDITORIAL NOTE.] The principal point in this case is the operation of the exception clause. This clause exempted the defendants from negligence, but it is held that this exemption was confined to negligence in the due execution of the contract. The contract was for delivery forthwith and it is held, in the circumstances of this case, where the journey is a short one, not to be carried into due execution if the driver leaves the lorry unattended for the purpose of getting a meal, and, therefore, in such circumstances, the defendants cannot avail themselves of the exception clause.

AS TO OBLIGATIONS OF BAILEE, see HALSBURY, Hailsham Edn., Vol. 1, pp. 748-750, para. 1232; and FOR CASES, see DIGEST, Vol. 3, pp. 60-64, Nos. 43-74].

Cases referred to:

- A * (1) *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*, [1942] A.C. 509; [1942] 1 All E.R. 491.
- B (2) *Donovan v. Laing, Wharton & Down Construction Syndicate*, [1893] 1 Q.B. 629; 34 Digest 26, 49; 63 L.J.Q.B. 25; 68 L.T. 512.
- (3) *Bain v. Central Vermont Ry. Co.*, [1921] 2 A.C. 412; 34 Digest 27, 54; 90 L.J.P.C. 221.
- (4) *Quarman v. Burnett* (1840), 6 M. & W. 499; 34 Digest 23, 29; 9 L.J.Ex. 308.
- (5) *Pagan v. Green & Edwards, Ltd.*, [1926] 1 K.B. 102; Digest Supp.; 95 L.J.K.B. 363; 134 L.T. 191.
- C (6) *Rutter v. Palmer*, [1922] 2 K.B. 87; Digest Supp.; 91 L.J.K.B. 657; 127 L.T. 419.
- (7) *Lilley v. Doubleday* (1881), 7 Q.B.D. 510; 3 Digest 77, 163; 51 L.J.Q.B. 310; 44 L.T. 814.
- (8) *The Cap Palos*, [1921] P. 458; 41 Digest 683, 5125; 91 L.J.P. 11; 126 L.T. 82.
- * (9) *Gibaud v. Great Eastern Ry. Co.*, [1921] 2 K.B. 426; Digest Supp.; 90 L.J.K.B. 535; 125 L.T. 76.
- D (10) *London & North Western Ry. Co. v. Neilson*, [1922] 2 A.C. 263; Digest Supp.; 91 L.J.K.B. 680.

ACTION to recover damages for goods lost whilst in the possession of the defendants as private carriers. The facts are fully set out in the judgment.

H. Vester for the plaintiffs.

W. Arthian Davies for the defendants.

E LEWIS, J.: The plaintiffs are manufacturers of material which I am told is knitted silk, and in June or July of last year the plaintiffs wanted some means of distribution to their customers in the London area. With that in view they got in touch with the defendants who describe themselves as: "Motor engineers and contractors." They had at that time, and at the time of the matters with which we are concerned in this action, some 8 vans or lorries, and a certain number of drivers. They were asked on the telephone on what terms they would hire out to the plaintiffs a lorry and a man for the purpose of delivering the plaintiffs' goods to their customers. I am satisfied that at that telephone conversation the terms were arranged, which were that the charge for the lorry would be made either by time, or by mileage.

F During the conversation a reference was made to the insurance by the defendants of anybody from the plaintiffs who accompanied the goods to their destination. The question was raised because the plaintiffs were anxious to know whether, if they sent a man of their own in the lorry with the defendants' man, in the case of an accident or anything of that sort that man would be covered by insurance; and they were told that the defendants' insurance policy covered an employee of the plaintiffs who accompanied the goods to their destination.

G It is quite clear that at that time, or, if not at that time, immediately the first order was given, it came to the knowledge of the plaintiffs that an important term or condition of the hire was that the defendants did not hold themselves responsible for the loss or damage to goods on their van; and all the transactions, which were 22 in number, including this last transaction out of which this case arises, were all carried out on the terms of that condition of hire, namely, that the defendants would not be liable or responsible for loss or damage to goods on the van.

H After the first arrangement on the telephone, as I have said, on 22 occasions between June and Dec. 29, 1942, the defendants supplied a van with a man to take the plaintiffs' goods to their customers. On some half-dozen occasions the plaintiffs sent a man with the goods. The particular reason, apparently, for

sending a man with the goods was in order to assist in loading and unloading, and particularly unloading at the premises of the customer; but it was found that it was unnecessary to send a man for that purpose on most occasions, because the customer did the unloading himself or got his man to do it, and what used to happen was that the van and the driver arrived at the plaintiffs' premises, there the plaintiffs' men loaded the material on to the van, the defendants' driver produced a docket, as it is called, examples of which I have before me, which was filled in with the name of the plaintiffs and the number of the van and the name of the driver, and then there was a space which was filled in as to the time at which the defendants' van had left the defendants' premises. Then there was a blank space to be filled in, as to the time at which the job was finished, and then there was a blank space in which the hours were to be filled in in order to ascertain the total charge, the rate being 6s. 6d. an hour, and then there was an alternative space in which the mileage was to be put if the job was one on which the mileage rate was to be taken instead of the time rate.

On Dec. 28 the defendants were rung up, and they were asked to supply a van about mid day on the next day, that is Dec. 29, and they were told that the job for which the plaintiffs wanted the van would last about 2½ hours, giving the defendants some sort of estimate as to the time for which the van would be required. On Dec. 29, the defendants' van, with a driver named Jelly, arrived at the plaintiffs' premises earlier than the time arranged on the telephone, and the driver was told that he could go and get a cup of tea (which he did) whilst the plaintiffs prepared their goods for loading. 55 bales were loaded of which 40 were to go to one customer, and 15 to another. The 15 bales were for an address in Vesty Street, London, N.1, and 40 bales were for an address in London, E.1.

The van left with nobody from the plaintiffs accompanying it. The van was not closed in any way, but the tailboard was up, and it was quite easy for any active person to climb up over the tailboard and get into the van. The bales, as I understand it, are of a substantial weight, and in that condition the van went off to deliver them at these two destinations. It did not matter to the plaintiffs which parcel was delivered first, and the van driver could take the two places in whatever order he liked, and he was, of course, expected to return when he had done his job to the plaintiffs' premises with his dockets to be paid.

Having left the plaintiffs' premises, the driver of the van was minded first of all to go to Vesty Street, and he made off in the direction of North London. Somewhere between 11 a.m. and 11.15 a.m., having arrived at East Road, E.C.1, he thought he would like to have another meal. He parked his lorry, removed the ignition key but took no further precautions to prevent anybody tampering with the van or the goods, and had a meal in the East Road Cafe, and afterwards went to a convenience nearby, some 50 yards away. He was absent from the van until some time between 12 midday and 12.20 p.m. When he came back to the place where he had parked the van, it had disappeared. Jelly then went to the police station and made a statement as to what had happened. The plaintiffs' representatives and the defendants were communicated with, and the police eventually recovered the van, but not the bales. I was not told how long it took to recover the van.

It is quite obvious that a thief had got into the lorry and by some means or other, which I am told is not difficult even without the ignition key, had started it, driven it away and disposed of the bales. Whether the van was abandoned or not I do not know, but at all events the van was recovered. The value of the goods which the plaintiffs lost was some £451 4s. 6d.

One of the questions which has arisen and which has been argued before me is whether or not John Jelly was the servant of the plaintiffs or of the defendants for the purpose of this expedition, and it is only right to say that when the plaintiffs hired a van from the defendants, both on this occasion and on other occasions, no particular driver was nominated or asked for by the plaintiffs; at no time did the plaintiffs ever pay the wages of that driver; and the only control which the plaintiffs had over the van was that when it arrived at their place of business they instructed the man as to the parcels to be delivered and gave him the necessary addresses, together with documents, which I think were called waybills or invoices. The driver could deliver the goods in any order

that he liked, and all he had to do was to come back when he had finished his job and present the dockets and be paid for the work done.

On those facts, the plaintiffs bring their action against the defendants, and they base their action both upon breach of contract and tort, that is to say, negligence. They allege first of all that the defendants were common carriers, that they failed to deliver these goods as common carriers, and that the defendants through their servant Jelly were guilty of negligence. Then they say that, if they are not entitled to recover on the ground of negligence, they are entitled to recover for breach of contract, because it was a term of the contract that these goods should be delivered forthwith and immediately, and that in breach of that contract the goods were not delivered forthwith or immediately, or at all.

Counsel for the defendants contended that the defendants were not common carriers and this point was conceded by counsel for the plaintiffs. Counsel for the defendants then argued that, if the defendants were not common carriers, they could only be liable for negligence, and he denied negligence.

The first part of that proposition is quite sound. If they are not common carriers, and therefore not insurers of the goods, the plaintiffs, in order to succeed must show that the defendants or their servants or agents have been guilty of negligence which has occasioned the loss.

The negligence which is alleged is that the driver, Jelly, left the van unattended for the best part of an hour with all this valuable stuff on it, and took no precautions whatever to safeguard the goods, or indeed to prevent any thief coming along and driving away the van, except to remove the ignition key. The defendants say that that was not negligence. To leave the van for an hour or so without taking any precaution to have it watched to prevent anything being taken out of it, or the van being driven away, is, to my mind, negligence.

It is said, apropos of the negligence, that the plaintiffs cannot recover in this case because they themselves were guilty of contributory negligence in not sending a man with the van. I have considered that in so far as it is necessary to consider it for the purposes of this case, and I find as a fact that there is no ground for saying that there was any contributory negligence on the part of the plaintiffs.

Counsel for the defendants then argued that, even if Jelly was negligent, for the purposes of this expedition he was not the servant of the defendants at all, but was the servant of the plaintiffs. That raises a question which has been much debated at various times, and the most recent reported case is *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board* (1). In that case the House of Lords considered a question which has arisen on more than one occasion, as to what is the position when a person who is in the general employment of A is doing something for B, and he is negligent in the course of that work. For the purposes of that particular task, has he ceased to be the general servant of A and become the servant for that particular task of B? Counsel for the defendants contended that Jelly, who was the general servant of the defendants, and paid by them, and employed by them, and in every sense of the word their servant, became for the purpose of this job which he was doing the servant of the plaintiffs for the time being.

The question would seem to me to be whether or not, as VISCOUNT SIMON, L.C., said in the *Century Insurance Co.* case (1), this was a contract of hiring out a lorry and a man, or a contract of lending the lorry and the man to the plaintiffs in order to do the work. In *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board* (1) the House of Lords held that the contractors' general servant, who was guilty of the negligence which was involved in the case, remained the servant of the general contractors who were undertaking the transport of the goods, and did not become the servant of the persons for whom they were at the time carrying out the job. LORD WRIGHT, who delivered the longer, and perhaps one may say in a sense the leading judgment in that case in the House of Lords, pointed out the test which has to be applied in ascertaining whether or not, under circumstances such as I have described, the servant remains the servant of the general employer or becomes the servant for the nonce of the person for whom the work is actually being done. Then he refers to *Donovan v. Laing* (2), and *Bain v. Central Vermont Ry. Co.* (3), and to the statement made by BOWEN, L.J., in *Donovan v. Laing* (2), and he quotes that

statement, at p. 516 ([1942] 1 All E.R., at p. 496) :

There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and, the end being prescribed, the means of arriving at it may be left to him. Or he may contract in a different manner, and, not doing the work himself, may place his servants and plant under the control of another—that is, he may lend them—and in that case he does not retain control over the work. Then LORD WRIGHT goes on to point out that the real test is control. He says, at p. 515 ([1942] 1 All E.R., at p. 495) :

LORD DUNEDIN said categorically that the facts of one case can never rule another case and are only useful so far as similarity of facts (for identity, the word so often used, is really a convenient misnomer) are a help and guide to decision, but, all the same, it has been sought to find some general idea, or perhaps mere catchword, which may serve as a clue to solve the problem, and for this purpose the idea of the word "control" has been introduced.

I have considered this case and the other cases referred to in that judgment, going back to *Quarman v. Burnett* (4) and I have come to the conclusion that this was a case in which, applying the test of control, Jelly did not become the servant of the plaintiffs when he brought the van round to discharge his duty to deliver the goods for the plaintiffs, but remained the servant of his real employers, if I may use that expression, namely, the defendants, and, therefore, his negligence was the negligence of the defendants. That being so, as far as the claim in tort is concerned I am satisfied the loss of these goods was due to the negligence of the defendants' servant, and, therefore, the plaintiffs would be entitled to recover the damage that they have sustained in the loss of those goods. However, counsel for the defendants contends that it was a condition of the hire of the van that the defendants should not be liable for loss or damage to goods on their van. There has been some discussion as to what that exemption clause means. I have, personally, very little doubt about it, if I am right in thinking that one has to consider what it is that the person who puts in that term is protecting himself against. What is the liability of persons in the position of the defendants where goods are entrusted to them for carriage? They are not common carriers; they are not insurers of the goods, their only liability is to carry safely; that is to say, they cannot be liable if the goods are lost, unless it can be shown that they have been guilty of negligence; and in construing these clauses one has to bear in mind always what it is that the person putting in such a clause is protecting himself against. I need only mention two cases which were referred to by counsel before me, and those are *Fagan v. Green & Edwards, Ltd.* (5), and *Rutter v. Palmer* (6). I am quite satisfied, upon the authority of those two cases, and there are many others, that that clause in this case is put in to provide, and it was a term of the contract, that the defendants should not be liable for any loss or damage even though it was occasioned by their negligence. That was a term of the contract, and therefore, although the driver was, in my view, the servant of the defendants and was negligent, the plaintiffs are not entitled to recover on the ground of negligence, because the defendants are protected by that clause, which was a term of the contract.

However, in my view, that does not complete this case. Counsel for the plaintiffs has raised an interesting point, and one which I confess I think is a good point, and it is this: The case is based in contract, alternatively to negligence, and counsel for the plaintiffs says that when Jelly, who was, in view of what I have decided, the servant of the defendants, abandoned (if I may use that expression) this van and its contents for an hour at least, and went off to have a meal, he was failing to carry out a term of the contract, namely, to deliver forthwith, or to deliver immediately. I must not be thought to be saying that a person who, on an expedition of this sort, perhaps leaves the van for 5 minutes to go to a public convenience, or something of that sort, or who on a long run kneels off for half an hour or an hour to have his dinner, by those mere facts commits a breach of the contract; but what one has to remember is this, that in this case the total period which these jobs were to occupy was estimated at 2½ hours, and the plaintiffs were paying upon the time basis; and it does seem to me to be quite impossible to say that, in the case of a contract under which payment is to be made by time, and the length of time to be occupied on the job is to be 2½ hours, it is reasonable for a person to take out of that 2½ hours one hour for his refreshment between 11.15 and 12.15 in the middle of the

day particularly when that person had had some refreshment just before starting out whilst the goods were being loaded on his van. I have come to the conclusion that, when Jelly did that, he was committing a breach of the contract to deliver forthwith and to deliver immediately.

I have been referred, upon this part of the case, to three authorities, and the point that counsel for the plaintiffs takes is this, which, as I have said already, I think is a good point. The clause in the contract which absolves the defendants from any liability for loss or damage only applies whilst the contract is in existence, and, if there is a breach of a contract by the defendants (and Jelly being the defendants' servant, and his action being in my view a breach of contract, there was a breach of the contract by the defendants), any clause upon which the defendants could rely to save themselves from liability goes.

I was referred, first of all to *Lilley v. Doubleday* (7), where the court, consisting of GROVE, LINDLEY and STEPHEN, JJ., held, as I understand it, in favour of the proposition which I have just mentioned. In that case the defendant contracted to warehouse certain goods for the plaintiff at a particular place and then warehoused part of them at another place, where without any negligence on his part they were destroyed, and the court held that the damage was not too remote, and that the defendant by his breach of contract had rendered himself liable for the loss of the goods. GROVE, J., says, at p. 511 :

I do not give any opinion whether what was done here amounted to a conversion, but I base my judgment on the fact that the defendant broke his contract, by dealing with the subject-matter in a manner different from that in which he contracted to deal with it.

Then I was referred to *The Cap Palos* (8), which, in my view, is extremely helpful in regard to this particular proposition, and particularly I was referred to the judgment of ATKIN, L.J., as he then was. After setting out the necessary facts, ATKIN, L.J., pointed out that it was a case in respect of a claim for towage, or breach of a contract of towage, and he pointed out that the figures which were before the court in that case gave the number of hours of towage done, and the number of hours where there was no towage, and he said, at p. 470 :

The figures appear to me to indicate such delay as to make the purported performance something quite different from that contracted for, a form of deviation quite familiar in marine adventures.

He cites a number of cases, and then says, at p. 471 :

The principle is well-known, and perhaps *Lilley v. Doubleday* (7) is the best illustration, that if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract the way in which you had contracted to do it.

That passage is cited from the judgment of SCRUTTON, L.J., in *Gibaud v. Great Eastern Ry. Co.* (9) at p. 435. He applied that principle to that particular case, and said that there was a breach of contract. The other case to which I was referred was *London & North Western Ry. Co. v. Neilson* (10), where the same proposition was laid down by the House of Lords. I do not know that it is necessary for me to cite the whole of it, but in particular I would refer to the judgment of LORD ATKINSON, which begins on p. 272 of the report, and, upon this point, goes on to about half-way down p. 274. LORD ATKINSON there again cites with approval the statement made by SCRUTTON, L.J., in *Gibaud v. Great Eastern Ry. Co.* (9).

That being so, in my view, the defendants, as they had broken the contract through their servant, and there had been a breach of contract by this hour's delay in the carriage of these goods, which were agreed to be delivered forthwith and immediately, cannot rely upon the clause which exempts them from all liability, because for that purpose the contract was at an end, in the sense that it had been broken by the defendants themselves. Therefore, I have come to the conclusion that this is a case in which the plaintiffs are entitled to succeed, for the reasons which I have given, and there must be judgment for the plaintiffs for the amount claimed.

Judgment for the plaintiffs with costs.

Solicitors : *Isadore Goldman & Son* (for the plaintiffs) ; *Mawby, Barrie & Letts* (for the defendants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

ASSOCIATED CINEMA PROPERTIES, LTD. v. THE MAYOR,
ALDERMEN AND COUNCILLORS OF THE METROPOLITAN
BOROUGH OF HAMPSTEAD.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Charles and Hallett, JJ.), **October 29, 30, November 3, 1943.**]

Rates and Rating—Rateable occupation—Lease of unfurnished dwelling houses taken in case of emergency—Houses empty and unused—Whether rateably occupied.

The appellants were the lessees of a number of unfurnished dwelling houses which they intended to use as offices in the event of enemy action damaging their existing offices. The houses were ready for occupation but were entirely devoid of moveable furniture and tenant's fixtures. The appellants were under no obligation to repair or maintain the premises until they actually entered into possession. As their offices were not damaged they had no occasion to use the houses and the question arose whether they were in rateable occupation of the premises :—

HELD : there was no rateable occupation as there was no occupation of any value to the person charged.

[EDITORIAL NOTE. The dispersal of the population of the larger towns and removals due to war damage had led to many houses being temporarily unoccupied and the liability to rates in such cases is a matter of much importance at the present time both to local authorities and the business community. It has been generally accepted in practice that the owner of a house which is both unoccupied and unfurnished is beyond doubt not liable to pay rates thereon and this view is here confirmed.

AS TO RATEABLE OCCUPATION, see HALSBURY, Hailsham Edn., Vol. 27, pp. 351-355, paras. 782-785, and FOR CASES, DIGEST, Vol. 38, pp. 426-431, Nos. 10-55.]

Cases referred to :

- * (1) *Liverpool Corpn. v. Chorley Union Assessment Committee*, [1913] A.C. 197 ; 38 Digest 428, 36 ; 82 L.J.K.B. 555 ; 108 L.T. 82.
- (2) *R. v. St. Pancras Assessment Committee* (1877) 2 Q.B.D. 581 ; 38 Digest 423 5 ; 46 L.J.M.C. 243 ; 37 L.T. 126.
- * (3) *R. v. Melladew*, [1907] 1 K.B. 192 ; 38 Digest 426, 15 ; 76 L.J.K.B. 262 ; 96 L.T. 189.
- * (4) *Borwick v. Southwark Corpn.*, [1909] 1 K.B. 78 ; 38 Digest 426, 16 ; 78 L.J.K.B. 121 ; 99 L.T. 841.
- (5) *Winstanley v. North Manchester Overseers*, [1910] A.C. 7 ; 38 Digest 452 189 ; 79 L.J.K.B. 95 ; 101 L.T. 616.
- (6) *Townley Mill Co. (1919), Ltd. v. Assessment Area of Oldham (Assessment Committee for)*, [1937] A.C. 419 ; [1937] 1 All E.R. 11 ; Digest Supp. ; 106 L.J.K.B. 140 ; 156 L.T. 81.
- (7) *Holywell Union Assessment Committee v. Halkyn District Mines Drainage Co.*, [1895] A.C. 117 ; 38 Digest 424, 7 ; 64 L.J.M.C. 113 ; 71 L.T. 812.
- (8) *Smith v. New Forest Union Assessment Committee* (1889), 61 L.T. 870 ; 38 Digest 428, 35.
- (9) *Allan v. Liverpool (Overseers)* (1874), L.R. 9 Q.B. 180 ; 38 Digest 445, 155 ; 43 L.J.M.C. 69 ; 30 L.T. 93.
- (10) *Gage v. Wren*, (1902) 87 L.T. 271 ; 38 Digest 435, 87.
- (11) *London County Council v. Hackney Borough Council*, [1928] 2 K.B. 588 ; Digest Supp. ; 97 L.J.K.B. 694 ; 139 L.T. 407.
- (12) *Westminster (Mayor) v. Southern Ry. Co. (Assessment Committee)*, [1936] A.C. 511 ; [1936] All E.R. 322 ; Digest Supp. ; 105 L.J.K.B. 537 ; 155 L.T. 33.
- (13) *Bayliss v. Chatters*, [1940] 1 All E.R. 680 ; Digest Supp. ; 84 Sol. Jo. 116.
- (14) *Hanter v. Salford Overseers* (1865), 6 B. & S. 591 ; 38 Digest 525, 726 ; 34 L.J.M.C. 206.
- (15) *Boote Overseers v. Liverpool Warehousing Co. Same v. Webster* (1901), 85 L.T. 45 ; 38 Digest 426, 14.

APPEAL by the defendants by way of case stated from a decision of the Hampstead Petty Sessional Court, dated Oct. 19, 1942, holding that the defendants were in rateable occupation of certain premises. The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

A. S. Comyns Carr, K.C., and *G. D. Squibb* for the appellants.
Sydney Turner, K.C., and *Erskine Simes* for the respondents.

VISCOUNT CALDECOTE, L.C.J. : This case raises questions which are difficult ; and the number of authorities which have been cited to us is enough, were it

not for what has already been said by the House of Lords, to show that it is not easy to disentangle the cases and to arrive at a reconciliation of the decisions, or of the reasons which were given for the decisions. In those circumstances I should have, perhaps, thought it right to take an opportunity of considering the form of my judgment; but as I have no doubt at all about the result, I think it right to give judgment now.

A I have referred to what was said in the House of Lords as to the difficulty of reconciling the different cases: and the passage I had in mind is in the opinion of LORD ATKINSON in *Liverpool Corpn. v. Chorley Union Assessment Committee* (1) where he said, at p. 210:

B But the authorities mainly relied upon by the appellants are those conversant with the non-rateability of vacant houses. I find great difficulty in reconciling these, one with the other, from the statement of the law by LUSH, J., in *R. v. St. Pancras Assessment Committee* (2), down to the decision in *R. v. Melladew* (3) and *Borwick v. Southwark Corporation* (4); and I find still greater difficulty in discovering any intelligible principle upon which the decisions are founded, or any principle applicable equally to vacant houses and to property like that sought to be rated in the present case.

C That leads me to say that I am of opinion that it would be useless to go through all the cases in order to find a straight line upon which to frame my judgment. Therefore, I propose to consider first of all what the question is which we have to consider: and then to approach that question in the light of the facts of this particular case. In the case to which I have already referred, *Liverpool Corpn. v. Chorley Union Assessment Committee* (1), LORD ATKINSON, at p. 208, refers to *Winstanley's case* (5), and says it:

D . . . had reference solely to the first of the three questions set forth at p. 12 of that report, into which it was stated the question for decision resolved itself. These questions were (1) (the bald question), Does the appellant occupy this cemetery for which he is rated? (2) If he does, is his occupation a thing of value? (3) What is the measure of that value?

Very much the same way of stating the question was adopted in *Townley Mill Co. (1919), Ltd. v. Assessment Committee for the Assessment Area of Oldham* (6), at p. 436, where LORD MAUGHAM says:

There is no doubt that in order to prove rateable occupation it was necessary to establish not only occupation, but that the occupation was a thing of value.

E It appears, therefore, that the question we have to consider is whether there is an occupation. Something has been said also about beneficial occupation; and I will have something to say on that point later on: but it seems to me to be one of the less important questions in this case, for the reason that it is not disputed that, if there is in fact occupation here, the occupation is beneficial occupation.

F Although it is difficult to find in the enactments, either in the Statute of Elizabeth or anywhere else, a definition of "occupation," the judgment of LUSH, J., in *R. v. St. Pancras Assessment Committee* (2), has so often been cited (and cited with approval in the House of Lords) that I may refer to it once more. LUSH, J., in his judgment, which was a considered judgment, said this at p. 588:

G It is not easy to give an accurate and exhaustive definition of the word "occupier." Occupation includes possession as its primary element, but it also includes something more. Legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession, and may maintain trespass against anyone who invades it, but as long as he leaves it vacant he is not rateable for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year.

H It is right to say, I think, that occupation is a question of fact. That was made plain in *Assessment Committee of Holywell Union v. Halkyn District Mines Drainage Co.* (7), at p. 125, where LORD HERSCHELL said:

The question whether a person is an occupier or not within the rating law is a question of fact, and does not depend upon legal title.

Several of the cases show (and I will only refer to one of them for this purpose) the decisive nature of the facts when they have been found. The illustration which I take is of *Smith v. Assessment Committee of the New Forest Union* (8), where the Court of Appeal held that there was no evidence of occupation. LORD ESHER said, at p. 870:

The possessor of this land was both legal owner and in legal possession, but he was not in actual possession. He never intended to do anything with the land but let it for building purposes. He put up a board, but he was never in such occupation as to be rateable under the Statute of Elizabeth.

LINDLEY, L.J., said, at p. 870 :

I agree. There was here no use or enjoyment or occupation.

LOPES, L.J., said, at p. 870 :

To constitute occupation under the Statute of Elizabeth, there must be use and enjoyment of the property capable of being beneficial. There is no evidence of any such here, and I agree with the Divisional Court.

The decisive facts there were that the person who was sought to be rated had "never enclosed, cultivated, used or let the land." In those circumstances, it is not surprising, I think, that the Court of Appeal found no difficulty in arriving at the decision that there was no rateable occupation.

I contrast that case with *Borwick v. Southwark Corpn.* (4). The facts have been so often referred to and stated in the argument before us to-day, that I need not repeat them. Suffice it to say that certain chattels used in connection with the business of the appellants were removed from a house, but wooden benches and shafting had been installed and fixed there. LORD ALVERSTONE, L.C.J., said at p. 82 :

There is no doubt that the appellants can make use of this property if they choose and will do so if and when they require it. I think they are making use of it by having the necessary shafting and benches upon the premises in readiness for use.

Then he continues on p. 83, after discussing whether they had become fixtures, although they were part of the subject-matter :

I cannot think, therefore, that there is no evidence of occupation.

He arrived at the decision that there was occupation because of the facts which consisted of the introduction of the shafting and benches and their fixing in partial readiness for the resumption of the business or other activities it was intended to carry on in the building.

I refer now to the facts in this case under consideration to show what the position was. I find it unnecessary to read the whole of them, but finding (d) in para. 5 says this :

The appellants had not entered into physical possession of the said premises and the landlords had taken any steps necessary for the maintenance, repair and preservation thereof.

Finding (f) is :

The object of the appellants in becoming tenants of the said premises was to have accommodation available for offices in the event of their present offices being rendered unfit for use by enemy action or should they desire to use the said premises owing to the exigencies of their business.

Finding (g) is :

The appellants had never used the said premises for any purpose.

These facts are so manifestly different from those which LORD ALVERSTONE, L.C.J., stated in *Borwick v. Southwark Corpn.* (4) that the difference seems to me very significant. In this case, according to the findings : "The appellants had never used the said premises for any purpose." Nothing could be more clear or more precise than that statement. It is true it follows a statement that "the object of the appellants in becoming tenants of the premises was to have accommodation available" in certain events. That was relied upon by counsel for the respondents here as proving an intention to occupy the premises which, it was said, was enough to constitute rateable occupation. I shall have something to say about intention later. Upon those findings the magistrates have said, after setting out some preliminary matters which are really not in question here, in para. 9 :

We have also heard the witnesses and we are satisfied that the defendants acquired these premises for use as offices in connection with their business : that the premises were and are capable of being so used, and that the defendants had and still have an intention so to use them whenever, according to the exigencies of their business, it was or is desirable. On the authorities, *R. v. Melladew* (3) and *Borwick v. Southwark Corpn.* (4), we are of opinion that the defendants must be held to be the occupiers, and to be enjoying the benefit of premises kept in reserve for them for use in their business in case of emergency and, therefore, rateable.

If those two cases did require the justices, as a matter of law upon the facts they found, to come to that decision, the respondents in this appeal will succeed. Therefore, it is necessary to look at those two cases to which the justices have referred.

A The first of them is *Borwick v. Southwark Corpn.* (4), to which I have already referred; and I repeat my reference to the judgment of LORD ALVERSTONE, L.C.J., in which he said quite clearly that the persons there sought to be charged were making use of the premises; and he gave reasons for that statement, namely, by having the necessary shafting installed. BIGHAM, J., says, at p. 84:

B It is, I think, obvious from these circumstances that the place is kept by the appellants as a "stand by" for use at any moment when the exigencies of their business may make it desirable to so use it, and is in readiness for such use. Such a state of things constitutes, in my opinion, a permanent user so as to create an "occupation" . . . whether a man "occupies" or not is in each case a question of intention, to be ascertained with reference to the particular circumstances.

So I find nothing so far, in the first of the two cases upon which the justices have relied as leading them to their decision, to support the view that as a matter of law they should so find.

The other case on which the justices rely is *R. v. Melladew* (3). The judgment of LORD COLLINS, M.R., in that case requires a little more attention. He says, at p. 200:

C It is important to remember, in dealing with questions of liability to pay rates, that occupation, which is the basis of liability, necessarily varies with the nature of the rateable subject-matter. The acts necessary to establish occupancy of a dwelling house may be very different from those which might be required to establish occupation of a non-habitable hereditament. It is, I think, clear from a comparison of many authorities, that the intention of the alleged occupier in respect to the hereditament is a governing factor in determining the question whether rateable occupancy has been established.

D Stopping there for the moment, no doubt counsel on behalf of the respondents is entitled to rely upon that as a cogent authority in favour of his submission that the all important question is whether there is an intention or not to occupy the premises. *Melladew's* case (3) was a case in which the business of a warehouseman had been carried on; but there were no goods in the warehouse at the material times and it was closed. Certain steps had been taken to indicate E that the business would not be carried on there, such as cutting off the water and the removal of weights and scales and trucks; but notwithstanding that, it was held that there was no cessation of the occupation of the warehouse by the warehouseman. Looking at it from that angle alone, the statement of LORD COLLINS, M.R., that the intention of the alleged occupier in respect to the hereditament "is a governing factor in determining the question whether rateable occupancy has been established" is, if I may say so with the greatest F respect, perfectly accurate and very much in point upon the facts of that particular case. He goes on, at p. 201:

For instance, the physical presence, actual or constructive, of the alleged occupant upon the hereditament may be consistent with the position of licensee or lodger as well as with that of an occupier in the sense required to establish rateability. "In order to ascertain this," says BLACKBURN, J., in *Allen v. Overseers of Liverpool* (9), "we must see what was the intention of the parties."

G I forbear to read the whole of the judgment, because I think the passages to which I have referred show my understanding of these two authorities. But at p. 202, LORD COLLINS, M.R., says this:

H I am aware that ownership is distinct from occupation, and that an owner does not make himself rateable by trying to let an house which he has ceased to inhabit. But the principle involved in that proposition does not apply to the case of the tenant of a vacant warehouse who retains control over it for the purpose of letting storage room . . . The warehouseman in getting a customer supplies visible evidence of his own occupation. In the case of the owner who tries to let the intention is not to occupy. In the case of the warehouseman it is exactly the reverse. It seems to me on the facts found by the justices, which I need not repeat, that the intention of the defendant here was as far as possible to avoid the semblance of occupation while carefully guarding the substance. He carefully retained the control, while his continuous intention was to utilise the premises for the purpose of his business whenever the opportunity offered, FARWELL, L.J., adds something to that, when at the bottom of p. 203 he says:

The test, in a case like the present, of business premises, appears to me to be, has the

person to be rated such use of the tenement as the nature of the tenement and of the business connected with it renders it reasonable to infer was fairly within his contemplation in taking or retaining it ? . . . I find it impossible to say that the defendant has ever given up the use of this warehouse or withdrawn it from his business so as to cease to occupy it within the meaning of the Act. He has merely kept it as spare room.

Applying that last passage from the judgment of FARWELL, L.J., which I think is quite consistent and in agreement with what LORD COLLINS, M.R., says—that the intention on the part of a person who has been in occupation of a warehouse to give up the occupation may be very material and is very material, supposing the facts agree with his intention—it is not an authority *simpliciter* for the proposition if a person acquires possession of a house and has an intention, which he may or may not communicate to anybody, at some future time to occupy it, that that is tantamount to rateable occupation. *R. v. Melladew* (3) does not, in my judgment, support any such proposition.

The importance of intention may be illustrated by what I may call the seaside cases, of which two or three examples have been cited to us. One of them is *Gage v. Wren* (10). At the top of p. 274 LORD ALVERSTONE, L.C.J., says :

I quite agree that if those things (that is fixtures, blinds, meters, floorcloths, etc.) were left in the house, and if the evidence before the magistrates was that they were only left with a view to finding a purchaser, or an incoming tenant, the inference of law to be drawn from that would not be that there was any evidence of occupation. But the case goes on to say that the respondent left all the fixtures and fittings she had hired from the previous tenant . . .

He continues on p. 274 :

I think that the proper inference of law to be drawn from the facts is that the respondent had the beneficial occupation of this house during the whole time. She intended to come back to the house, and she might come back, and she made no attempt whatever to dispose of it, nor is there any evidence at all that she meant to go out of the beneficial occupation of the house during the year.

As I understand the case, it is an illustration of the application of the significance of intention. When a person has been in occupation, an intention to go out, coupled with facts which support the intention, may establish a state of things in which there is no rateable occupation, because there is no use being made of the premises.

That is really sufficient for the purposes of my judgment. I find here (and I repeat the finding of the magistrates) that no use whatever was made of these premises. All that they did was to pay £1,600 on the conditions which are set out in the case, so as to have a stand by office, of which they made no use whatever, either by taking any furniture in or by any other means, for use in case the exigencies of their business required it.

Looking at the case as one which raises a question of fact in the first instance, on the first question whether there is occupation here I am of opinion that the magistrates came to a wrong conclusion, and there was no occupation simply because I find no other factor at all except the acquisition of possession and the intention to go there at some future time, which as I have said, I think is not decisive of the question of rateable occupation.

I can summarise what I meant to say about beneficial occupation in almost one sentence. Occupation will fail to be rateable occupation if it is of no value to the person who is sought to be charged. In this case there is no dissent from the view that, if there is an occupation, there is beneficial occupation.

CHARLES, J. : I agree. Save for the fact that this is a matter of considerable importance at this present time, I should not feel disposed to add to the judgment of VISCOUNT CALDECOTE, L.C.J., with which I entirely agree. But I wish in the circumstances to add a few words, though not a great deal.

It is to be observed that the whole matter arises to begin with upon an agreement which was entered into because and in consequence of the possibility of damage arising from enemy action. That agreement, therefore, is couched in somewhat unusual terms. The appellants, the Associated Cinema Properties, Ltd., according to the magistrates finding, covenanted :

. . . to keep the said premises in good and tenantable repair, order and condition provided that the appellants should not be under any liability for the maintenance, repair or preservation of the said premises unless and until the appellants should enter

into possession of the same and in the meantime the landlords were to be at liberty to take such steps as they should consider necessary for such maintenance, repair or preservation.

Para. (d) says :

The appellants had not entered into physical possession of the said premises and the landlords had taken any steps necessary for the maintenance, repair and preservation thereof.

A Para. (f) says :

The object of the appellants in becoming tenants of the said premises was to have accommodation available for offices in the event of their present offices being rendered unfit for use by enemy action, or should they desire to use the said premises owing to the exigencies of their business.

B That latter part, one would rather gather, is a sort of addition, because at this particular time the taking of these offices was in case their present offices might be rendered unfit for use by them by enemy action. Then it is found : that the appellants had never used the said premises for any purpose.

It has been said by counsel for the respondent that, if you, in those circumstances, take a lease of a house and leave it a shell and put nothing into it and do nothing to it, you are still in beneficial occupation so as to bring you within the ambit of rating.

C Why are you in beneficial occupation because you have the right, if you like to exercise it at some future time, of going into that empty house ? A very long chain of cases has been cited to us from the time of LORD BLACKBURN down to 1937 : but there is no case which is comparable with this particular case. All the cases cited to us, whether they refer to a factory or warehouse, or seaside boarding house or bungalow, are subject to vital differences when compared with this house. In the case of the warehouse, one finds that there

D already had been a beneficial occupation, but the occupier had abandoned the premises for a time. Sometimes in those cases he left something behind. Sometimes where the warehouses are a block with other warehouses occupied by him, he has transferred the chattels next door, ready for return if and when he should let part of the warehouse. The seaside boarding house cases are cases in which they are occupied quite frankly during the season ; quite frankly they are left when the season is at an end ; quite frankly, there is an intention to come back directly the next season starts. In the case of the bungalows, there were five bungalows and furniture for four ; and the furniture could be shifted about in either of the five, or to the display house as was most convenient. They are all based on special circumstances which, so far as I can see, are in no way akin to the circumstances which we are considering in this case today.

E What, then, is necessary before you can arrive at a consideration of what is a beneficial occupation so as to make a house rateable ? You have to find actual occupation. There cannot be simply a sort of thought transference from a distance of an intention at some time of coming to a house which you have never seen, and perhaps never will see, under certain circumstances which may never arise. There must be in my view (and I think what I am saying is in accord with all those cases) actual occupation. There must be use : that is the word used in some of the cases.

F G LORD ATKINSON, in *Liverpool Corpn. v. Chorley Union Assessment Committee* (1), at p. 211, says :

H When the statute, therefore, enacts that the occupier of a house should be rated, it must mean that the person to be rated shall occupy the house as a house ; that is, that he shall use the house for the purpose of living in it, or sojourning in it, or working in it, keeping animals in it, storing other chattels in it, or using it for some such other purpose as houses may reasonably be devoted to ; and that, as a vacant house is not used for any of these purposes, it is not occupied as a house within the meaning of the statute.

These houses were never occupied within the meaning of the statute. These houses were never used. Nothing was ever put into them. No preparation had been made for the reception of the offices. There had in short been no actual occupation.

There being no actual occupation, in my view it does not profit us to enter into long discussions of what intention there would be to use a house into which one had entered by way of actual occupation. There is no beneficial occupation

here : there is no occupation that makes these houses rateable. The magistrates, when they came to the conclusion that because of the decisions in *R. v. Melladew* (3) and *Borwick v. Southwark Corpn.* (4) (the criticisms of which by VISCOUNT CALDECOTE, L.C.J., I entirely agree with) they ought to come to the decision that the defendants must be held to be occupiers, in my opinion reached a decision which was incorrect and, therefore, cannot be supported.

HALLETT, J. : I agree. The authorities seem to me to show that in order to establish rateable occupation, there must be (a) legal possession, as to which see *Holywell Union Assessment Committee v. Halkyn Drainage Co.* (7) ; (b) actual occupation, and (c) beneficial occupation. The phrase "actual occupation" will be found to have been used by FARWELL, L.J., in *R. v. Melladew* (3), at p. 203, and also by WRIGHT, J., (as he then was), in *London County Council v. Hackney Borough Council* (11), at p. 599. The phrase "actual possession" was used by LORD RUSSELL in what is called the *Victoria Station* case, *Mayor of Westminster v. Southern Ry. Co.* (12), at p. 529. If it be said that in deciding whether there was an actual occupation by the alleged occupier during the period to which the rate relates, evidence of intention should be taken into account, I respectfully agree. I think in many cases evidence of intention would be most relevant in deciding whether there has been, during the material period, an actual occupation. But if it were said that an intention to occupy is the same thing as actual occupation, then, apart from authority, I should have said that was clearly wrong. I should have said that the intention to do a thing and the actual doing of it (unless some statute provides to the contrary) were always obviously different things.

As I understand, it is said that there are three authorities, one decision of the Court of Appeal and two of the Divisional Court, namely, *Melladew's* case (3), *Borwick's* case (4), and a case which I think has not been mentioned in the other judgments, but which was cited to us, of *Bayliss v. Chatters* (13), which compel me to come to a decision to which I should not otherwise have come. It is unnecessary that I should go through those cases, because the principle governing them has already been fully examined in the preceding judgments. Suffice it to say that I find nothing in those cases which compels me to answer the question here in a way in which I should not otherwise have answered it. I do not think that actual occupation and a mere intention to occupy are the same thing ; and I find no authority which compels me to take a different view. Therefore, I agree with the judgments which have already been delivered.

Appeal allowed with costs.

Solicitors : *Waterhouse & Co.* (for the appellants) ; *P. H. Harrold*, Town Clerk of Hampstead (for the respondents).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

Re PETITION OF RIGHT OF CANADIAN EAGLE OIL CO., LTD.

[KING'S BENCH DIVISION (Macnaghten, J.), **October 12, 1943.**]

Income Tax—Double taxation—Relief—Shares in British companies held by Canadian company—Dividends of British companies suffering tax—Relief claimed by Canadian company in respect of tax deducted from dividends paid to British shareholders—Income Tax Act, 1918 (c. 40), s. 147, Sched. D, case V.

The suppliant, a Canadian company, held shares in certain British companies and suffered a deduction of income tax from the dividends received from these companies and from the interest on money lent to them. The suppliant was also directly assessed to income tax in respect of interest on money deposited with British bankers. On the payment of dividends to shareholders resident in the United Kingdom, the suppliant, by its agent, deducted tax at the rate then in force. Until 1932, the Special Commissioners exempted from assessment to income tax such part of such dividends as arose from profits made in the United Kingdom, but, since then, no repayment was allowed in respect of fixed preferential dividends, and since 1940, the only repayment made was in respect of income directly assessed. The suppliant claimed the repayment of all tax from the year 1932 onward assessed on dividends arising from profits made in the United Kingdom :—

HELD : (i) if the assessments were excessive and the excess were recover-

able by petition of right, repayment would be due not to the suppliant, but to the individual shareholders.

(ii) procedure by petition of right was not open to the suppliant since, if it were entitled to repayment, it could have appealed under sect. 147 of the Income Tax Act, 1918.

[EDITORIAL NOTE.] Dividends of a foreign company which are payable at the option of the shareholders in the United Kingdom or abroad, but are in fact paid by the London agency of the company, are assessed and charged to tax under Sched. D by the Special Commissioners. Where, however, the company carries on trade in London, an allowance is made in respect of the portion of the dividends which arise from profits charged to United Kingdom tax. The real question at issue between the parties was whether it is essential in such a case that the company shall carry on business in the United Kingdom, but the case is decided on a subsidiary point, namely, that no petition of right lies where there is an alternative remedy.

As to *Gilbertson v. Fergusson* RELIEF, see HALSBURY, Hailsham Edn., Vol. 17 p. 195, para. 399; and FOR CASES, see DIGEST, Vol. 28, p. 79, No. 431, DIGEST, Supp., Income Tax 431a.]

Cases referred to:

(1) *Gilbertson v. Fergusson* (1881), 5 Ex.D. 57; 7 Q.B.D. 562; 28 Digest 79, 431; 46 L.T. 10; 1 Tax Cas. 701.

(2) *Barnes v. Hely-Hutchinson*, [1940] A.C. 81; [1939] 3 All E.R. 803; Digest Supp.; 108 L.J.K.B. 893; 161 L.T. 181.

PETITION OF RIGHT by the suppliant claiming repayment of part of the income tax assessed and charged under the Income Tax Act, 1918, Sched. D, case V, on dividends paid by it in London to shareholders resident in the United Kingdom.

J. Millard Tucker, K.C., and *Heyworth Talbot* for the suppliant.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), and *Reginald P. Hills* for the Crown.

MACNAGHTEN, J.: This is a petition of right presented by the Canadian Eagle Oil Co., Ltd., a company incorporated in the Dominion of Canada on Jan. 4, 1928, by letters patent under the laws of that Dominion. The suppliant claims to be entitled, in the circumstances set out in the petition, to repayment of part of the income tax assessed and charged under the Income Tax Act, 1918, Sched. D, case V, on dividends paid by it in London to shareholders resident in the United Kingdom of Great Britain and Northern Ireland.

The Attorney-General, on behalf of the Crown, demurred to the petition; and the demurrer came on for argument before me at the end of the Trinity sittings, when judgment was reserved.

The share capital of the suppliant is divided into three classes, namely (1) cumulative first preference shares of three Canadian gold dollars each, entitled to a fixed cumulative cash dividend at the rate of 10.08 pence sterling per share per annum, payable in London on Apr. 30 and Oct. 31, in each year; (2) participating preference shares of no par value, entitled to a fixed preferential non-cumulative dividend at the rate of 23.88 cents per share per annum; and (3), ordinary shares of no par value.

If in any year the divisible profits are more than sufficient to pay the preferential dividends and a dividend at the rate of 23.88 cents on the ordinary shares, the surplus is divided among the holders of the participating preference and ordinary shares rateably. All the dividends on the cumulative first preference shares and a large part of the dividends on the other two classes of shares are paid here in London by the Midland Bank as agent for the suppliant; and for the purpose of making those payments the suppliant remits to its London financial agent, the Whitehall Securities Corporation, Ltd., the gross amount of the dividend (less Canadian Dividend Tax) payable to its shareholders in London, and the Whitehall Securities Corporation, Ltd., transfers that sum to the Midland Bank.

Many of the shareholders who thus receive their dividends from the Midland Bank are resident in the United Kingdom; and, since the suppliant is for the purposes of income tax a "foreign company," the dividends paid to them are subject to British income tax under the Income Tax Act, 1918, Sched. D, case V, as "income arising from possessions out of the United Kingdom."

By r. 7 of the Miscellaneous Rules applicable to Sched. D, which reproduces the provisions contained in the Income Tax Act, 1853, s. 10, it is provided that

where, as in the present case, the dividends payable in respect of the shares of a foreign company are entrusted to a person in the United Kingdom for payment to a person in the United Kingdom, such dividends are to be assessed and charged to income tax by the Special Commissioners, and that the rules applicable to the tax under Sched. C are to extend to the tax so assessed and charged. By the Rules applicable to tax under Sched. C, the person entrusted with the payment of the dividends is required to furnish particulars thereof, and it is provided that :

The Special Commissioners shall . . . assess and charge the dividends at the rate of tax in force at the time of payment, but reduced by the amount of the exemptions (if any) allowed by them, and shall give notice of the amount so assessed and charged to the person intrusted with payment. The person intrusted with payment shall out of the moneys in his hands pay the tax on the dividends on behalf of the person entitled thereto, and shall be acquitted in respect of all such payments . . .

In accordance with these rules, the Midland Bank, year by year, made returns to the Special Commissioners of all dividends intrusted to it by the suppliant for payment to shareholders in London ; and in due course the Special Commissioners assessed and charged the dividends payable to those shareholders who were resident in the United Kingdom at the rate of tax in force at the time of payment. On payment of their dividends to those shareholders, namely, the shareholders resident in the United Kingdom, the bank deducted tax at the rate then in force ; and, after receiving notice of the assessment from the Special Commissioners, the bank, on behalf of the shareholders, paid the tax so assessed out of the moneys intrusted to it by the suppliant ; and thus, in the language of the Rules, was "acquitted in respect of all such payments."

The suppliant is not and never has been "resident" in the United Kingdom within the meaning of the Income Tax Acts ; nor has it ever carried on any business in the United Kingdom ; but, from the first, it has held shares in certain companies which were incorporated and carry on business in this country ; namely, the Anglo-Mexican Petroleum Co., Ltd., the Anglo-Mexican Oil and Shipping Co., Ltd., the Eagle Oil and Shipping Co., Ltd., and the London and National Property Co., Ltd.

Those companies, pursuant to r. 20 of the General Rules, deduct income tax from the dividends paid to their shareholders. Moreover, interest on money lent by the suppliant to one or other of the above-mentioned companies is subject to deduction of tax by the borrower ; and, in the case of interest on money deposited by the suppliant with its bankers, direct assessment to tax is made upon the suppliant's London financial agent, the Whitehall Securities Corpn., Ltd. Thus it comes about that, in every year since its incorporation in 1928 part of the income of the suppliant—in some years the whole of its income—was subject to British income tax.

In these circumstances, the suppliant claims that, in accordance with the rule laid down more than 60 years ago in *Gilbertson and Others v. Fergusson* (*Surveyor of Taxes*) (1), it is entitled to repayment of part of the tax which the Midland Bank paid to the Crown on behalf of its shareholders resident in the United Kingdom.

In *Gilbertson's* case (1), as in the present case, the question arose with regard to the assessment to income tax on dividends which were payable here in London in respect of the shares of a foreign company and had been intrusted to an agent in this country for payment. In that case the foreign company was the Imperial Ottoman Bank, a Turkish corporation incorporated by a firman of the Sultan in accordance with the laws of Turkey, with a capital divided into shares of £20 each. In 1863 the Imperial Ottoman Bank acquired and took over the assets and business of a British banking company, established and carrying on business here in London, called the Ottoman Bank of London ; and the shareholders of that company received 112,500 of the £20 shares fully-paid of the Imperial Ottoman Bank. From that time the Imperial Ottoman Bank carried on the business in London by a committee of ten persons.

The appellants in *Gilbertson's* case (1) were the members of this committee. For the year which ended on Apr. 5, 1875, an assessment was made upon them in respect of the profits made by the London agency of the Imperial Ottoman Bank in the sum of £81,477 14s. 8d., being the average of the profits of the agency during the three preceding years. There was no dispute about that

assessment. During the year ended Apr. 5, 1875, the appellants had paid to the shareholders of the Imperial Ottoman Bank who were resident in the United Kingdom dividends on their shares amounting in all to £98,322 10s., and the Special Commissioners, pursuant to the Income Tax Act, 1853, s. 10, made an assessment on the appellants in respect of those dividends at the rate of tax in force for the year 1874-75. The Special Commissioners were, it seems, of opinion that, since the dividends were paid out of the profits of the Imperial

- A Ottoman Bank, and those profits had been earned partly in this country and partly abroad, and the profits earned in this country had paid income tax, the assessments on the shareholders resident in the United Kingdom should be limited to so much of the dividends as had been earned abroad; or, in other words, that the shareholders resident in the United Kingdom ought not to be required to pay tax on that portion of their dividends which represented the profits earned by the bank in this country. However, the Special Commissioners, having no information as to what proportion of the sum of £98,322 10s. represented profits which had been earned abroad, made an assessment upon the whole of that sum, leaving it to the appellants to prove upon appeal what amount should be deducted from the assessment in respect of the profits earned in this country. The appellants raised two grounds of appeal against this assessment: namely (1) That the case did not come within sect. 10 of the Income Tax Act, 1853, because they were not "persons intrusted" with the payment of the dividends within the meaning of the section: and (2), since the profits earned in this country in the year 1874-75 exceeded the amount of the dividends paid to the British shareholders in that year, the assessment on the dividends payable to the British shareholders should be nil. The Special Commissioners rejected both those contentions; and, at the request of the appellants, stated a case for the opinion of the court. The Crown did not enter any appeal. The decision of the Special Commissioners was upheld by the Exchequer Division of the High Court, HUDDLESTON and POLLOCK, BB., KELLY, C.B., dissenting, and by the Court of Appeal, consisting of BRAMWELL, BRETT and COTTON, L.JJ. The order made by the Court of Appeal was that the assessment on the dividends made by the Special Commissioners was based upon the right principle:

... in so far as it assesses so much of the dividends intrusted to the committee for payment in the United Kingdom as is not shown, by a proper return on the part of the bank, to arise from profits made in the United Kingdom.

- E From that date, 1881, the Special Commissioners, in making their assessments on the dividends paid by foreign companies to British shareholders, have acted on the principle laid down in *Gilbertson's* case (1). They have, until recently, exempted from the assessments such part, if any, of such dividends as arose from profits made in the United Kingdom.

- F In accordance with that rule, in each of the years ended Apr. 5, 1929, 1930 and 1931, the Commissioners of Inland Revenue repaid to the suppliant in the present case the tax on so much of the dividends paid in those years to shareholders resident in the United Kingdom as represented profits which had suffered tax, either by direct assessment or by deduction. For the year ended Apr. 5, 1929, the dividends paid to persons resident in the United Kingdom amounted to £305,736, and of that sum no less than £177,711 represented profits which had suffered tax either by direct assessment or by deduction; and tax at 4s. in the pound (the rate then in force) amounting to £35,542 4s. was repaid. In 1932, the Commissioners of Inland Revenue were advised that no reduction could be allowed under the rule in *Gilbertson's* case (1), in respect of preference shares entitled to a fixed rate of dividend; and, since then, no repayment has been allowed to the suppliant in respect of such dividends.

- H The decision of the House of Lords in *Barnes v. Hely-Hutchinson* (2), has established the correctness of this advice. Hely-Hutchinson was the holder of preference shares in an Indian company, which entitled him to a preferential dividend at a fixed rate. The company remitted the dividends to Hely-Hutchinson direct, and he was accordingly assessed to income tax under case V of Sched. D on the full amount of his dividends. The Indian company held shares in two British companies. The dividends received by Hely-Hutchinson were paid partly out of taxed dividends received on its shares in the British companies and partly out of other income which had not borne British income tax. Hely-Hutchinson appealed against the assessment on the ground that,

according to the rule in *Gilbertson's* case (1), the assessment should have been limited to so much of the dividend as was paid out of profits which had not borne British income tax. This contention was upheld by the Special Commissioners, and, on appeal to the court, by the Revenue Judge, and the Court of Appeal; but it was overruled by the House of Lords, who held that *Gilbertson's* case (1) does not apply to a fixed preferential dividend, and that *Holy-Hutchinson* had been correctly assessed upon the full amount of his dividends. The House of Lords commented upon, but did not overrule, *Gilbertson's* case (1).

In 1940, the Special Commissioners restricted the repayment of tax to the suppliant under the rule in *Gilbertson's* case (1) to that part of its income which had been directly assessed, and this amounted for that year to no more than £151 8s. 7d. They disallowed repayment in respect of income which had suffered tax by deduction at the source.

In these circumstances, on Mar. 20, 1942, the suppliant presented this petition of right. The suppliant by the petition prays for the repayment of tax for the year ended Apr. 5, 1932, and subsequent years; it prays for such repayment to itself, or, alternatively, to the Whitehall Securities Corp., Ltd., or, to the Midland Bank as its agents. However, if the assessments in question ought under the rule laid down in *Gilbertson's* case (1) to have been at a rate less than the standard rate, and the excess were recoverable by petition of right, it is not the suppliant or its agents, but the individual shareholders, who would be entitled to the return of the excess. The Midland Bank paid the tax which is alleged to have been excessive out of moneys which had been entrusted to it by the suppliant for those shareholders. The suppliant had no right to those moneys—they belonged to the individual shareholders. Therefore, on that ground alone the petition by the suppliant must necessarily fail and judgment must be entered for the Crown on the demurrer.

A further point is raised on behalf of the Crown, namely, that, if the assessments were excessive and the suppliant were entitled to repayment of part of the tax, it could have appealed under the Income Tax Act, 1918, s. 147, and it is, therefore, not open to the suppliant to proceed by petition of right. Counsel on behalf of the suppliant urged that sect. 147 has no application except to assessments made under Part VI of the Income Tax Act. No such limitation is expressed in the section, which provides that:

Where proceedings in order to an assessment under Sched. D are taken before the Special Commissioners . . .

the person assessed may appeal against the assessment. In this case proceedings "in order to an assessment under Sched. D" were taken before the Special Commissioners. R. 7 of the Miscellaneous Rules applicable to Sched. D expressly requires that such proceedings should be so taken; and I see no ground whatever for limiting the provisions of sect. 147 to assessments made under Part VI of the Act. It seems to me they apply to all proceedings "in order to an assessment under Sched. D" taken before the Special Commissioners.

The Attorney-General, on behalf of the Crown, raised a further point, namely, that, in view of the observations upon *Gilbertson's* case (1) by LORD ATKIN and LORD WRIGHT in *Hely-Hutchinson's* case (2), the rule in *Gilbertson's* case (1) is applicable only where a foreign company carries on business in this country; and that tax on dividends in British companies and tax on interest on money lent to persons in the United Kingdom does not come within the rule in *Gilbertson's* case (1). In view of the opinion that I have formed on the two points I have mentioned, it is unnecessary for me to come to any decision upon that question. It seems to me, however, since the House of Lords did not overrule the decision in *Gilbertson's* case (1), I should be bound to make the same order as was made by the Court of Appeal in that case, and to declare that so much of the dividends entrusted by the suppliant to the Midland Bank for payment to its shareholders who were resident in the United Kingdom as arose from profits made in the United Kingdom should be excluded from the assessments.

For the reasons I have given, I think that the demurrer succeeds and that judgment must be entered for the Crown with costs.

Judgment for the Crown on the demurrer with costs.

Solicitors: *Horace Davey* (for the suppliant); *Solicitor of Inland Revenue* (for the Crown).

[Reported by GWYNEDD LEWIS, Barrister-at-Law.]

RICHARD THOMAS & CO., LTD. v. THE COUNTY VALUATION COMMITTEE FOR COUNTY OF MONMOUTH AND THE WEST MONMOUTHSHIRE ASSESSMENT COMMITTEE.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Charles and Hallett, JJ.), **October 28, 1943.**]

- A** *Rates and Rating—Assessment—Machinery—Transformers and distribution boards—Main transmission of power—Rating and Valuation Act, 1925 (c. 90), s. 24, Sched. III—Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O., 1927, No. 480).*

Electrical current was brought into a large works from the Grid at a voltage of 11,000 volts. From the first distribution board some of this current was led straight to machines operating at 11,000 volts and the remainder taken through transformers to a second distribution board at 440 volts. From this board some passed to the machinery and some through transformers to another distribution board at 110 volts. Similar arrangements applied to other current generated at the works at 6,000 volts and 2,200 volts:—

- B** **HELD:** all the above were part of the “main transmission of power” and, therefore, part of the hereditament for rating purposes.

- C** **[EDITORIAL NOTE.]** This case considers again, but with the like result, a point which was before ATKINSON, J., in the *South Wales Aluminium Co.’s* case (1). In a simple case power is received at a high voltage and transformed down to a low voltage at which it is supplied to the lighting and power circuits. In a large works, however, different machines and different processes require current at varying voltages. We thus get current being supplied for consumption at varying voltages from different distribution boards. The regulations having to deal with this very complicated state of affairs have not, perhaps, been drafted in the happiest language, but it now seems clear that all apparatus until we get to lines going to the machines actually carrying on the work of the factory on the one hand or running the lighting, heating and ventilation and so forth on the other is part of the “main transmission of power.”

- D** AS TO RATING OF MACHINERY AND PLANT, see HALSBURY, Hailsham Edn., Vol. 27, pp. 393, 394, para. 827; and FOR CASES, see DIGEST, Vol. 38, pp. 531-534, Nos. 772-795.]

- E** Case referred to:

** (1) South Wales Aluminium Co. v. Neath Assessment Area Assessment Committee, [1943] 2 All E.R. 587.*

APPEAL by way of case stated from the decision of the appeals committee of quarter sessions. The facts are fully stated in the judgments.

A. S. Comyns Carr, K.C., and A. A. Warren for the appellants.

Craig Henderson, K.C., and Harold B. Williams for the respondents, Monmouth

- F** County Valuation Committee.

Erskine Simes for the respondents, West Monmouthshire Assessment Committee.

- G** VISCOUNT CALDECOTE, L.C.J.: The Rating and Valuation Act, 1925, s. 24, made an important change in the law of rating with regard to plant and machinery. Up to that time it may be said (I hope with substantial accuracy) that a hereditament with plant or machinery on it or in it was to be valued as if the plant or machinery was part of the hereditament. The effect of sect. 24 of the 1925 Act is to leave out of account all plant and machinery except certain classes which are to be deemed to be part of the hereditament. In this case the question is whether certain electrical plant in the hereditament is to be valued as being within what I call the excepted classes and, therefore, to be deemed to be part of the hereditament. The answer to this question depends upon the proper construction of what is called a statement, which has statutory force and is intended to give precise information as to what machinery and plant falls within the classes which I call the excepted classes specified in the Third Schedule to the Act. The statement is not easy to understand at first sight, though I am bound to say now with due humility that I have formed a clear opinion as to its meaning in the circumstances of this case.

- H** Counsel for the valuation committee has quite properly reminded us that the statement was intended for experts who are well acquainted with the technicalities of this question and with the meaning of the terms which are current in

the profession or industry, but, if there is any dispute as to their meaning, its terms have to be interpreted and applied by the court upon the same principles and in the same way as those of any other document. The technical meaning of the words may be of some assistance to the court, or it may be that their ordinary meaning, if there is any difference between the technical meaning and the ordinary meaning, would be the one to which the court would refer. But I apply the principle which I mentioned more than once in the course of the argument, the principle upon which any other document has to be construed, namely, that you must seek to give all the words and all the parts of the document some meaning of which the words are capable and construe the document accordingly. A

The appellants occupied a very large undertaking known as the Ebbw Vale Steel Works. The processes there carried out required a great deal of electrical energy to be supplied at varying voltages and in different forms. The appellants obtain some of this electrical energy from the Central Electricity Board; and this passes from a sub-station outside the hereditament to the bus-bars of the distribution board within the hereditament—I will call that Distribution Board No. 1. It comes there at a voltage of 11,000 volts A.C. The appellants also generate their own energy at a power station which is part of the hereditament. Some of it is generated at 6,000 volts and some at 2,200 volts. The energy, some of which is received from outside and some of which is generated on the hereditament, is then dealt with as shown on two diagrams which have been most helpfully and usefully prepared for our consideration, and form part of the case. One is a plan, and the other is in diagrammatic form. B C

The design and lay-out of the plant is that energy at 11,000 volts received at what I have called Distribution Board No. 1 passes to another distribution board, No. 2, at the same voltage. Some passes out, still at 11,000 volts, to the mill motors; the rest is transformed down to 440 volts and then passes to what I may call Distribution Board No. 3. Some is then transformed down to 110 volts and as such passes to a distribution board which I call Distribution Board No. 4, and then to the motors. The rest of the lay-out is similar, not, of course, identical, but the same characteristics are exhibited in the other parts of this lay-out. D

I turn to the statutory statement to see what, if any, of this plant is to be deemed to be part of the hereditament. First, it is to be observed that the statement takes the place of Schedule 3 in the Act. Sect. 24 (3) of the Act provides as follows: "For the purpose of enabling all persons concerned to have precise information as to what machinery and plant falls within the classes specified in the said Third Schedule," there is to be constituted a committee. Then the subsections go on to the point at which it is indicated that the statement, "as confirmed by the Order shall for all purposes have effect as if it were substituted for the Third Schedule to this Act." The Third Schedule is enacted but it has to have something substituted in its place when the committee which the Minister is to set up has reported, and when he has had an opportunity of seeing the report and considering it and, if he thinks fit, making an Order confirming it. That Order has been made in this case: and the statement we have to construe is the statement which takes the place of the Third Schedule contained in the Act. E F

I think it is desirable that I should refer in passing to the language of the Third Schedule. Omitting immaterial words, it provides: G

Machinery and plant . . . which is used or intended to be used mainly or exclusively in connection with any of the following purposes, that is to say: (a) the generation, storage, primary transformation or main transmission of power in or on the hereditament.

It is to be noticed that those phrases "primary transformation or main transmission" are left undefined—they are left to speak for themselves. Perhaps it is not altogether surprising that it was thought that they needed clarification. Counsel for the respondents says that any doubt as to the meaning of these words "primary" or "main," if there was any doubt, has been cleared up by the statement which we have to construe. On the other hand, counsel for the appellants says that the word "primary" must be contrasted with the words "secondary" or "tertiary"; and the word "main" is to be contrasted with "branch" or "subsidiary," or some word to that effect. H

When I turn to the statement which is to take the place of the Third Schedule, the first thing I find is that, with a significant addition, the words which I have quoted from the Third Schedule are reproduced. I find in class 1 (a) : "Machinery and plant specified in paras. (a) to (i) of the Schedule to this class"—that is a slight alteration, but it is an immaterial one—"which is used or intended to be used mainly or exclusively in connection with the generation, storage, primary transformation"—and then come these significant words—" (as herein defined), or main transmission (as herein defined) of power in or on the hereditament."

A These words, "as herein defined," I think, are intended to clear up the doubt or obscurity in which the words were left in the Third Schedule. Therefore, I look at the definition to see what those words mean. I no longer feel free to give to them the meaning which counsel for the appellants suggests, and, perhaps, quite properly suggests, is their natural meaning. I respectfully agree that the use of the word "primary" suggests a contrast to that which comes secondly or thirdly, or later; and "main" indicates something which is contrasted with "subsidiary" or "branch." But, as I have said, I no longer feel free, now I have the definition, to form my own opinion about the meaning of those words, because I have the definition which is intended to show what they mean.

B Counsel for the assessment committee said that these words are now merely shorthand, and that, to find their true meaning you must look at what is written out at length in the definition. I agree with that argument; and I think C that the task we have to perform is to see not what the words at their first blush may seem to import, but to see what the definition declares they do mean and convey. I look, therefore, at the definition: and first of all at the definition of "primary transformation of power":

D "Primary transformation of power" means and includes any transformation of electrical power in or on the hereditament by any transforming plant which changes the pressure or frequency or form of current of the power as generated in or on or supplied to the hereditament to another pressure or frequency or form of current for distribution in the hereditament wherever such transformation is effected at some point in the main transmission as hereinafter defined.

That takes me to the consideration of the words "main transmission of power"; because it is only when such transformation "is effected at some point in the main transmission as hereinafter defined" that one is in a position to say there E has been "primary transformation of power."

I come to the critical words which have been so much discussed in argument before us this morning:

F "Main transmission of power" means and includes all transmission of power from the generating plant or point or points of supply in or on the hereditament up to and including the main distribution board or boards to which the cable or cables from the generator or generators, or point or points of supply is or are led . . . and whose bus bars carry, or are intended to carry electrical energy at the pressure at which the power distribution circuits are supplied.

Everything between those two points, which I have more than once called the *terminus a quo* and the *terminus ad quem*, is to be deemed to be part of the hereditament. I left out some words after the words "is or are led" and those words are:

G either directly or with the intervention of a transformer or transformers.

H Counsel for the appellants says (and he said it with an attractiveness which I have already confessed to recognising) that means it may be led "with the intervention of a transformer or transformers, but otherwise it must be led with no other thing or plant intervening; and that you must have the *terminus ad quem* which has been reached without any intervention at all except that of transformer or transformers. Therefore, he says, if you have what I have called Distribution Board No. 1 followed by another called Distribution Board No. 2, the latter is not a distribution board to which the cables are directly led, because a distribution board has already come in front of it on the circuit; and, therefore, the end of the plant, on his contention, which is to be deemed to be part of the hereditament is Distribution Board No. 1. The difficulty of that view seems to me that the end has to be a distribution board not only to which the cable or cables are led, but one whose bus-bars carry or are intended to carry electrical energy at the pressure at which the power distribution circuits are supplied. Distribution Board No. 1 clearly does not satisfy that condition.

It may be, if you assume that every distribution board receives and carries on the energy at the same voltage and in the same form as that at which it receives it, that might be a distribution board which satisfies the last two lines of sub-cl. (iii) of the Schedule to the Order. On that interpretation it might be said that all those distribution boards which I have called Nos. 1, 2, 3 and 4 are distribution boards which might be the *terminus ad quem*. The view which I think it is sufficient for the purposes of this case to express, is that Distribution Board No. 1 does not satisfy that second condition. Until you get to the last distribution board which sends out the power to the motor at the voltage at which it comes in, you do not exclude the machinery which has to go into the valuation of the hereditament for rating purposes.

One thing which seems to me quite clear is that the statement assumes that there is a distribution board which satisfies both conditions. We have had some discussion as to whether or not there is a distribution board at all. That question was considered by ATKINSON, J., in *South Wales Aluminium Co. v. Neath Assessment Area Assessment Committee* (1), to which I shall refer in a moment. I think that the statement assumes that there is and must be a distribution board which satisfies the first condition in para. (iii) as well as the third condition. If the bus-bars of the distribution board do not carry energy at the pressure at which the power distribution circuits are supplied, it cannot be the distribution board which is the end of the main transmission. I feel, therefore, driven to the conclusion that the intervention of a distribution board does not prevent a later distribution board which satisfies both conditions from being the end of the plant which is to be deemed to be part of the hereditament.

As to the parenthesis, namely, the words "either directly or with the intervention of a transformer or transformers," I am inclined to think that the intention was to make it quite plain that the intervention of a transformer would not prevent the cable or cables leading from the point of generation or supply to the main distribution board. It clearly might be said, and said with great force, that a transformer which alters the current from alternating current to direct current, or *vice versa*, or transforms it up several thousand volts or down several thousand volts, is such a break in the chain that the cable could not be said to be led to the main distribution board. To deal with the suggested difficulty, words are put in which I think simply mean this. It does not matter whether there is a transformer or not, but to make it a little plainer perhaps it uses the words "either directly or with the intervention of a transformer or transformers." In that sense I think it is right to say that the distribution board does not afford a break in the transmission of the energy.

In reply to me counsel for the appellants said that, if current or energy comes in to a distribution board at one voltage and goes out at the same voltage but in dribbles, that is a break. It may have been thought that it was not a break of the same dramatic character as that which takes place when the whole form as well as the whole voltage of the current is changed. But I have come to the conclusion, after very fully considering the arguments, that right down to the two distributing boards where this current goes to the motors they are main distributing boards for the purpose of the valuation of the hereditament.

There has been a discussion (and I must say a word about it) about the meaning of the words "power distribution circuits are supplied." For the appellants it was said that counsel for the respondents seeks to put in words there; and the words that he seeks to put in there are "to which the power distribution circuits to the machines are supplied." I do not understand that those are words which, on the argument of counsel for the valuation committee, are necessary to be inserted. It may be that is the effect of the words; but I think the meaning of "power distribution circuits" in this context is quite plain. Their meaning is illustrated by what happens when you get to the end of the series of distribution boards to which I called attention. You get to a point where all the processes of transformation are at an end; where all the changes which may be required to take place are at an end, and where the electrical energy is carried at the pressure—and I am going to use some words here which may not be technically correct—at which it is to be used. I think that is the effect and meaning of the words "at which the power distribution circuits are supplied." I find it impossible to give any other meaning to that last part of cl. (iii). I think it is quite a reasonable meaning.

Counsel for the appellants was inclined to suggest that the words added nothing to what has gone before : but inasmuch as I think they do add something, and add something without in the least twisting the words, but applying them in their natural and ordinary sense, I must give effect to that as their meaning. That is to apply the ordinary canons of construction to these words. I do not feel at all driven—far from it—to the conclusion that those two last lines scarcely add anything—I am not sure that counsel for the appellants put it higher than that—and I certainly think they cannot be said to add nothing to the words which have gone before.

The conclusion which I have tried to express seems to be in conformity with what ATKINSON, J., said in the *South Wales Aluminium Co's* case (1). He was dealing with a case of which the facts have not been fully stated to us, because we have not been given a copy of the special case upon which he came to his decision ; but we have had the advantage of a full report of his judgment.

He says, at p. 589 :

The problem with which the manufacturers had to deal was this. For the above process the only current which is of any use is direct current. Again, as everybody knows, nearly all the big electricity producers today are producing alternating current. The local authority in this district produces only alternating current. The problem was solved in this way. The company brought the current to the premises by the usual cables at a voltage of 66,000, where the voltage was cut down to 6,600 volts by passing it through two transformer systems. It was then conducted to what I may call a "distribution board." The question has to be determined whether it is a "distribution board" within the meaning of the Order . . .

Having held that these generators were transformers, he deals with the definition with which I have been chiefly dealing in what I have said in my judgment. Then ATKINSON, J., says this, at p. 591 :

If this is a main distribution board which complies with this paragraph, the main transmission is a part between that distribution board and the point of supply. One has to see whether that distribution board complies with the description here. The main distribution board has to be the one to which the cable from the point of supply is led, either directly or through the transformer. It complies with the condition "and whose bus-bars carry or are intended to carry electrical energy at the pressure at which the power distribution circuits are supplied." I take that to mean, if it fits on to the machinery which is going to use it at the same voltage—that is, the same pressure—as that at which it reached the distribution board, the board complies with this definition.

That, as I understand the judgment of ATKINSON, J., is precisely the view which I hold of the meaning and effect of the second part of the conditions which are necessary to satisfy subcl. (iii) of the statement. I only desire to add this. I think the view to which I have come has substantial and intelligible reason for it. It seems to me to lead to a perfectly logical and natural division of the plant which by Parliament was ordered to be deemed to be part of the hereditament and, therefore, to be taken into account for valuing for the purposes of rateability, and the plant which was not to be taken into consideration.

I think the construction contended for by counsel for the appellants would not illustrate the principle which I think Parliament intended to be applied in dividing the machinery and plant into rateable machinery and plant and non-rateable machinery and plant. But whether that last consideration is well-founded or not, I have formed a clear view that the decision of the appeals committee was right ; and the question which they have submitted to the court should be answered in that way.

CHARLES, J. : This matter comes before the court by way of special case stated by the county valuation committee for the county of Monmouth and the West Monmouthshire Assessment Committee ; and involves a consideration of the Rating and Valuation Act, 1925, s. 24, and the Third Schedule to that Act ; and also of the Plant and Machinery (Valuation for Rating) Order, 1927. The section to which I have referred runs as follows :

For the purpose of the making or revision of valuation lists under this Part of this Act, the following provisions shall have effect with respect to the valuation of any hereditament other than a hereditament the value of which is ascertained by reference to the accounts, receipts or profits of the undertaking carried on therein : (a) All such plant or machinery in or on the hereditament as belongs to any of the classes specified in the Third Schedule to this Act shall be deemed to be part of the hereditament.

So it falls to look at the Third Schedule, which contains the following provisions :

Machinery and plant . . . which is used or intended to be used, mainly or exclusively in connection with any of the following purposes, that is to say : (a) the generation, storage, primary transformation or main transmission of power in or on the hereditament.

Then one refers back to sect. 24 (3) of the Act. It may have been felt that the Schedule, which referred to wide words like "primary transformation" and "main transmission of power," needed some elucidation. Sect. 24 (3) runs as follows :

For the purpose of enabling all persons concerned to have precise information as to what machinery and plant falls within the classes specified in the said Third Schedule, there shall be constituted a committee consisting of five persons to be appointed by the Minister, and the said committee shall, as soon as may be after the passing of this Act, prepare a statement setting out in detail all the machinery and plant which appears to the committee to fall within any of the classes specified in the said Schedule.

Then the committee had to transmit their statement to the Minister ; and the Minister, if he thought fit, was to make an Order confirming it. As a result, in 1927, the Plant and Machinery (Valuation for Rating) Order, was made by the Minister of Health under the Rating and Valuation Act, 1925, s. 24 (5), confirming with modifications the statement prepared by the committee constituted under sect. 24 (3) of that Act. So the report of the committee is incorporated into the Act. The committee made their report in the form of a statement and it was headed "Classes of machinery and plant deemed to be part of the hereditament." So far from being in any way obscure, it appears to me to be extremely clear.

It first quotes the Third Schedule, saying :

Machinery and plant . . . which is used or intended to be used mainly or exclusively in connection with the generation, storage, primary transformation (as herein defined) or main transmission (as herein defined) of power in or on the hereditament.

What the committee had set out to do was to define in their statement the words "primary transformation" and the words "main transmission of power in or on the hereditament." They proceeded to do so. It is upon that statement and upon the definition of "primary transformation of power" and "main transmission of power" that the bulk of the argument of the appellants, and, indeed, of the respondents, rests.

I now quote from the statement :

"Primary transformation of power" means and includes any transformation of electrical power in or on the hereditament by any transforming plant which changes the pressure or frequency or form of current of the power as generated in or on or supplied to the hereditament to another pressure or frequency or form of current for distribution in the hereditament wherever such transformation is effected at some point in the main transmission as hereinafter defined.

That appears to me to be plain enough. Whatever A or B may think or imagine "primary transformation of power" to mean, they are bound, as we are bound, by that which is now the statutory definition of these words. They seem to me to be perfectly plain, as plain as they can be. But inasmuch as the first part of the statement which I have just read uses the words "main transmission as hereinafter defined," it is necessary to consider what the statement goes on to say about "main transmission of power." The statement says :

"Main transmission of power" means and includes all transmission of power from the generating plant or point or points of supply in or on the hereditament up to and including . . . (iii) Where electrical power is transmitted by means of a cable or cables, the main distribution board or boards to which the cable or cables from the generator or generators or point or points of supply is or are led, either directly or with the intervention of a transformer or transformers, and whose bus bars carry or are intended to carry electrical energy at the pressure at which the power distribution circuits are supplied.

Speaking for myself, having regard to the findings in this special case, it appears to me that those words imply and clearly cover the case which is now before us, and which was before the assessment appeals committee. There were two sources of supply to this great works. One was received from the grid, the Central Electricity Board, and the other from three generating stations within the hereditament. One sees by the special case, to which I feel it necessary to

refer, that the power that was taken into these works was dealt with in the following way : "The bus-bars of these two distributing boards are interconnected by means of the intervention of the transformers"; that is to do with two particular mills, which are not dealt with on any special basis but which were simply singled out in the case. Then there was "a single three-phase 20,000 volt cable forming a ring main laid along the west side of the hereditament and is looped into the following sub-stations," which are indicated. Now comes a description as to what happens to that energy that was imported into the works either by the grid or from their own generating plant. It is necessary in looking at this description, to see whether or not it does not come exactly within the description of "primary transformation of power and main transmission of power" as defined in the statement to which I have referred :

The energy received at these three sub-stations at 20,000 volts is in each case there transformed down to 3,200 volts A.C., and at that voltage is conveyed by mains to various other sub-stations and other buildings within the hereditament except as above mentioned (as indicated by green lines on plan B), where further transformation to lower pressures and in some cases conversions from A.C. to D.C., take place, until, finally, the energy is delivered at the bus-bars of one or more distribution boards in the other buildings at pressures and in the form required for circuits supplying power to process machinery there installed or for lighting or driving motors for pumps, fans or other plant.

Let us stop there for a moment and just see how it fits in with the definition. "Primary transformation of power" is "any transformation by any transforming plant . . . for distribution in the hereditament wherever such transformation is effected at some point in the main transmission." Here there is one cable or more than one cable which bring this power into the works.

We have been provided with a plan which shows that the power from the grid came in at 11,000 volts to distributing boards. Counsel for the appellants says that, once you get there, there is your last distributing board so far as the power derived from the grid is concerned. For the purpose of finding out whether the distributing boards are part of the plant liable to become rateable, everything is then exhausted so far as that board is concerned. Any other distribution boards which come thereafter are not, and cannot be, called main distribution boards, because they are subsidiary to the size of the parent distribution board which stands at the head. The arguments are the same, taking it from another angle, as to the power obtained from the generating station.

But can that be so, when one comes to see what really happens and sees that a portion of the 11,000 volts obtained from the grid—for convenience I will deal with the grid side of it—is supplied directly to certain mills at 11,000 volts. But, beyond that, that is to say in the further history in the life of this current which is all being transmitted, there is transformation and the 11,000 volts are transformed to 440 volts. That is then carried on to a distribution board carrying 440. If counsel for the appellants is right, that distribution board has nothing to do with the rateable property on the hereditament, because, whatever you like to call it, it is not a distribution board within the ambit of the Plant and Machinery (Valuation for Rating) Order, cl. (iii), and the statement which contains the definitions.

It is pressed by the respondents that he must be wrong there, because cl. (iii) anticipates more than one board. It anticipates the intervention of a transformer : but it does a great deal more, for it goes on to say :

And whose bus bars carry or are intended to carry electrical energy at the pressure at which the power distribution circuits are supplied.

When you have your distribution board transforming 11,000 down to 440, that becomes a new source of supply to some particular machine, or may go down to another transformer—indeed, some of it does—which reduces it to 110 and then you get another distribution board which is the 110 volt distribution board. Surely, all those distribution boards are boards which are anticipated as boards which, in a works where very diverse pressures are necessary and are used, are essential in order to carry bus-bars which are intended to carry electrical energy at the proper pressure to the various machines which require electrical energy of that particular pressure. Thus you get bus-bars which are carrying energy at the right pressure. They are there in order to distribute the energy at the proper pressure "at which the power distribution circuits are supplied."

The case goes on :

From the bus-bars of the distribution board in the appellants' sub-station at which the supply from the Central Electricity Board is received at 11,000 volts A.C. two circuits at that voltage are led off to the bus-bars of distribution boards in the Hot Mill and Cold Mill respectively. In the Hot Mill part of the energy so received is fed direct at that voltage to a circuit supply power to four large motors there installed. With that exception, all the energy led off from the bus-bars at those two distribution boards is subjected to various transformations of pressure, with in some cases, conversion of form of current from A.C. to D.C. and is finally delivered at the bus-bars of various distribution boards at the various pressures and in the various forms required for circuits supplying power to the different process machines installed or for lighting or driving motors for pumps, fans, or other plant. In every case the energy ultimately reaches the bus-bars of a distribution board at the voltage and in the condition at which it is finally consumed. In the circuits between the bus-bars of such last mentioned distribution boards and the actual points of consumption, there are in some cases switch-boards.

It is pointed out that these are not brought within the ambit of the rateable property in the hereditament. The distribution board is the board at the voltage which has to be distributed. It is in fact distributing to A, B and C current at the pressure which is required. If any other machine requires a lower pressure, then the transmission is passed on to another transformer, and you get it transformed down again, and then you get into another distribution board until you get as low or as high—it does not matter which—a pressure as the works desire. But in each case you have a distribution board which comes within the ambit of the definition, in my opinion, of "main distribution board."

It is, indeed, not necessary for me to say more because, as I have indicated, a close comparison and a mere comparison between the facts as stated in the case and the statement which governs the consideration of, those facts, makes it, to me at any rate, quite clear that the respondents' contention advanced before the assessment appeals committee was the proper contention and we ought to support it and to say by our answer that it is right.

I am fortified in the opinion I have taken in this case by the judgment of ATKINSON, J., in *South Wales Aluminium Co., Ltd. v. Neath Assessment Area Assessment Committee* (1); and, in conclusion, I would like to refer to one or two passages only in that judgment. After quoting cl. (iii) in the statement, ATKINSON, J., says, on p. 591 :

It is not very easy to follow that, but in substance it means this : that main transmission of power includes all the transmission plant between the point of supply and the main distribution board as therein defined . . . If, in substance, the distribution board distributes that which it receives at the same voltage to the point at which the electricity is going to be used, it seems to me to comply with that paragraph, and I think . . . that this distribution board is a main distribution board within the meaning of that paragraph.

I agree that the answer to the question asked in the special case should be in the affirmative.

HALLETT, J. : I agree. While not wishing to cover the ground which has been already so amply covered, I should like to add a few words of my own. I think the clue to the problem which the appeals committee had to solve, and which we have to solve now, is to be found in the last 23 words of subcl. (iii) of the definition headed "Class 1 (a)" in the Schedule to the Plant and Machinery (Valuation for Rating) Order, 1927.

I cannot find the clue in the Third Schedule to the Act of 1925 itself, because the word "primary" and the word "main" there might, if unexplained, have given rise to considerable doubt and difficulty. I cannot find the clue in the definition of "primary transformation" in the schedule to the Order itself, because, as has already been pointed out, that is defined to mean and include any transformation which is effected at some point in the main transmission. Therefore, I have to look to see where it is that the main transmission ends. Looking at subcl. (iii), it seems to me quite plain that main transmission ends for present purposes when one finds a distribution board :

. . . whose bus-bars carry or are intended to carry electrical energy at the pressure at which the power distribution circuits are supplied.

The expression "power distribution circuits" has led to difficulty. Counsel

for the valuation committee contends that a distinction should be drawn between the power transmission circuits and power distribution circuits. Counsel for the appellants argues (and I think correctly) that, before the court could draw such a distinction it would require to have the necessary finding in the case. But he goes on to contend that, in this case the distribution board marked "Main works 11 K.W. sub-station," is the main distribution board, and the circuits which go away from that distribution board are within the meaning of this definition the power distribution circuits. If that be right (and I think it is essential to his argument), then those 23 words become, as, indeed, at one time I think he was saying, meaningless, or, at any rate, useless; because in every case the bus-bars of a distribution board necessarily carry energy at the pressure at which the outgoing circuits from that distribution board are supplied. The last 23 words are left with no effect at all. Accordingly, I think, if possible, some other meaning must be found for them.

In order to make clear the other points on which I rest my judgment, I am afraid I must refer shortly to the history of the current. The current comes to the Central Electricity Substation at 132,000 volts. It is then transformed outside the appellants' premises down to 11,000 volts; and at 11,000 volts it is delivered to the main works sub-station of the appellants. It leaves the main works sub-station by six circuits. Two of them take it to transformers, where it is transformed up to 20,000 volts; and then it goes on to the Victoria sub-station. About those circuits I am going to say nothing. Two of the circuits take it on at 11,000 volts to the Cold Mill sub-station. About those circuits I am going to say nothing. The remaining two circuits take it on at 11,000 volts to the Hot Mill sub-station. When it gets to the Hot Mill sub-station, having come in by the incoming 1 and 2 circuits, it goes off that distribution board to 16 circuits. Four of those circuits go to four big rollers, which require 11,000 volts for their operation, and, if they were the only outgoing circuits I think it would be conceded by the respondents that the main transmission had ended at the Hot Mill substation distribution board. That is still one step further than counsel for the appellants concedes; but I think the respondents would concede that. But the other 12 circuits all go to various categories of transforming apparatus. By those various categories of transforming apparatus the 11,000 volts are transformed down to 230, 440 or 500. There are three transformers which transform down to 440; there are three, and provision for a fourth, which all transform it down to 230—but I need not go into detail about it. It is sufficient to say that it goes to apparatus which transforms it down to at least three different pressures. After it gets to the 440 distribution board, it is further transformed down to still lower voltages. It is sufficient if I take one instance. It is transformed down to 110 A.C.; and, having been so transformed, it goes to the 110 A.C. distribution board: and that is the lowest board which is claimed by the respondents as falling within the rateable area.

I ask this question: Are the circuits which run from the 110 A.C. distribution board to machines power distribution circuits? Counsel for the valuation committee asserts that they are. Counsel for the appellants, as I understand it, must agree that they are: because, if he says, as he has said in terms to me, that the circuits from the main works sub-station to the Hot Mills sub-station are power distribution circuits (which counsel for the valuation committee denies, saying they are power transmission circuits), he must concede—and, I think, it is conceded—that the circuits from the 110 A.C. distribution board to the machines are power distribution circuits. Then what is the pressure at which those power distribution circuits from the 110 A.C. distribution board are supplied? The answer (which is obvious on the face of the diagram) is 110 volts A.C. My next question is: Is 110 volts A.C. the pressure of the electrical energy carried on the bus-bars at the main works sub-station? I look at the diagram and the answer is No. The pressure of the energy carried on the bus-bars at the main works sub-station is 11,000 volts, not 110. Therefore, the distribution board at the main works sub-station cannot satisfy the definition in subel. (iii), because its bus-bars do not carry, nor are they intended to carry, electrical energy at the pressure at which the power distribution circuits from the 110 A.C. distribution board, are supplied. I could multiply that point by repeating the same language with reference to the 440 A.C. circuits, the 230 A.C. circuits, the 500

A.C. circuits, and so on. The clue then seems to me to be this. If one looks at the concluding words of the paragraph, the bus-bars must "carry electrical energy at the pressure at which the power distribution circuits are supplied." A distribution board does not come within that definition if its bus-bars carry electrical energy only at one of the pressures at which some of the power distribution circuits are supplied. That is not what the words say. The words are: "the pressure at which the power distribution circuits are supplied."

Therefore, I reach the conclusion which the other members of the court have reached by a somewhat different route: that you do not get to the last distribution board within the area of rateability until you find that distribution board whose output is energy at the pressure which goes on to power distribution circuits and thereafter undergoes no further change. For these reasons, I agree with the judgments which have already been delivered.

Appeal dismissed with costs.

Solicitors: *Collins, Woods & Vaughan Jones*, Swansea (for the appellants); *Vernon Lawrence*, Newport, Mon. (for the county valuation committee); *T. P. R. Watkins*, Pontypool (for the assessment committee).

[Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.]

Re W. & R. HOLMES AND COSMOPOLITAN PRESS, LTD.'S CONTRACT.

[CHANCERY DIVISION (Simonds, J.), November 4, 1943.]

Sale of Land—Title—Exercise of power a link in title—Exercise of power unchallenged for 21 years—No assumption of validity.

Trustees—Powers—Duration of powers—Power of sale—Reversionary interests—Sale must be effected within reasonable time after interests fall into possession.

By his will, made in 1872, a testator gave his property to his trustees on trust for his children for their lives and the lives of the survivors of them with reversionary gifts to the grandchildren and children of those grandchildren who should attain 21 years of age. He further directed that it should be lawful for the trustees at any time to sell, convert into money, call in, or dispose of, or retain, as they should think fit, all or any of the property. The testator died in 1875. In 1922 the trustees for the time being of the will, in purported exercise of the power contained in the will, conveyed on sale a part of the property to the present vendors. In a contract of sale of that part of the property between the present vendors and purchasers the conveyance of 1922 formed a necessary link in the chain of title. The purchasers required the vendors to show that the power of sale contained in the will of 1872 was still exercisable in 1922. The vendors contended (i) that a power exercised in 1922 and not challenged from that date to the present must be assumed to have been validly exercised; and (ii) that the power of sale being indefinite in point of time must be assumed to subsist unless determined by the concurrence of all the persons beneficially interested:—

HELD: (i) the will must be read as if it contained a limitation that the power should be exercisable only during the period before the reversionary interests were ascertained and vested or, possibly, within a reasonable time after those reversionary interests had been ascertained.

(ii) the purchasers were entitled to have proof that the power was validly exercisable in 1922.

[EDITORIAL NOTE.] In order to avoid powers being void as infringing the rule against perpetuities they are when possible construed as being exercisable only up to the time when the interests vest in possession of persons *sui juris*. Here the power was exercised in 1922 and it is held that a purchaser is entitled to evidence that the power had not then come to an end under the above rule.

AS TO VENDOR'S OBLIGATION AS TO TITLE, see HALSBURY, Hailsham Edn., Vol. 29, pp. 307-317, paras. 404-414; and FOR CASES, see DIGEST, Vol. 40, pp. 136-148, Nos. 1076-1177.]

Cases referred to:

* (1) *Re Sudeley (Lord) & Baines & Co.*, [1894] 1 Ch. 334; 43 Digest 902, 3447; 63 L.J.Ch. 194; 70 L.T. 549.

* (2) *Re Cotton's Trustees & London School Board* (1882), 19 Ch.D. 624; 43 Digest 902, 3446; 51 L.J.Ch. 514; 46 L.T. 813.

VENDOR AND PURCHASER SUMMONS taken out by the purchasers asking for a declaration that certain requisitions and objections as to title had not been sufficiently answered and that a good title to the property had not been shown. The facts are fully set out in the judgment.

C. L. Favell for the purchasers.

C. Gandy for the vendors.

A SIMONDS, J. : This is a vendor and purchaser summons under the Law of Property Act, 1925, in which the purchaser, Cosmopolitan Press, Ltd., claims against the vendors, W. & R. Holmes, a declaration that certain requisitions and objections in respect of the title to the property No. 95, Yorkshire Street, Rochdale, in the county of Lancaster, which was the subject of a contract made between the parties on Mar. 21, 1943, have not been sufficiently answered and that a good title to that property has not been shown.

B The contract between the parties provided by cl. 5 that the title should commence with a conveyance of May 15, 1824, made between Joshua Wilson and John Elliott of the one part and Thomas Wilkinson of the other part to be followed by the will of the said Thomas Wilkinson and the purchasers were required to assume that at the death of the said Thomas Wilkinson on June 27, 1875, he had an estate in fee simple in the premises agreed to be sold free from incumbrances, and the purchasers were debarred from making any requisition or objection as to the intermediate title whether appearing by recital or otherwise.

C A necessary link in the chain of title was a conveyance which was purported to be made in exercise of a power of sale contained in the will of Thomas Wilkinson. By that will which was dated June 7, 1872, Thomas Wilkinson appointed certain persons to be his executors and trustees; and according to the abstract of the will which was contained in that abstract of title duly delivered by the vendors to the purchasers the testator directed :

D That it should be lawful for the trustees or trustee for the time being from time to time and at any time or times after his decease absolutely to sell convert into money call in or dispose of or retain and continue so long as the said trustees or trustee should think fit all or any of the estates effects and property real and personal thereinbefore devised and bequeathed or which might be purchased or taken under or by virtue of any of the powers therein contained. . . .

E And the powers therein set out are elaborated so as to give the widest possible scope to the trustees.

F The abstract of the will did not set out any of the beneficial interests, but it appeared from a copy of the will which was subsequently delivered to the purchaser that the beneficial interests were in fact in favour of the testator's numerous sons and daughters for their lives, and the lives and life of the survivors or survivor of them with reversionary gifts in favour of the grandchildren and children of those grandchildren who should attain the age of 21 years.

F The testator died on June 27, 1875. Numerous appointments of new trustees were made upon the death of the trustees named in the will and I need refer to no deed or act in the law until I come to a deed of May 8, 1922, being a conveyance of sale of the property, the subject of the contract of Mar. 31, 1943, to the present vendors. By that deed the then trustees of the testator's will purported, in exercise of the power contained in the will, to sell the property to the present

G vendors. The dispute with which I am here concerned arises in this way. Upon that title being shown the purchasers made this requisition :

H The will of Thomas Wilkinson did not contain a trust for sale but only a power which is not expressed to be limited as to the time when it might be exercised. It could only be exercised while the purposes of the settlement made by the will remain unexhausted ; see per CHITTY, J., in *Re Lord Sudeley v. Baines & Co.* (1), at p. 339. The beneficial trusts must, therefore, be abstracted and the deaths of parties stated so as to show that the power was still exerciseable in May, 1922, that is 47 years after the testator's death.

In defence to that the vendors replied :

We enclose herewith copy of the will and probate. We have no information as to the dates of deaths of the children of the testator.

Although there was subsequent correspondence, and some facts were stated in regard to the Wilkinson family, I think it would be fair to say that the vendors did not attempt to satisfy the purchasers requisition upon this point but rested

upon the contention which has been advanced in this court today : that it was not incumbent upon them to show that the conditions of the exercise of the power still subsisted ; and that is the question which I have to determine.

I think it is first essential to consider what is the power and what are the limits of its exercise. Clearly a power of this kind contained in a will, if it is to be regarded as unlimited in point of time, must be bad as infringing the rule against perpetuities ; but such a provision is construed benevolently so as to avoid that infringement, and it must be construed as limited in point of time by the intended purpose of the testator which one can ascertain from the document as a whole and in particular the language of the provision in question.

In this case upon the authority of *Lord Sudeley's* case (1), to which I have been referred, and the further case of *Re Cotton's Trustees v. School Board for London* (2), I must construe this power as being a power exercisable only during the period before the reversionary interests are ascertained and vested, or at most (though I have some doubt as to this) within a reasonable time after those reversionary interests have been so ascertained ; and accordingly the will must be read as if that limitation of time was therein set out. That then is the power, a power exercisable within certain limits and while certain conditions subsist.

The question for my consideration then is this : The power being exercised, is it incumbent upon the vendors to show that when the power was exercised those conditions still subsisted ? Clearly if they did not subsist the power was not validly exercised. The purchasers in effect say : "Here is a power which has been exercised, you must show me that the conditions which were necessary to its valid exercise still subsist," which the vendors decline to do.

It appears to me in this case that the purchasers are right in their objection. It is said (and the case was forcibly argued by counsel for the vendors) that it being now the year 1943 he is entitled to assume in favour of the vendors that a power exercised in 1922, and not challenged from that date to this, must be assumed to be validly exercised. I see the force of that contention ; but on the other hand it appears to me that the purchasers ought not to have imposed upon them the burden of speculating whether the conditions of the valid exercise of the power in 1922 in fact then subsisted or, if they did not subsist, what is the risk of the exercise of the power in 1922 being now challenged. In other words the purchasers are not, in my judgment, to be put to the risk of incurring a possible loss.

It is a salutary rule, of which many examples are to be found in this branch of the law, that the purchaser is not bound to be put to a risk of that kind, particularly as the vendor can, by appropriate provisions in the contract, enormously safeguard himself against any undue trouble to which he might be put by inquiries about facts which took place some time ago. Accordingly, I think that the purchasers are entitled to be satisfied that when in 1922 the trustees purported to exercise their power of sale, that power of sale still subsisted by reason of the continued existence of the conditions which justified it.

A further argument has been directed to the court that such a power of sale is in fact indefinite in point of time and must be assumed to subsist unless it is determined by the concurrence of all the persons beneficially interested. I cannot possibly subscribe to that view for it appears to me that it is inconsistent with the view that such a power (unless it is to be regarded as limited in time) must infringe the rule against perpetuities. I cannot, therefore, give effect to that contention which has been put forward on behalf of the vendors and I must answer the questions which are put to me by declaring that the requisitions and objections of the purchaser have not been sufficiently answered and that a good title to the property has not been made in accordance with the contract. I must order the deposit of £280 to be repaid with interest thereon at the rate of 4 per cent. per annum from Mar. 31, 1943, until payment, and the applicants must have their costs of the summons.

Order accordingly. Applicants to have the costs of the summons and of investigating the title.

Solicitors : *Pollock & Co.* (for the purchasers) ; *Torr & Co.*, agents for *Brierley & Hudson*, Rochdale (for the vendors).

[Reported by R. L. ZIAR, ESQ., Barrister-at-Law.]

Re EUMORFOPOULOS (deceased), RALLI v. EUMORFOPOULOS.[CHANCERY DIVISION (Simonds, J.), **October 29, 1943.**]*Wills—Construction—Bequest of contents of house up to certain value taken at probate valuation—“Probate valuation”—“Contents.”*

A By his will the testator bequeathed to his wife such contents of his specified house as his wife should select up to the value of £10,000 taken at the probate valuation. The effects were valued for the purpose of obtaining probate and the valuation was £9,783. The widow in the exercise of her rights under the will selected the whole of the contents. Subsequently most of the effects were sold by auction for a sum far in excess of £10,000 owing to favourable market conditions arising after the testator's death. The Estate Duty Office made a claim for further duty and eventually agreed that, for the purposes of duty, the value of the articles sold should be the sale price less $33\frac{1}{3}$ per cent. On behalf of the residuary estate it was

B contended that the words “probate valuation” in the will meant the value of the goods according to the rate of duty which was ultimately exacted by the Revenue authorities. A subsidiary question arose as to whether “contents” included (a) articles kept by the testator at his bank except on special occasions when they were taken to his house for exhibition purposes; (b) articles usually kept at the testator's house but which at

C the outbreak of war in 1939 were removed to the country for greater safety; (c) articles falling within the categories (a) and (b) but which at the time of the testator's death were in America for exhibition purposes and one of which was sold in America:—

HELD: (i) on the true construction of the will “probate valuation” meant the valuation which was included in the affidavit leading to probate.

D (ii) the articles in category (a) were not part of the contents of the house. The articles in category (b) were part of the contents. The articles in category (c) formed part of the contents of the house if they were kept there in normal circumstances, otherwise not.

[**EDITORIAL NOTE.** It is common form to agree to take the value of particular articles or interests included in the estate of a testator as the “probate valuation.” It is here shown that there may be ambiguity in these words and that, in such a case,

E the amount included in the affidavit leading to probate is the value to be taken.

AS TO MEANING OF WORDS, see HALSBURY, *Hailsham Edn.*, Vol. 34, pp. 222-226, paras. 278-283; and FOR CASES, see DIGEST, Vol. 44, p.p 735-740, Nos. 5894-5964.]

SUMMONS by the testator's executors to determine certain questions of construction arising under the deceased's will. The facts are fully set out in the judgment.

F *H. H. King* for the executors.
H. Wynn-Parry, K.C., and *Geoffrey Cross* for the widow.
J. Neville Gray, K.C., and *H. O. Danckwerts* for the residuary legatee.

G SIMONDS, J.: The testator, George Eumorfopoulos, died on Dec. 19, 1939, that is to say, a little more than three months after the outbreak of the present war. By his will, which was dated Apr. 12, 1938, the testator, by cl. 3, bequeathed to his wife free of duty, first, all his watches, jewels, trinkets, personal ornaments and wearing apparel and personal papers, and, secondly—and these are the material words of the bequest:

... such of the contents of my house No. 7, Chelsea Embankment in the county of London and the outbuildings belonging thereto (other than such of my books periodicals and other publications as may be selected under cl. 6 (iv) of this my will) as my wife shall select up to the value of £10,000 taken at the probate valuation.

H I need not read the rest of the will. The contest here is between the widow, who claims under that gift, and the residuary estate which is represented by the second defendant.

Before I proceed further I have to state the provisions of the Finance Act, 1930, s. 40. It would not, I think, be extravagant to assume that the testator was aware of the general effect of this provision. Sect. 40 provides:

(1) Where there pass on the death of a person dying after the commencement of this Act any objects to which this section applies, the value of those objects shall not be taken into account for the purpose of estimating the principal value of the estate

passing on the death or the rate at which estate duty is chargeable thereon, and those objects shall, while enjoyed in kind, be exempt from death duties.

(2) In the event of the sale of any objects to which this section applies, death duties shall, subject as hereinafter provided, become chargeable on the proceeds of sale in respect of the last death on which the objects passed and, as respects estate duty, at the rate appropriate to the principal value of the estate passing on that death upon which estate duty is leviable, and with which the objects would have been aggregated if they had not been objects to which this section applies, and the person by whom or for whose benefit the objects were sold shall be accountable for the duties and shall deliver an account for the purposes thereof within one month after the sale.

(3) The objects to which this section applies are such pictures, prints, books, manuscripts, works of art, scientific collections or other things not yielding income as on a claim being made to the Treasury under this section appear to them to be of national, scientific, historic or artistic interest.

Upon the testator's death the usual course was followed. An affidavit was made leading to probate, which included a valuation of the contents of the testator's house. In that valuation were included all the contents, though it may well have been thought that, under the provisions of sect. 40 a claim might ultimately be made for the exemption for which that section provides. The valuation of the contents, so far as it consisted, I think, of works of art, was made by Sotheby & Co., and the facts in regard to that are stated in the paragraphs of the affidavit of Sir Strati Ralli which I will now read. He says:

For the purpose of obtaining a grant of probate of the said will of the testator his executors obtained a valuation by Sotheby & Co., of 34 and 35, New Bond Street, in the county of London, as at the date of the testator's death of (a) the contents of the testator's house, No. 7, Chelsea Embankment aforesaid; (b) certain articles temporarily stored in the country for safety; and (c) other articles deposited for safe custody at the testator's bank. The amounts of such respective valuations were: (a) £6,258, (b) £2,975, and (c) £550, making together £9,783. After probate of the said will had been obtained an application was successfully made that certain articles included in the said valuations at values amounting to £6,228 10s. should be exempt from death duties until sale [under sect. 40]. No such claim was made in respect of the remaining articles included in the said valuations at sums amounting to £3,554 10s.

I interpolate, because I think it comes chronologically in order here, to state that, the whole of the contents having been valued at under £10,000, the widow exercised her right and selected the whole of the contents. At a later date this is what happened:

In the months of May, June and July, 1940, part of the articles comprised in the said valuations with certain other articles which at the date of the testator's death were on exhibition in America and which were brought back to this country and valued by Sotheby & Co. at £581 were sold by auction on the joint instructions of the executors and the testator's widow at prices exceeding the valuations previously made thereof. The articles of national, historic or artistic interest valued as aforesaid at £6,228 10s. with the said articles valued at £581 (making together £6,809 10s.) less articles included in the said valuation at £1,307 10s. but not so sold, realised on sale a total sum of £28,580 5s., being £23,078 5s. in excess of the amount of the valuations thereof. The expenses in connection with such sale amounted to £3,054 9s. 2d. The articles included in the said valuations which were not claimed to be exempt from death duties under the said section and had been valued as above mentioned at £3,554 10s. (less articles included in the said valuations at £1,571 10s. which were taken by legatees in specie) were sold and realised together the sum of £8,103 13s., being £6,120 13s. in excess of the amount of the valuations thereof. The expenses in connection with such sale amounted to £862 2s. 11d.

Information as to these sales having reached the Estate Duty Office, a claim was made for further duty. The result is stated in the following paragraph:

Following the said sales correspondence took place between the solicitors representing the executors and the Estate Duty Office as to the value at which the articles so sold which were not exempt from death duties until sale should be taken for the purposes of the estate duty payable thereon at the testator's death. On behalf of the executors it was represented that there had been a radical change in the market value of works of art between the date of the testator's death and the date of sale, owing to the fact that in December, 1939, there was little public interest in works of art but 6 months later there was a general fear of inflation and a desire to invest in tangible assets such as precious stones and works of art the value of which was thought likely to be relatively unaffected by inflation. This change in market values is explained in a letter dated Apr. 8, 1942, from Sotheby & Co. As a result of such representations the Estate Duty Office agreed by way of compromise that the value for duty purposes of the unexempted articles which had been sold should be the sale price less 33½ per cent.

Upon those facts this question arises. It is claimed on behalf of the widow that she has exercised her right to choose in amount £10,000 worth of the contents of the testator's house, the value being taken at the probate valuation. It is claimed, on the other hand, by counsel representing the residuary estate that "probate valuation" in this will is an expression which means the value which must be ascribed to the property passing on the death according to the rate of duty which is ultimately exacted by the Revenue authorities and that means, in regard to what I have called the unexempted articles, the price that was agreed as a compromise, subject, I think, to some further concession in regard to deduction of expenses, and, in regard to what I have called the exempted articles, a value which must at some time be ascertained by analogy with the value accepted by way of compromise with the Revenue authorities in regard to the unexempted articles, that is to say, I suppose, a value which is again the sale price less $33\frac{1}{3}$ per cent. Between those two contentions I have to make my choice.

I think one thing, at least, is agreed by all counsel, namely, that it is impossible to ascribe to the testator the intention that a different method of valuation should be ascribed to the articles forming the contents of his house according to whether or not a claim for exemption be made under the Finance Act, 1930, s. 40: that is to say, he is using the words "value . . . taken at the probate valuation" as meaning the same thing in regard to articles whether they are exempted or unexempted. I will, therefore, examine the contentions by reference, first of all, to the exempted articles which formed the larger part of the contents. What did the testator mean by the expression "value . . . taken at the probate valuation" in reference to articles as to which I will assume he was well aware there might be an exemption from duty? One thing at least is clear, that no value is ascribed by the Revenue to articles which are exempted from duty, for the reason that duty is exigible not on any principal value ascertained in any arbitrary or conventional way but, under the specific terms of sect. 40 of the Act of 1930, by reference to the proceeds of sale. But, although it is true that there is no valuation of such articles by the Revenue for the purpose of exacting duty, yet there is a valuation for the purpose of probate which includes those articles as well as other articles. I find it impossible to believe that, in regard to those articles, when the testator used the words that I have cited, "value . . . taken at the probate valuation," he meant anything but the valuation which is included in the affidavit leading to probate. He cannot have meant anything else, for there is no valuation which can be called a probate valuation. It is inconceivable that, in giving to the widow a choice of contents up to the value of £10,000 he could have meant contents to the value of £10,000 to be ascertained at a time, 1 year, 5 years, 15 years later, when they are sold and estate duty is in fact exacted. Therefore, in regard to exempted articles I can come to no other conclusion than that the test is, what was the valuation ascribed to such articles in the affidavit which led to probate and which, in familiar language, in my experience, is referred to as the "probate valuation."

If the testator meant that in regard to exempted articles, I find it impossible to believe that he meant anything else in regard to unexempted articles. But in regard to these articles I think I should come to exactly the same conclusion even if I did not have the assistance of the conjunction of unexempted and exempted articles; for there, too, it appears to me that, what the testator was doing was providing a convenient method as between the several recipients of his bounty of deciding how the benefit given to his widow should be measured. He assumes, as I have said before—and was entitled to assume—that a fair and proper valuation would be made, as it was made by the valuers who were called in. It may be there would be a contest upon that valuation or upon some particular items of it for the purpose of duty as between the executors and the Revenue authorities; but, as a fair method of ascertaining the value as between the different beneficiaries under his will it is reasonable to assume that he would take the measure of the probate valuation in the sense of the valuation made by the expert valuers.

A further question arises in this case as to whether certain classes of goods are included in the expression "contents of my house No. 7, Chelsea Embankment." The question is first raised in regard to a set of gold plate, as to which

the facts are thus stated :

. . . kept by the testator at his bank except on special occasions when it was brought to the testator's house and placed with the rest of his collection for exhibition purposes.

There is, therefore, no evidence that this gold plate was ever brought to the house except for exhibition purposes. The statement that I have read is the whole of the evidence in regard to the gold plate. There is nothing to show that it ever was part of the contents of the house ; there is nothing to show that it ever was near the house except for the single purpose of exhibition, which may have been often or seldom. In those circumstances, I should not be justified in saying that such gold plate is part of the contents of the house.

The next question which is raised is with regard to articles which are of a very different character. They are articles

. . . which were usually kept at the testator's house but at the outbreak of war in September, 1939, were removed to the country for greater safety.

There you have articles which were normally part of the contents of the house, but which were temporarily removed with a view to safe custody. With regard to such articles, I think it is clear (and the view is supported by authority) that they must be regarded as part of the contents of the house.

Then the question is raised also in regard to certain articles which, at the testator's death, were in America, whither they had been sent for the purpose of exhibition. Such articles, again, fall into two categories ; some which were sent to America which were articles normally in the testator's house, and one article, a gold dish, which was usually kept at the bank. The articles which were normally part of the equipment of the house form part of the contents although they may have been temporarily sent to America for exhibition. The particular article, the gold dish, which was not normally part of the contents but was kept at the bank, comes within my earlier decision in regard to gold plate which was usually kept at the bank and only brought out for the purpose of exhibition.

Finally, there is a work of art known as the Khmer Head, which was also on exhibition in America at the testator's death and was sold there for £130. It does not appear upon the evidence, but I was told (and I accept the statement) that it was sent to America for exhibition with a view to its return, and that it was only after the death of the testator that it was sold in America. That article also must be regarded as part of the contents of the house, within the meaning of that phrase that I have adopted, and I decide accordingly.

Declarations accordingly. Costs of all parties to be paid out of the estate.

Solicitors : *Freshfields, Leese & Munns* for all parties.

[Reported by R. L. ZIAR, Esq., Barrister-at-Law.]

HOCKIN v. AHLQUIST BROTHERS, LTD.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Macnaghten and Hallett, JJ.), **November 9, 1943.**]

Evidence—Best evidence—Charge that clothing not made in accordance with statutory restrictions—Whether clothing must be produced—Making of Civilian Clothing (Restrictions) Order, 1942 (S.R. & O., 1942, No. 541).

The respondents were charged with breaches of the Making of Civilian Clothing (Restrictions) Order, 1942, in that they manufactured garments with more pockets and buttons than the Order allowed. Evidence was given by the officer of the Board of Trade that he had inspected the particular articles referred to in the charge and had found that they did not comply with the regulations. It was contended for the respondents that the clothing which was alleged to infringe the regulations should have been produced :—

HELD : production of the clothing itself was unnecessary and the charge

was sufficiently proved by the evidence of the officer who had seen the clothing.

[EDITORIAL NOTE. It is said here that it is in all cases necessary to produce the best evidence available to prove any particular fact and that the best evidence that a garment infringes certain regulations is the production of the garment itself. It is shown, however, that there is authority that such production is not necessary and that the evidence of persons who have inspected the garment is sufficient proof.

A AS TO BEST EVIDENCE, see HALSBURY, Hailsham Edn., Vol. 13, pp. 530, 531, para. 595; and FOR CASES, see DIGEST, Vol. 22, pp. 20-22, Nos. 5-31.]

Cases referred to :

(1) *Boosey v. Davidson* (1849), 13 Q.B. 257; 22 Digest 213, 1863; 18 L.J.Q.B. 174; 13 L.T.O.S. 13.

(2) *R. v. Hunt* (1820), 3 B. & Ald. 566; 22 Digest 215, 1877.

* (3) *Lucas v. Williams & Sons*, [1892] 2 Q.B. 113; 22 Digest 129, 1043; 61 L.J.Q.B. 595; 66 L.T. 706.

B * (4) *R. v. Francis* (1874) L.R. 2 C.C.R. 128; 14 Digest 385, 4056; 43 L.J.M.C. 97; 30 L.T. 503.

APPEAL by way of case stated from a decision of the stipendiary magistrate for the city of Manchester sitting as a court of summary jurisdiction. The respondents were charged with not complying with the restrictive provisions of the Making of Civilian Clothing (Restrictions) Order, 1942, in that (i) they made a jacket with more than 3 pockets, (ii) they made a waistcoat with a back strap and more than 5 buttons, and (iii) they made a pair of trousers of a width of more than 19 ins. at the bottom. It was proved that an enforcement officer of the Board of Trade visited the premises of the respondents and there inspected clothing made by them some of which failed to comply with the above order. No notice to produce the clothing complained of was given by the appellant and it was not produced. On behalf of the respondents it was contended that the best available evidence had not been given and the magistrate being of opinion that this contention was right dismissed the informations.

Valentine Holmes for the appellant.

C. N. Glidewell for the respondents.

VISCOUNT CALDECOTE, L.C.J. : I am of opinion that the stipendiary magistrate arrived at a wrong decision in point of law in this case. Counsel for the respondents has strenuously argued that there are two points raised by the special case, but I confine myself to the one point which, in my opinion, is raised by the case. There was a prosecution of the respondents for making articles of civilian clothing contrary to the provisions of a statutory rule and order. Evidence was given by the enforcement officer of the Board of Trade that articles inspected by him failed to comply with the Order, and then the special case proceeds as follows :

It was contended on behalf of the respondents that the best available evidence had not been given in that the said articles of clothing were not produced in court. No other evidence than as above was given.

The stipendiary magistrate then said :

I dismissed the said informations, being of opinion that the contention on behalf of the respondent was right and that the appellant had failed to discharge the onus of proof which was upon him.

The point that seems to be raised by the decision of the magistrate is that on the facts of this case the best evidence was not the evidence tendered, but could only be the production of the clothes themselves. We have had an interesting discussion on the history, or some of the history, of this supposed rule, that the best evidence must always be produced. It is not very easy to see how the rule would work out in practice. Counsel for the appellant in opening the appeal said that whether it is the production of a coat or of a battleship, the best evidence was the production of the article concerned, and I understand his argument to be that the relevance of the rule could not be greater or less according as the weight of the article itself was less or greater.

The supposed rule about the best evidence is comparatively recent in the history of our law as compared with the rule of law as to the proof of documents, which dates from a much earlier time. In *Boosey v. Davidson* (1)

there was a question of infringement of copyright, and evidence was given by a gentleman who said that he had heard the opera which was suggested to be an infringement and what was said there, was that the document which contained the printed music must be produced. That seems to be some way from a rule of law that in every case the object about which the evidence is being given* must be produced. In *R. v. Hunt* (2) it was held that the banner of a riotous mob need not be produced and that evidence could be given of the contents of the words on the banner. That case again has little bearing on the point in this case. A

However HALLETT, J., referred to two cases of more recent date than that, both of which seem to be very much in point. One is *Lucas v. Williams & Sons* (3), where damages were claimed for the infringement of copyright in a picture, and it was held that evidence was admissible given by a party who said he had seen the picture and that it was evidence for the jury that the photograph sold by the defendants was a copy of the original picture. LORD ESHER, M.R., said, at p. 116: B

Different kinds of evidence may be used to prove the same fact, and this is another way of proving the fact that the picture which the defendants sold is a copy of the original picture in respect of which there is copyright. If the jury were not satisfied, it would be open to them to say: "You could have produced better evidence; you have not produced the original picture; we will not act upon this evidence, though it is legal evidence." C

And then he and other members of the Court of Appeal said that it was not necessary for the plaintiff to produce the original picture.

The other case is *R. v. Francis* (4). There it was a question of attempting to pass off a false ring. The person charged tried to obtain an advance from a pawnbroker by pretending that it was a diamond ring, when it was not a diamond ring. LORD COLERIDGE, C.J., said, at p. 132: D

It was objected that the evidence of what took place at Leicester was not properly received, because the cluster ring which he there attempted to pass was not produced in court, and that the evidence of two witnesses who saw it, and swore to its being false, was not admissible. No doubt if there was not admissible evidence that the ring was false, it ought not to have been left to the jury; but though the non-production of the article may afford ground for observation more or less weighty, according to circumstances, it only goes to the weight, not to the admissibility, of the evidence, and no question as to the weight of this evidence is now before us. E

In my judgment it is much too late, even if it was ever possible, to suppose that evidence about the nature of chattels cannot be given by people who have seen them and speak to their condition. To suppose that there ought to be produced in court all the articles about which issues are raised in a great variety of cases would lead to consequences which would show how impossible the rule would be in practice. In my judgment his decision was wrong, and he should have considered the evidence which was tendered, quite apart from the production of the coats themselves, the condition of which might have been, of course, quite different at the material time for the purposes of the charge. I answer the question asked in the special case by saying that the decision of the stipendiary magistrate was wrong. F

MACNAGHTEN, J.: I agree, and have nothing to add. G

HALLETT, J.: I agree with the judgment of my Lord.

Appeal allowed with costs.

Solicitors: *Solicitor to the Board of Trade* (for the appellant); *Saml. Price & Sons*, agents for *Percy H. Barker*, Manchester (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.] H

RICHES v. WESTMINSTER BANK, LTD.

[COURT OF APPEAL (Lord Greene, M.R., Ma K mon and du Pareq, L.JJ.).

November 10, 11, 12, 15, 1943.]*Practice—Interest—Pleading—Whether interest must be claimed in statement of claim—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 3—R.S.C. Ord. 20, r. 6.*

A The appellants were the judicial trustees of a testator. The respondent claimed that by an agreement made between him and the testator, the profits of a certain transaction were to be divided equally between them. The respondent was paid much less than the agreed sum and was fraudulently deprived over a period of years of his proper share. The testator died before the claim could be brought to trial and the appellants resisted it on behalf of the estate. The trial judge gave judgment for the respondent and, in the exercise of his discretion under the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, awarded interest at the rate of 4 per cent. for the appropriate period on the appropriate amount. It was contended that the judge had no power to exercise his discretion on the ground that there was no claim for interest in the statement of claim and, therefore, without an amendment of the pleadings, the judge could not act under that section:—

C HELD: the section does not require a claim for interest to be pleaded, or that the statement of claim must say that the plaintiff, if successful, will ask the judge to exercise his discretion. In the present case, the judge exercised his discretion properly. This rule also applies where the claim is made against the executors of a deceased person.

D [EDITORIAL NOTE. This is a short practice point, the only question being whether a judge has power to award interest under sect. 3 of the 1934 Act when no claim for interest is made in the pleadings. It is held that there is no need to mention this matter in the pleadings.

AS TO INTEREST, see HALSBURY, Halsham Edn., Vol. 23, pp. 177-179, paras. 256-259; and FOR CASES, see DIGEST, Vol. 35, pp. 182-185, Nos. 117-142.]

Case referred to:

*(1) *Bank of Athens v. Royal Exchange Assurance*, [1938] 1 K.B. 771; [1938] 1 All E.R. 514; Digest Supp.; 107 L.J.K.B. 302; 158 L.T. 244.

E APPEAL by the defendants from a judgment of OLIVER, J., dated May 17, 1943. The defendant bank were sued in a representative capacity, having been appointed judicial trustees of the will of the testator in place of the executors appointed by the will. The plaintiff claimed that he was entitled to one-half of the profits realised on a transaction relating to certain shares. OLIVER, J., found in his favour and also allowed a large sum for interest. It is only on the point arising out of the award of interest that the case is here reported, the contention against such an award being that it was not pleaded in the statement of claim that interest would be asked for.

N. L. C. Macaskie, K.C., and Valentine Holmes for the appellants.

Gilbert Beyfus, K.C., and H. V. Lloyd-Jones for the respondent.

LORD GREENE, M.R.: A large sum of interest was awarded by OLIVER, J., under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3. That section provides:

(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment. Provided that nothing in this section . . . (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise.

H OLIVER, J., awarded interest at 4 per cent. for the appropriate period on the appropriate amount, exercising his discretion under that section. It was said, first of all, that he had no power to exercise that discretion, because there was no claim in the statement of claim for interest and that, therefore, without an amendment of the pleading, at any rate, the judge could not act under the section. In my opinion, that argument is ill-founded. There is nothing in the section to indicate that the claim must be pleaded, or that the statement of claim must say that, at the trial the plaintiff, if successful, will ask the judge to exercise

his discretion. There is nothing in the section which suggests the necessity of that, and, for myself, I cannot see how it can be read in. It is to be noticed that, in *Bank of Athens v. Royal Exchange Assurance* (1), a case tried by BRANSON, J., shortly after the Act came into operation, that judge awarded interest under the section in the case of an action which had been commenced before the Act came into force at all where accordingly there was not, and could not be, in the pleading any claim under the section.

The next point that is suggested is that, for some reason or another, the executors ought to be treated in a particularly favourable way. I am afraid I cannot follow that argument. Here is a case in which the profits of a transaction were to be divided equally between two persons. One of them fraudulently deprives the other over a period of years of his proper share. Before the claim which the other makes can be put into shape and brought to trial, the fraudulent party dies and his executors, acting quite properly as executors (I do not criticise them for a moment) resist the claim. Why in the world a plaintiff, in those circumstances, should be in a worse position with regard to recovering interest on money which is his money withheld from him by fraud because the fraudulent party has happened to die and the executors are put in the awkward position in which executors often are put of having to make investigations and having to make up their mind as to what they shall do and whether they shall fight the claim or not—why the successful party should be prejudiced because the fraudulent party has happened to die and his executors are put into that position, I cannot understand. It seems to me that the learned judge, exercising his discretion under the section, quite apart from any right to interest which the plaintiff might otherwise have had, exercised it in a way with which we cannot possibly interfere.

In the result, therefore, in my opinion, the appeal must be dismissed with costs.

MACKINNON, L.J. : I agree.

DU PARCQ, L.J. : I also agree.

On the question of interest, which is a comparatively minor matter, although in this case of some importance, I wish to say only this. I think that the plaintiff on the cause of action pleaded was not entitled to interest as of right and, therefore, that the judge was at liberty, in the exercise of his discretion, to award interest under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3. The discretion which the judge has under that section seems to me to be as unfettered as any discretion can be, and I think it would be a misfortune if we were to seek to import into this section the result of decisions on other sections of other Acts of Parliament, or, indeed, the words of other Acts of Parliament which the legislature has not thought fit to reproduce. There is nothing here about notice; there is nothing, as my Lord has said, to indicate that it is necessary—I say “necessary”—to state in the pleadings that it is intended to ask for interest. If one looks at R.S.C., Ord. 20, r. 6, it is quite clear, as it seems to me, that such relief as this may always be given by the court, although it is not asked for in the pleadings. That rule says—I am quoting only part of it—that relief may always be given as the court or a judge may think just to the same extent as if it had been asked for. At the same time, I think it may be well to say that there is never any objection to stating in the statement of claim that it is intended to ask for interest. I see that the latest edition of BULLEN AND LEAKE suggests that that should be done. I do not agree that it is necessary that it should be done. There can, as I say, be no objection to it and it may sometimes be convenient, where there is a payment into court, that the party paying in should know that a claim for interest, not a claim as of right but still a claim for interest, is to be made against him. I say nothing about the effect of such a claim on payment in or on the question of costs, but it seems to me that it may be advantageous that the point should be raised in the statement of claim. But that it is necessary to plead it I am by no means convinced; in fact, I feel clear that it is not.

Appeal dismissed with costs.

Solicitors : *Kenneth Brown, Baker, Baker* (for the appellants); *Last, Riches & Co.* (for the respondent).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

SELECTION TRUST, LTD. v. DEVITT (INSPECTOR OF TAXES)
AND INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Macnaghten, J.), **October 27, 28, November 1, 1943.**]

Income Tax—Double taxation—Relief—British company held shares in American company which held shares in 5 British companies—Dividends received by American company from British companies and by British company from American company suffering tax—Relief claimed by British company—Income Tax Act, 1918 (c. 40), Sched. D, case I.

Revenue—National defence contribution—Dividends received by British company from American company which held shares in British companies—Income received "indirectly" from a company liable to be assessed to national defence contribution—Finance Act, 1937 (c. 54), Sched. IV, para. 7 (a) (1).

The appellant, a British investment company, held shares in the common stock of an American company which itself held shares in 5 British companies. The American company suffered a deduction of income tax from the dividends paid to it by the British companies and the appellant was assessed to income tax in respect of the dividends it received from the American company. The appellant contended that so much of the dividends paid to it by the American company as were attributable to that part of the profits of the American company which consisted of dividends received by it from the 5 British companies ought to be excluded from assessment to income tax in accordance with the principle laid down in *Gilbertson v. Fergusson* (1). The appellant further contended that a similar proportion of the dividends received by it from the American company should be excluded from the computation of its profits for the purposes of national defence contribution as being income received "indirectly" from a company whose profits were liable to be assessed to national defence contribution:—

HELD: (i) the rule laid down in *Gilbertson's* case (1) had no application here since the American company did not carry on business or make profits in the United Kingdom. The appellant was, therefore, rightly assessed to income tax in respect of the dividends received from that company.

(ii) the dividends received by the appellant from the American company came within the exception in para. 7 (a) (1) of the Finance Act, 1937, Sched. IV, and that proportion of them which represented profits made in the United Kingdom by the 5 British companies should be excluded from assessment to national defence contribution.

[EDITORIAL NOTE. Dividends of a foreign company payable either abroad or in the United Kingdom are charged with tax in the United Kingdom if the shareholder exercises his option to have them paid there, but, if the company carries on business in the United Kingdom, an allowance has been made in respect of the portion of the dividends arising from profits in the United Kingdom. It was contended that the profits made included income from investments, but it is held that the rule applies only to profits from a business.]

As to *Gilbertson v. Fergusson* RELIEF, see HALSBURY, Hailsham Edn., Vol. 17, p. 195, para. 399; and FOR CASES, see DIGEST, Vol. 28, p. 79, No. 431.

As to NATIONAL DEFENCE CONTRIBUTION, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 30, pp. 356-358.]

Cases referred to:

* (1) *Gilbertson v. Fergusson* (1881), 7 Q.B.D. 562; 28 Digest 79, 431; 46 L.T. 10; 1 Tax Cas. 501.

* (2) *Barnes v. Hely-Hutchinson*, [1940] A.C. 81; [1939] 3 All E.R. 803; Digest Supp.; 108 L.J.K.B. 893; 161 L.T. 181.

(3) *Cull v. Inland Revenue Comrs.*, [1940] A.C. 51; [1939] 3 All E.R. 761; Digest Supp.; 108 L.J.K.B. 879; 161 L.T. 173; *sub nom. Inland Revenue Comrs. v. Cull*, 22 Tax Cas. 603.

(4) *Re Canadian Eagle Oil Co., Ltd.*, [1943] 2 All E.R. 702.

APPEAL by the taxpayer by way of case stated from a decision of the Special Commissioners confirming assessments to income tax and national defence contribution.

J. Millard Tucker, K.C., F. Grant, K.C., and J. W. P. Clements for the appellant.
The Attorney-General (Sir Donald B. Somervell, K.C.), J. H. Stamp, and Reginald P. Hills for the respondents.

Tucker, K.C. : In *Re Canadian Eagle Oil Co., Ltd.* (4), the contention that the rule in *Gilbertson v. Fergusson* (1) was confined to trading profits made in this country was rejected. The income of the American company in so far as it was derived from the British companies consisted of profits made in the United Kingdom. That income must be deemed to have been charged to British tax since it had borne tax by deduction—one of the two recognised methods of charging tax.

The Attorney-General : The *ratio decidendi* in *Barnes v. Hely-Hutchinson* (2) covers this case ; even though in that case the appellant held preference shares, the result would have been the same if he had held ordinary stock as here. The American company did not pay tax on behalf of the British company, for a company cannot pay tax on behalf of its shareholders. In *Gilbertson v. Fergusson* (1), the foreign company had been trading in England, but LORD WRIGHT and LORD ATKIN in *Barnes v. Hely-Hutchinson* (2) said it was impracticable to extend the rule to cases where there were intervening companies. [Counsel referred to *Cull v. Inland Revenue Comrs.* (3).]

Tucker, K.C., in reply : The passages in the opinions of LORD WRIGHT and LORD ATKIN in *Barnes v. Hely-Hutchinson* (2) on which the Crown relied were purely *obiter dicta*.

MACNAGHTEN, J. : In the first of these cases, the appellant, Selection Trust, Ltd., appeals against a decision of the Special Commissioners with regard to assessments to income tax made upon it under the Income Tax Act, 1918, Sched. D, case I, for the years ended Apr. 5, 1940, and Apr. 5, 1941.

The appellant is a British company incorporated under the Companies Act, 1929. It carries on in this country the business of dealing in and holding investments. Throughout the relevant years the appellant held shares in the common stock of an American company called the American Metal Co., Ltd., and during those years it received dividends in respect of those shares, namely, during the 15 months ended Mar. 31, 1938, dividends amounting to £157,035 17s. 4d., during the year ended Mar. 31, 1939, dividends amounting to £68,514 17s. 2d., and during the year ended Mar. 31, 1940, dividends amounting to £96,220 7s. 5d.

The American Metal Co. is, for the purposes of income tax, a "foreign company," and the dividends received from it by the appellant are assessable under case V of Sched. D as income received from "possessions out of the United Kingdom." Since, however, the appellant carries on business in the United Kingdom, these dividends are also assessable under case I of Sched. D as part of the profits of the appellant's trade or business, and the Crown has chosen, as it is entitled to do, to assess the dividends under case I instead of under case V.

While the appellant held shares in the American Metal Co., the American Metal Co. held shares in certain British companies incorporated and carrying on business in the United Kingdom, namely, the Roan Antelope Copper Mines, Ltd., Rhodesian Selection Trust, Ltd., Rhodesian Anglo-American, Ltd., San Francisco Mines of Mexico, Ltd., and Anglo-Metal Co., Ltd. Those companies paid dividends to the American Metal Co. out of profits which had been charged to income tax in this country, and, on payment to the American company of dividends on the shares belonging to that company, the British companies, pursuant to r. 20 of the General Rules, deducted income tax at the rate then in force (less the amount, if any, allowed in respect of Dominion Tax Relief). During the relevant years the profits which the American Metal Co. distributed by way of dividend amongst its shareholders were made up, in part, of its own trading profits, in part, of dividends received on shares which it held in other foreign companies, and, in part, of the dividends which it received from the 5 British companies.

In the computation of the profits of the appellant under case I of Sched. D for the years ending Apr. 5, 1940, and Apr. 5, 1941, the full amounts of the dividends received by the appellant from the American Metal Co. were credited as receipts and thus became chargeable to tax at the standard rate. Since, however, British income tax had been deducted from the dividends received by the American company from the British companies the appellant claimed that, in accordance with the principle laid down by the Court of Appeal in *Gilbertson v. Fergusson* (1), in the computation of its profits for the purpose of assessment to income tax under case I of Sched. D, so much of the dividends received by it from the American Metal Co. as is attributable to that part of

the profits of the American company which consisted of dividends received by it from the British companies, ought to be excluded from the computation. The Special Commissioners rejected that claim.

The question at issue on this appeal is, therefore, whether, in the computation of the profits of the appellant for the purpose of assessment under case I of Sched. D, the full amount of the dividends received by the appellant from the American company ought to be credited as a receipt, or whether, as the appellant contends, so much of those dividends as is attributable to the dividends received by the American company from the 5 British companies ought to be excluded from the computation in accordance with the rule or principle laid down in *Gilbertson's case* (1).

It is, therefore, necessary to ascertain precisely what rule or principle was laid down in *Gilbertson's case* (1). In that case, as in this, the question arose with regard to the assessment to income tax in respect of dividends paid by a foreign company: in that case, the Imperial Ottoman Bank to shareholders resident in the United Kingdom. The Imperial Ottoman Bank was a Turkish corporation incorporated by a firman of the Sultan in accordance with the laws of Turkey, and it had a branch or agency in London. The appellants in *Gilbertson's case* (1) were the managers of the London branch of the bank, and for the year ending Apr. 5, 1875, an assessment was made upon them in respect of the profits made by the London agency in the sum of £81,477 14s. 8d., being the average of the profits of the agency during the three preceding years. There was no dispute about that assessment. During that year 1874-5, the appellants had paid to the shareholders of the Imperial Ottoman Bank who were resident in the United Kingdom dividends amounting in all to £98,322 10s., and the Special Commissioners, pursuant to sect. 10 of the Income Tax Act, 1853, made an assessment on those dividends at the rate of tax in force for that year and gave notice of the assessment to the appellants as the persons who had been intrusted with the money to pay the dividends.

It seems that the Special Commissioners were of opinion that, since the dividends were paid out of the profits of the Imperial Ottoman Bank, and those profits had been earned partly in this country and partly abroad, and the profits earned in this country had been assessed to income tax, the assessments on those shareholders who were resident in the United Kingdom should be limited to so much of the dividends as had been earned abroad, or, in other words, that the shareholders resident in the United Kingdom ought not to be required to pay tax on that portion of their dividends which was attributable to the profits earned by the bank in this country. However, having no information as to what proportion of the sum of £98,322 10s. paid by way of dividend to the British shareholders was attributable to profits which had been earned abroad, the Special Commissioners made an assessment upon the whole of that sum, leaving it to the appellants to prove upon appeal what amount should be deducted from the assessment in respect of the profits earned in this country.

It so happened that the profits of the London branch of the Imperial Ottoman Bank for the year ending Apr. 5, 1875, exceeded the amount of the dividends paid by way of dividend to the British shareholders in that year, and the appellants claimed that, in those circumstances, the British profits should be appropriated to the payment of the dividends on the shares held by the British shareholders, with the result that the assessment of those dividends would be nil. The Special Commissioners rejected that contention, and, at the request of the appellants, stated a case for the opinion of the court.

It seems that the Crown assented to the view of the Special Commissioners that the assessment should be reduced in respect of the profits made in this country, since no cross-appeal was entered. The decision of the Special Commissioners was upheld by the Exchequer Division of the High Court and by the Court of Appeal. The order made by the Court of Appeal was that the assessment was based upon the right principle:

... in so far as it assesses so much of the dividends ... as is not shown, by a proper return on the part of the bank, to arise from profits made in the United Kingdom. The decision of the court was based on the ground that an assessment on profits made in the United Kingdom which had already borne British income tax would infringe the rule against double taxation which is implicit in income tax legislation.

Gilbertson's case (1) came up for consideration in the case of *Barnes v. Hely-Hutchinson* (2). In that case, Hely-Hutchinson held preference shares in an Indian company which entitled him to a preferential dividend at a fixed rate. The company remitted the dividends to Hely-Hutchinson direct, and he was accordingly assessed to income tax under case V of Sched. D on the full amount of his dividends as "income arising from possessions out of the United Kingdom." The Indian company held shares in two British companies, and those companies deducted tax under r. 20 of the General Rules from the dividends paid by them to the Indian company. The dividends received by Hely-Hutchinson were paid out of a fund which comprised the taxed dividends received by the Indian company from the two British companies. Hely-Hutchinson appealed against the assessment on the ground that, according to the rule in *Gilbertson's* case (1), the assessment should have been limited to so much of the dividends as was paid out of the profits of the Indian company which had not borne British income tax. This contention was upheld by the Special Commissioners, and, on appeal to the court, by the Revenue Judge and the Court of Appeal.

The case was then carried to the House of Lords, and there Hely-Hutchinson met with a reverse. The House of Lords, consisting of LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN and LORD WRIGHT, were unanimous in holding that the rule in *Gilbertson's* case (1) was not applicable to a fixed preferential dividend, and that Hely-Hutchinson had been correctly assessed upon the full amount of his dividends.

In the opinions of LORD ATKIN and LORD WRIGHT the decision in *Gilbertson's* case (1) was subjected to comment and criticism, and the criticisms are, I think, relevant to the issue that arises in the present case. LORD ATKIN, referring to *Gilbertson's* case (1), said at pp. 89, 90 ([1939] 3 All E.R. at p. 806):

It will be seen that there, as in the present case, the shareholders were liable to pay tax on foreign dividends, though in that case the tax was paid "on behalf of them" by the persons entrusted with money to pay the dividends. As far as the company had been taxed on its profits made in England, it seems to me plain that the reasoning proceeded on the theory then prevailing, that the company paid tax on its profits on behalf of its shareholders, a theory which, as was pointed out in *Cull v. Inland Revenue Comrs.* (3), can no longer be maintained. It seems equally plain that the exception which the courts were able to imply was based upon this very ground, the injustice that would prevail if the tax were payable twice over by the same person in respect of the same thing. Whatever the grounds of the decision, it has stood to the present day, and the Attorney-General did not seek to dispute its validity in facts such as those found in that case. There has been much legislation in income tax matters since the date of its decision, and this House would hesitate long in these circumstances, before infringing a decision of such long standing, and so often acted upon. But does the decision affect the present case? In that case, no doubt, as in this, the shareholder was being charged in respect of dividends in a foreign company. In that case the foreign company had been directly charged with income tax on its English profits. In the present case the foreign company has not been, and could not be, charged with income tax on its dividends derived from the British companies. The fund out of which profits had been declared by the British company, had no doubt been diminished by the incidence of the British tax: and the Indian company had suffered the deduction from their dividends in respect of "tax" which the British companies were entitled to make if they chose, the nature of which I have mentioned in *Cull's* case (3). I think that this distinction makes it difficult to apply the decision in *Gilbertson v. Fergusson* (1) now to the case of ordinary shareholders in the Indian company. Where does the inquiry end in the case of a shareholder in a foreign company? If he can inquire which of the dividends received by that company had suffered British tax, can he go on to inquire what proportion of those dividends were derived from income that had suffered tax and so on *ad infinitum*: and what fraction of a fraction of a fraction has eventually to be calculated and verified?

LORD WRIGHT also criticised *Gilbertson's* case (1). Speaking of that case, he said at pp. 95, 96 ([1939] 3 All E.R. at pp. 810, 811):

The claim in the action was two-fold, first a claim against the company represented by its London agency in respect of the profits of its English trading, and secondly, a claim also against the London agency, in respect of the moneys entrusted to them to distribute as dividends to English shareholders. In the latter claim, the agency were in truth assessed as representing the English shareholders. It was held that the latter assessment should be reduced in respect of so much of the dividends as represented profits arising within the United Kingdom. However, in that case, the dividends were ordinary, and not preference, dividends, so that the amount of the ordinary dividends

might, in fact or in theory, have been reduced by the English taxation. There was the further difference that the Indian company, unlike the Ottoman Bank, was not carrying on business in England and was not directly assessable or assessed in England. Its contribution to British taxation was indirect, in the sense that there had been the deduction made by the two British companies in paying their dividends to the Indian company. Thus it may be said that the Indian company occupied the same position for this purpose as did the English shareholders in the Ottoman Bank case, whereas the respondent is one stage more remote. The Indian company is interposed between the respondent and any question of British taxation on the Indian company's income. Logically, the process of tracing back profits of a foreign company to ascertain if they have, however remotely, indirectly borne British tax, should not stop at a single stage, but I need not point out the practical difficulties of going back beyond the simple stage at which the foreign company has directly borne British tax. It is not, however, necessary here to examine *Gilbertson's* case (1) in principle or in detail. It raises questions perhaps of great importance, but questions not material to this appeal. Your Lordships were told that it has been followed in practice and it has certainly stood for many years. If it is ever after this lapse of time to be reconsidered, that should be done, when occasion arises where the facts are analogous. In the present case the circumstances are so different that a decision can be arrived at without finally exploring *Gilbertson's* case (1).

LORD MACMILLAN simply concurred in the judgment, which may have meant that he merely concurred in the result but did not approve of all the observations of LORD ATKIN and LORD WRIGHT; but LORD RUSSELL OF KILLOWEN after reading the opinion of LORD ATKIN said at p. 91 ([1939] 3 All E.R. at p. 807):

I have been given the opportunity of considering the opinion which I have just read, and also the opinion about to be delivered by my noble and learned friend, LORD WRIGHT. They indicate exactly the views which I entertain on the subject of this appeal.

It seems to me that, in this case it is necessary to examine *Gilbertson's* case (1) in principle and in detail. In that case the Imperial Ottoman Bank made profits by carrying on business in London, and those profits were duly charged to income tax. The order made by the court in that case—and it is clear that the form of the order was considered carefully by the judges in the Court of Appeal since they amended the order of the Exchequer Division so that there should be no ambiguity or doubt as to its meaning or effect—was that so much of the dividends “as arose from profits made in the United Kingdom” were to be exempt from assessment. The words in the order, “profits made in the United Kingdom,” plainly mean “profits made by the Imperial Ottoman Bank in the United Kingdom”—they cannot mean anything else.

The rule laid down in *Gilbertson's* case (1) would no doubt be applicable in any case where a foreign company carries on business in the United Kingdom and thereby makes profits which are charged to income tax; but is there any ground, especially in view of the observations of LORD ATKIN and LORD WRIGHT, for extending the rule to a case where the foreign company does not carry on business or make profits in the United Kingdom? In my opinion, there is none, and any such extension of the rule is unwarranted. The American Metal Co. received dividends from the British companies which were paid out of profits made by them either in the United Kingdom or elsewhere, but no profits were made by the American Metal Co. in the United Kingdom charged to British income tax. The fact that for many years the Commissioners of Inland Revenue did—erroneously, as I think—apply the rule in cases similar to the one now under appeal is immaterial and cannot affect the decision of the court. I, therefore, think that the appeal in the first case must be dismissed with costs.

In the second case, the Selection Trust appeal against a decision of the Special Commissioners with regard to assessments to National Defence contribution, and the question at issue is whether, in the computation of the appellant's profits for the purpose of assessment to National Defence contribution, the dividends received by the appellant from the American Metal Co. should be included, or only so much as represents profits made abroad. That depends upon the Finance Act, 1937, Sched. IV, para. 7, which provides, in the case of a company such as this:

Income received from investments or other property shall be included in the profits in the cases and to the extent provided in this paragraph, and not otherwise: (a) in the case of the business . . . consisting wholly or mainly in the dealing in or holding of investments or other property, the profits shall include all income received from

investments or other property except : (i) income received directly or indirectly by way of dividend or distribution of profits from a body corporate carrying on a trade or business to which the section of this Act charging the national defence contribution applies.

The 5 British companies in which the American Metal Co. hold shares were liable to be assessed to income tax. They each carried on a trade or business to which the section of the Finance Act, 1937, charging the National Defence contribution applied. The appellant received income by way of dividend from the American Metal Co., which is not, of course, liable to be assessed to the National Defence contribution. It received that income directly from the American Metal Co. The question is : did it thereby receive income "indirectly" from the 5 British companies in which the American Metal Co. held shares ? It seems to me that the words "or indirectly" must have been inserted for no other purpose than to meet such a case as this, for I cannot see how otherwise any meaning can be given to the words "or indirectly." It was suggested that the words were inserted to meet a case where the shares are held in the name of a nominee, but, if that was all that was meant by the word "indirectly," there was no reason for inserting the words "directly or indirectly" since the beneficial owner of shares standing in the name of a nominee obviously received the income by way of dividend from the company.

The final result, therefore, is that the appeal on the first case will be dismissed with costs, and, in the second case, it will be allowed with costs, and in the second case the assessments will go back to the Special Commissioners to be adjusted in accordance with my decision.

Declaration accordingly.

Solicitors : *Freshfields, Leese & Munns* (for the appellant) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by GWYNEDD LEWIS, Barrister-at-Law.*]

WILSON (INSPECTOR OF TAXES) *v.* NICHOLSON SONS & DANIELS, LTD.

WILSON (INSPECTOR OF TAXES) *v.* SIR PERCY DANIELS.

[KING'S BENCH DIVISION (Macnaghten, J.), **October 18, 1943.**]

Income Tax—Sched. E—Payment of lump sum in consideration of acceptance of reduced salary.

The respondent company was a private company in which, at the time of its formation in 1934, the respondent was the holder of all the share capital with the exception of one share which was held by his wife. By the articles of association of the company, the respondent was appointed a director for life. Under the terms of an agreement of Mar. 19, 1935, made between the respondent and the respondent company, as varied by an agreement of July 25, 1935, it was provided that the respondent should act as chairman and governor and managing director of the company for life at a salary of £15,000 per annum. By another agreement of Apr. 3, 1937, the former agreements were cancelled and it was provided that the respondent should resign from the offices of chairman and governing and managing director of the company and become an advisory director for life at a salary of £1,000 per annum, and that in consideration of the cancellation of the agreements and by way of compensation for the loss of the offices, the company should pay to the respondent the sum of £75,000. It was contended for the respondent that the £75,000 was compensation for loss of office and, being within the principle laid down in *Hunter v. Dewhurst* (1), was not assessable to income tax :—

HELD : the respondent was assessable to income tax under Sched. E in respect of the sum of £75,000 paid to him by the respondent company.

Tilley v. Wales (3) followed.

EDITORIAL NOTE. The wording of Sched. E seems specially designed to include all emoluments received under a contract of service and it seems quite immaterial that these may be lump sums which in other cases would be regarded as the capitalised equivalent of periodic sums. Indeed in the case of this schedule it seems that the

distinction between capital and income is not applicable.

AS TO PAYMENTS ASSESSABLE UNDER SCHED. E, see HALSBURY, Halsham Edn., Vol. 17, pp. 212-217, paras. 431-438; and FOR CASES, see DIGEST, Vol. 28, pp. 85-88, Nos. 490-507.]

Cases referred to:

(1) *Hunter v. Dewhurst* (1932), 16 Tax Cas. 605; Digest Supp.; 146 L.T. 510.

* (2) *Cameron v. Prendergast*, [1940] A.C. 509; [1940] 2 All E.R. 35; Digest Supp.: 109 L.J.K.B. 486; 162 L.T. 348; 23 Tax Cas. 122.

A * (3) *Tilley v. Wales*, [1943] A.C. 386; [1943] 1 All E.R. 280.

APPEALS by the Inspector of Taxes against the decisions of the Special Commissioners allowing the deduction of a sum paid by the respondent company as a trading expense and allowing the appeal of the respondent from an assessment to income tax under the Income Tax Act, 1918, Sched. E in respect of that sum. The facts are fully stated in the judgment.

B *The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.) and Reginald P. Hills* for the appellant.

J. Millard Tucker, K.C., and J. S. Scrimgeour for the respondents.

MACNAGHTEN, J.: These are appeals by the Inspector of Taxes against decisions of the Special Commissioners, who held that the sum of £75,000 payable by the respondents in the first case, Nicholson Sons & Daniels, Ltd., to Sir Percy Daniels, the respondent in the second case, under an agreement dated Apr. 3, 1937, ought to be allowed as a trading expense in computing the profits of that company under Sched. D, and that Sir Percy Daniels was not assessable to income tax under Sched. E in respect of that sum.

C The two cases came on for hearing before LAWRENCE, J., on Jan. 28, 1942, when a question arose as to the meaning of para. 6 in the first of the two cases, and the case was remitted to the commissioners with regard to that question. D The commissioners who had stated the case were Mr. Gallagher and Mr. England. Unfortunately Mr. Gallagher died, and on May 21, 1943, Mr. England stated a supplemental case alone.

Nicholson Sons & Daniels, Ltd., is a private company, limited by shares. It was registered under the Companies Act, 1929, on Mar. 15, 1935, with the object of acquiring a tannery in Wellingborough. The subscribers to the memorandum of association were Sir Percy Daniels and his wife, Lady Daniels: E they each subscribed the memorandum for one share of £1. This tannery formerly belonged to Sir Percy Daniels and two of his brothers, and they had carried it on in conjunction with other businesses in partnership under the style of Nicholson Sons & Daniels. After a time the partnership was converted into a private company under the Companies Act, 1929. Early in 1935 the three brothers decided to wind up their company and to divide its various F businesses amongst themselves, and it was agreed that Sir Percy Daniels should take over the Wellingborough tannery as from June 30, 1934, and also the name of Nicholson Sons & Daniels. He accordingly formed the respondent company for that purpose. The transaction was carried out in the usual way. The company formed by the partnership went into voluntary liquidation and the liquidator sold the tannery to the respondent company as from June 30, 1934, for shares in that company. The original share capital of the respondent G company was £10 divided into 10 shares of £1 each. Cl. 14 of the articles of association provided that a resolution signed by all the members of the company should have the same force and effect as if it had been passed at a duly convened extraordinary general meeting. All the members of the company at that date were Sir Percy Daniels and Lady Daniels, so, for the purpose of increasing the capital of the company, it was only necessary that they should sign a resolution to that effect, and the capital would be thereby increased. Immediately H after the formation of the company Sir Percy Daniels and Lady Daniels increased its capital from £10 to £71,062 divided into 71,062 shares of £1 each. When that had been done, the liquidator of the old company transferred the tannery to the respondent company, and the respondent company issued to the liquidator 71,060 shares fully paid, and he, in accordance with the arrangement made between the three brothers, transferred the 71,060 shares to Sir Percy Daniels, who then became the holder of the whole of the share capital except the one share held by his wife.

Cl. 18 of the company's articles of association (which adopted with certain

exceptions and modifications the regulations contained in Table A) provided that unless otherwise determined by the company in general meeting the number of directors should be not less than two nor more than seven, that Sir Percy Daniels and Mr. Herbert Spencer Teesdale, an employee of the company, should be the first directors, and that Sir Percy Daniels should (unless disqualified under cl. 24) be entitled to hold office for life. Mr. Herbert Spencer Teesdale, of course, held no shares in the company, because all the shares in the company were held by Sir Percy and Lady Daniels. Mr. H. S. Teesdale received the sum of £100 as a fee for his services as a director and three other employees of the company were appointed directors on the same terms.

On Mar. 19, 1935, four days after the incorporation of the company, an agreement was made between the company and Sir Percy Daniels with regard to his remuneration. It contains two clauses, which read thus :

(1) The company hereby appoints Sir Percy Daniels to be and he agrees to act as chairman and governing and managing director of the company for the term of his life unless he shall himself at any time desire to resign and cease to act in that capacity and he shall not be subject to retirement by rotation. (2) the remuneration of Sir Percy Daniels shall be the sum of £3,000 per annum until otherwise agreed between himself and the company.

On July 25, 1935, it was agreed between Sir Percy and the company that his salary should be increased to £15,000 per annum, and the agreement of Mar. 19, 1935, must, therefore, be read as if "the sum of £15,000" was substituted for "the sum of £3,000," in cl. 2 of that agreement.

On the previous day, July 24, Sir Percy Daniels and Lady Daniels held an extraordinary general meeting and passed a special resolution whereby the existing 71,062 shares of £1 each were converted into "A" shares of £1 each, and the capital of the company was increased to £81,562 by the creation of 10,000 "B" shares of £1 each and 10,000 "C" shares of one shilling each; and it was provided that the "A" shares should be entitled to non-cumulative preferential dividends at the rate of £6 per cent. per annum; and the "B" shares to non-cumulative dividends at the rate of £10 per cent. per annum, and that the balance of the profits should be distributed *pro rata* among the holders of "C" shares. The 10,000 "C" shares of 1s. each, amounting to £500, were issued to Sir Percy and Lady Daniels jointly for cash. They intended to settle those shares on trust for the benefit of Lady Daniels and a daughter of the marriage, but no trust was in fact declared in regard to those shares until a year or more later. Some of the shares transferred by the liquidator to Sir Percy Daniels did not belong to him absolutely. Before the formation of the respondent company, he had, by four deeds, settled some of the shares of the former company for the benefit of his children, and by reason of that fact he was under an obligation, so it is said, to settle 27,600 shares of the respondent company on the same trusts. The facts of the case with regard to these settlements are somewhat obscure, but Sir Percy did subsequently transfer 24,500 "A" shares to himself, Lady Daniels and a Mr. Jones as trustees for the children of the marriage, and thereby the membership of the company was increased from two to three. But the voting rights were not affected, since the name of Sir Percy Daniels stood first on the register, although he would, of course, be bound to exercise his right to vote in respect of the shares held by him on trust in what he considered to be the best interests of the beneficiaries. Sir Percy also transferred 12,500 shares to himself and Lady Daniels as trustees for Lady Daniels and one of their daughters.

I now come to the agreement of Apr. 3, 1937, under which the sum of £75,000 became payable to Sir Percy Daniels. The agreement contains the following three clauses :

(1) The agreement dated Mar. 19, 1935, between the company and Sir Percy Daniels whereby the company appointed Sir Percy Daniels to be chairman and governing and managing director of the company for the term of his life shall be cancelled as from Mar. 31, 1937. (2) Sir Percy Daniels shall as from the said Mar. 31, 1937 resign [not from the directorate to which he had by the articles of association been appointed for life, but] from the offices of chairman and governing and managing director of the company. (3) The company shall pay to Sir Percy Daniels in consideration of the cancellation of the said agreement of Mar. 19, 1935, and by way of compensation for the loss of the said offices and the cessation of the said remuneration the sum of £75,000.

The Special Commissioners have held the company is entitled to treat that sum as a trading expense but that Sir Percy is not assessable to Income tax under Sched. E in respect of it. The facts stated by the commissioners with regard to the making of that agreement are that in March, 1937, the health of Sir Percy became so impaired that he considered it would be impossible for him to give to the affairs of the company the time and attention which he had previously given, and that it became, therefore, a question whether it would be to the advantage of the company that the respondent should continue in office under the terms of his agreement of Mar. 19, 1935, as varied by the agreement of July 25, 1935, and that it was agreed that the respondent should give up his rights under that agreement for a sum of £75,000 and should be appointed an advisory director during his life at a salary of £1,000 per annum. The Special Commissioners express their decision thus:

We, the commissioners who heard the appeal, were of opinion that the payment of £75,000 was a payment of compensation by the company for depriving the respondent of the office which under the terms of the agreement of Mar. 19, 1935, he was entitled to hold for life.

The use of the word "depriving" is, to say the least, inappropriate in a case where a person voluntarily resigns an appointment on receiving substantial compensation for so doing. There is nothing in the facts as stated by the commissioners which justifies the use of that word.

The case was not argued before me on the footing that the company had deprived Sir Percy Daniels of the office of chairman or governing or managing director; indeed it was not possible for the company to deprive Sir Percy Daniels of anything. He was a director of the company for life; he could only be deprived of his office if he became disqualified under cl. 24 of the articles of association. None of the circumstances which would have disqualified Sir Percy Daniels under that clause ever arose.

The case on behalf of Sir Percy was put on the ground that under the agreement of Mar. 19, 1935, he held the offices of chairman, governing director and managing director, and that the salary of £15,000 a year was remuneration for his services, and that the £75,000 was compensation for loss of office and was within the principle laid down in *Hunter v. Dewhurst* (1). That decision is, of course, binding on the court, but it seems to me that some of the deductions which have been drawn from that decision are not, in the light of the decision of the House of Lords in *Cameron v. Prendergast* (2), and *Tilley v. Wales* (3), warranted by it. The recent case of *Tilley v. Wales* (3) as I venture to think, has clarified the position. In that case VISCOUNT SIMON, L.C., after explaining the grounds on which *Hunter v. Dewhurst* (1) was decided, goes on to say at pp. 392, 393 ([1943] 1 All E.R. at pp. 282, 283):

I should myself take the view that a lump sum paid to commute a pension is in the nature of a capital payment which is substituted for a series of recurrent and periodic sums which partake of the nature of income. But can the same view be taken of an arrangement made between an employer and his servant under which, instead of the whole or part of a periodic salary, a single amount is paid and received in respect of the employment? Generally speaking, I think not. An "office or employment of profit"—to use the actual phrase in Sched. E—necessarily involves service over a period of time during which the office is held or the employment continues. The ordinary way of remunerating the holder or the person employed is to make payments to him periodically, but I cannot think that such payments can escape the quality of income which is necessary to attract income tax because an arrangement is made to reduce for the future the annual payments while paying a lump sum down to represent the difference.

The case for Sir Percy Daniels depends, therefore, on whether the £75,000 was compensation for his resignation of the offices of chairman, governing director and managing director.

In view of the commanding position in the company which Sir Percy held, his appointment as chairman and governing director and managing director should, I think, be regarded as a recognition of the fact that he had complete control of the company and as conferring on him honorific titles rather than imposing any duties or obligations upon him. The agreement of Mar. 19, 1935, does not say that Sir Percy Daniels's remuneration is for acting as chairman and governing and managing director, but simply that his remuneration should be £3,000 per annum until otherwise agreed between himself and the company. I think that,

if the Special Commissioners could have had the advantage of reading the opinions of the House of Lords in *Tilley v. Wales* (3), they would not only have refrained from saying that Sir Percy Daniels had been "deprived" by the company of his offices, but would have held, as I hold, that in view of that decision the sum of £75,000 must be regarded as assessable to income tax under Sched. E.

In my opinion the decision of the Special Commissioners was erroneous, and the appeal in Sir Percy Daniels's case must be allowed. It follows that the appeal in the company's case must be dismissed. The order, therefore, will be that the appeal in the company's case will be dismissed with costs and the appeal in Sir Percy Daniels's case will be allowed with costs, and the matter remitted to the Special Commissioners to adjust the assessment.

Order accordingly.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Pakeman Son & Read* (for the respondents).

[Reported by GWYNEDD LEWIS, Barrister-at-Law.]

LARRINAGA STEAMSHIP CO., LTD. v. R.

[COURT OF APPEAL Lord Greene, M.R., MacKinnon and du Parc, L.JJ.),
November 4, 5, 22, 1943.]

Insurance—Marine insurance—War risks—Warlike operations—Ship returning home in ballast after discharging cargo at war base.

Shipping—Charterparty—Master to obey order of charterer "as regards employment"—Ship stranded while returning home in ballast after discharging cargo at war base—Ship ordered to leave port by charterer's representative—Whether stranding due to compliance with a wrong order.

A ship was requisitioned by the Government on Sept. 3, 1939, under the conditions of the charterparty T.99A, whereby the master was to act under the orders of the charterer, who was to be liable for loss arising as a consequence of warlike operations. The ship had carried a cargo of munitions to a war base and on returning from that voyage she was to be released from Government service. She finished discharging her cargo on Oct. 13, and on the same evening the chief officer, who was in command owing to the master's illness, was ordered by the charterer's agent to leave the port as soon as discharge was completed because the berth was wanted for another ship. The charterer's agent refused the chief officer's request that the sailing should be deferred until the following morning owing to bad weather and the ship set sail the same night, but in consequence of the storm she stranded and sustained serious damage. The owners contended that the damage was sustained while the ship was engaged on a warlike operation, or that it was a consequence of a wrong order given by the charterer:

HELD: (i) on the discharge of the cargo the warlike operation came to an end and the subsequent stranding was not a consequence of it.

(ii) the stranding was not due to compliance with a wrong order given by the charterers but to a peril of the sea.

Decision of ATKINSON, J. ([1943] 1 All E.R. 450) reversed.

[EDITORIAL NOTE. So far as the point relating to warlike operation is concerned, the Court of Appeal have affirmed the decision of ATKINSON, J., but they have differed from him upon the construction of the word "employment" used in the charterparty. It was contended that this meant employment of the ship, but the Court of Appeal is clear that it means employment of persons.

AS TO CONDITIONS OF TIME CHARTER, see HALSBURY, Ha'lsam Edn., Vol. 30, p. 299, para. 492: and FOR CASES, see DIGEST, Vol. 41, pp. 356, 357, Nos. 2051-2059.]

Cases referred to:

* (1) *Yorkshire Dale S.S. Co. v. Minister of War Transport (The Coxwold)*, [1942] A.C. 691; [1942] 2 All E.R. 6; Digest Supp.; 111 L.J.K.B. 512; 167 L.T. 349.

* (2) *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service (The Geelong)*, [1923] A.C. 191; 29 Digest 226, 1838; 92 L.J.K.B. 142.

* (3) *Wharton, J. (Shipping), Ltd. v. Mortleman*, [1941] 2 K.B. 283; [1941] 2 All E.R. 261; Digest Supp.; 165 L.T. 342.

- (4) *Limerick S.S. Co. v. Stott*, [1921] 2 K.B. 613; 41 Digest 521, 3496; 90 L.J.K.B. 865; 125 L.T. 516.
 (5) *Manchester Trust, Ltd. v. Furness*, [1895] 2 Q.B. 539; 41 Digest 401, 2479; 73 L.T. 110.
 (6) *Lensen Shipping Co., Ltd. v. Anglo-Soviet Shipping Co., Ltd.* (1935), 40 Com. Cas. 320; Digest Supp.

APPEAL by the Crown from a judgment of ATKINSON, J., dated Feb. 15, 1943, reported [1943] 1 All E.R. 450. The material facts are contained in the judgment of MACKINNON, L.J.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.), and *Patrick Devlin* for the Crown.

F. A. Sellers, K.C., and *Owen L. Bateson* for the respondents.

The Attorney-General: The request to leave port on the evening of Oct. 13 did not amount to a charterer's order within the terms of the charterparty. It amounted to a strong order, but it was not an order with regard to agency or other arrangements within the meaning of the clause. On any view this marine risk cannot be regarded as a consequence or the direct result of the order. Whatever may be the scope of the word "employment," it does not include navigation. The navigation of the ship is not an employment. No shipowner would be willing to enter into a contract under which the master of his ship could be given orders as to navigation. If the clause does not cover a charterer's order, it cannot cover a marine risk which arises out of that order. [Counsel referred to *Wharton Shipping, Ltd. v. Mortleman* (3), *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service (The Geelong)* (2), *Limerick S.S. Co. v. Stott* (4), *Manchester Trust, Ltd. v. Furness* (5), and *Lensen Shipping Co., Ltd. v. Anglo-Soviet Shipping Co., Ltd.* (6).]

Sellers, K.C.: In the present case the loss was a consequence of a warlike operation. As soon as this vessel was requisitioned she was put on warlike operations. While so engaged she was acting as a quasi-warship and that activity had not come to an end before the casualty occurred. It was recognised that, on the release of the vessel from requisition she would have to be reconditioned. While at St. Nazaire the ship received certain orders and left accordingly. This was in effect a warlike operation and the owners are entitled to recover under that head. The only practical view to take of the present case is that warlike operations continued and would have continued until the ship got back to Newport. Compliance with the order that the ship should leave St. Nazaire on Oct. 13 was part of a warlike operation and the damage sustained was a consequence of it. [Counsel referred to *Limerick S.S. Co. v. Stott* (4), *Yorkshire Dale S.S. Co. v. Minister of War Transport (The Corvold)* (1), *Wharton Shipping, Ltd. v. Mortleman* (3), *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service (The Geelong)* (2), and *Lensen Shipping Co., Ltd. v. Anglo-Soviet Shipping Co., Ltd.* (6).]

The Attorney-General in reply: Under the charterparty, in the present case, the charterers were free to employ the vessel either upon a warlike operation or upon an operation which would not be a warlike operation. Going to a war base is not in itself a warlike operation. A merchant ship upon the high seas is *prima facie* not engaged in warlike operations. If, however, it is found to be carrying munitions of war and going to a theatre of war, it is engaged on warlike operations. After a ship has discharged her cargo and is returning, one cannot say that the ship is at that time engaged upon a warlike operation. It is necessary to find something which is in the nature of a warlike operation. [Counsel referred to *Lensen Shipping Co., Ltd. v. Anglo-Soviet Shipping Co., Ltd.* (6) and *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service (The Geelong)* (2).]

MACKINNON, L.J.: LORD GREENE, M.R., has authorised me to say that he has read the judgment I am about to read, and he agrees with it.

The suppliants are the owners of the S.S. *Ramon de Larrinaga*. On Sept. 3, 1939, these owners entered into a contract in writing with the Minister of War Transport. That contract is what is commonly called a time charterparty, that is to say, a contract by which the owners agree during a certain period of time to render services, by their captain and crew, to the charterers in carrying such cargoes as he shall tender to them on voyages specified by him. On Oct. 13, 1939, while the owners were carrying out such agreed services, the steamship

went aground near St. Nazaire in France, and sustained considerable damage. The owners claimed that, by the terms of the charterparty the charterer had agreed to make good to them the loss and expenses occasioned to them by this stranding. That claim being disputed, the owners on Oct. 21, 1940, filed a petition of right to enforce it.

The charterparty provided (in the misleading phraseology habitually used in such documents) that :

... the owners agree to let and the charterer agrees to hire the ship for such period as the charterer may require [for carrying cargoes] between good and safe ports or places as the charterer or his representative shall direct. A

As the vessel might sustain damage while so employed provisions were inserted to provide for that event. By cl. 2 :

The owners shall provide and pay ... for the insurance of the ship except as otherwise provided in cl. 23.

Cl. 23 referred to "attached form T.773, the provisions of which are herewith incorporated." This attached form says :

The risks of war which are taken by the charterer are those risks which would be excluded from an ordinary English policy of insurance by the following, or similar, but not more extensive clause: Warranted free of capture, seizure, arrest, restraint or detainment ... also from the consequence of hostilities or warlike operations ... B

We were told that in fact the owners did not effect any marine insurance policy, as is contemplated by cl. 2. In other words, they preferred to be their own insurers. As the damage in question was sustained by the stranding of the vessel, which *prima facie* is obviously a loss by perils of the sea, the owners, if they are to base their claim on the provisions in Form T.773, must establish that, if they had taken out a marine policy containing this F.C.S. clause, and if they had claimed this loss under it, the underwriters could have successfully pleaded that they were not liable, because the loss was a "consequence of hostilities or warlike operations." C

Though damage by stranding, or by collision, is *prima facie* a loss by perils of the seas there are many cases which show that marine underwriters might plead that it was "a consequence of warlike operations," of which cases the latest is that of *The Coxwold* (1). Such a plea has to be based on the nature of the cargo being carried, and the ports between which it is being conveyed. D

In that aspect the material facts in this case are these. On Sept. 20, 1939, the vessel sailed from Newport, Mon., with a cargo of motor lorries for army transport. She discharged this cargo at Nantes, and then returned in ballast to Newport. On Oct. 5, she sailed from Newport with another cargo of army lorries and some guns, and carried them to St. Nazaire, which was a base for army supplies. This cargo was there discharged by Oct. 13. On the evening of that day the transport officer ordered the captain to leave the port in ballast, and make for Quiberon Bay, there to join a convoy bound for the Bristol Channel. (The Minister had previously intimated to the owners, by letter of Oct. 7, that after arrival at Newport the vessel would be surveyed and then be released from service under the charterparty). The vessel accordingly left St. Nazaire in ballast in charge of a pilot. The weather being bad she anchored, her anchor dragged and its cable broke. She then went aground and was damaged. E

At the time of this disaster the vessel had no cargo on board, and was bound for Newport. If it had happened when she was on her way outwards to St. Nazaire carrying her cargo of warlike stores the marine underwriters could have said that she was engaged on a warlike operation, and, on the authority of *The Coxwold* case (1), that her stranding was a consequence of that warlike operation. Can they say the same when she has delivered her cargo and is proceeding back to Newport in ballast? I think not. If precise authority be sought for that conclusion it is to be found in *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service* (2), in which it was held that the *Geelong* was not engaged in a warlike operation, though the *Bonvilston* was so engaged, and *J. Wharton (Shipping), Ltd. v. Mortleman* (3), is to the same effect, though that concerned a vessel proceeding in ballast to a port before she there started upon a warlike operation, while this is the case of a vessel proceeding in ballast to a port of discharge from the charterparty after she has completed a warlike operation. F

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I am, therefore, of opinion that ATKINSON, J., was right in holding that the suppliants' claim based upon cl. 23 and Form T.773 failed, and that the suppliants' argument against that part of his judgment also fails.

However, the suppliants succeeded before ATKINSON, J., in an alternative claim based upon some words in cl. 9 of the charterparty. It is perhaps desirable to take note of some other parts of the charterparty as bearing upon the effect of the words in cl. 9 that are so relied on.

A By cl. 1, as I have pointed out, the vessel is to be employed between such ports as the charterer or his representative shall direct. By cl. 2, the owner is, in effect, to provide and pay for the insurance of the ship against marine risks. By cl. 3, the charterer is to pay for various expenses, including stevedoring, pilotage, and port charges, and it is added that the owner shall "arrange" and pay for these services and be reimbursed by the charterer. Cl. 6 provides that, subject to cl. 9, cargoes are to be loaded and discharged by the charterer's

B stevedores. The whole of cl. 9 is as follows :

The master shall prosecute his voyages with the utmost despatch, and shall render all possible assistance with ship's officers and crew and boats, cranes, derricks and winches on board, and although appointed by the owners he shall be under the orders and direction of the charterer as regards employment, agency or other arrangements ; and the charterer hereby agrees to indemnify the owners for all consequences or liabilities that may arise from the master or officers signing bills of lading or other documents or complying with such orders, as well as from any irregularity consequent thereon in the ship's papers. The charterer shall not be held responsible for loss or damage sustained by the owners through the negligence of pilots, masters, officers or crews of tug-boats, stevedores or other qualified persons employed by the charterer in the loading, stowage or discharge of the cargo. Nothing in this charterparty shall relieve owners from their responsibility for safe and proper stowage of the cargo.

D Cl. 11 says that the charterer or his representative shall furnish the master from time to time with all requisite instructions and sailing directions in writing.

The argument for the suppliants is that when the captain left St. Nazaire on Oct. 13, he did so under "the orders and direction of the charterer as regards employment," and that :

... the charterer agrees to indemnify the owners from all consequences or liabilities that may arise from the master ... complying with such orders.

E It is because the argument rests upon these words selected, or abstracted, from cl. 9 that I advisedly said that it was based upon "some words in cl. 9." The gist of this argument is that the order to leave St. Nazaire was "as regards the employment of the ship."

The right of the charterer to direct when, how, and whither, the ship shall be navigated by the captain is expressly set out in cl. 1—"to be employed between such ports as the charterer shall direct" ; and by cl. 11 : "The charterer shall furnish the master with sailing directions." Reading together cl. 6 and the whole of cl. 9, it seems to me obvious that the word "employment" in the part of cl. 9 which speaks of "employment, agency, or other arrangements," cannot refer to "the employment of the ship" pursuant to cl. 1 and cl. 11. Manifestly it refers to the "employment" of stevedores, agents, pilots, tug-owners or other persons, with whom by direction of the charterer the master is to make contracts or "arrangements." That is the more apparent from the second paragraph in cl. 9, which says that the charterer shall not be responsible for loss or damage sustained by the owners through the negligence of various persons "employed" by the charterer ; and the persons in question are those for whose services the owner is to "arrange" pursuant to cl. 3. In short, "employment" in cl. 9 means "employment of persons," not "employment of the ship."

H Reading the charterparty as a whole, I think it is manifest that if "employment" in cl. 9 be read as meaning "employment of the ship," pursuant to sailing directions given by the charterer, a great many of the elaborate provisions of the contract will be made futile and ridiculous. Every movement of the vessel, during the chartered period, is the result of such directions. Every damage of any kind sustained by her during such movements can be argued to be a "consequence" of "complying with such orders." The owners, on this reasoning, could claim to be indemnified from every such loss or damage ; and, if they have insured, as is contemplated by cl. 2 and recovered from their underwriters, those underwriters could by subrogation recover over from the charterer under these words in cl. 9.

I should add that much reliance was placed by counsel for the respondents upon evidence that, when the captain was told to leave the port on the night of Oct. 13 he objected, on the ground that the weather was threatening and his crew tired, and asked to be allowed to wait till next morning, but was overruled by the charterer's representative. This seems to have weighed with the learned judge who, in the course of his judgment, says that the ship :

... was proceeding on the night of Oct. 13 out of the estuary and beyond solely in compliance with the orders of the agent of the charterers and against the better judgment of the acting master, a judgment which had been clearly expressed to the charterer's agent and as I believe overruled. A

This incident seems to me to be entirely irrelevant. It is more matter of prejudice. It may go to suggest that this is a hard case on the owners, or would have been on their underwriters, if they had chosen to insure, but a hard case may well result in very bad law in the interpretation of this contract. I say the incident is irrelevant, for, if the master had obeyed without making any protest, the grounding of the vessel could be argued to be a consequence of his obeying orders as to the "employment of the vessel"; and, if his request had been granted, he had sailed next morning, and then gone aground, the damage then resulting could equally be contended to be a consequence of his complying with orders as to the "employment of the vessel." B

In the result, I think the appeal succeeds and must be allowed with costs here and below. C

DU PARCQ, L.J. : I concur with the judgment which has just been delivered, and have nothing to add to it.

Appeal allowed with costs.

Solicitors : *Treasury Solicitor* (for the Crown); *Lightbouns, Jones & Co.* (for the respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*] D

Re D. S. SMITH.

[COURT OF APPEAL (Scott, L.J., and Simonds, J.). **November 8, 22, 1943.**] E

Emergency Legislation — Liabilities adjustment order — Validity of order disputed — Proper course to appeal against order and not to ask for variation — Liabilities (War-time Adjustment) Act, 1941, (c. 24), s. 10 (2).

The appellants building society were the mortgagees of a house, the property of a debtor whose affairs were the subject of an adjustment order. The material terms of the order were shortly that the mortgagees should not be allowed to realise their security and should be restricted as to interest to the amount of the rent received in respect of the property less outgoings. The order was made on Mar. 5, 1943. From that order no appeal was brought, but the building society being dissatisfied with it on June 29, 1943, asked the county court judge to vary it. The county court judge refused to vary the order and from that refusal the present appeal was brought. The preliminary point was taken that, since it was said that the order was wrong, the appellants' proper remedy was to appeal against the order and not to ask for its variation. F

Held : when the validity of the order is challenged the proper remedy is by way of appeal against the order. G

[EDITORIAL NOTE.] This case raises a point of great importance to building societies, but is decided upon a preliminary objection. It appears to be the practice when making adjustment orders to give liberty to apply for a variation of the order. Such an application must assume the validity of the order and be restricted to some incidental variation. If the validity of the order is attacked, the proper course is to appeal against the order. The Court of Appeal have left open the question whether there is jurisdiction to include a power to vary the order, merely stating that there is no provision for it in the Act. H

FOR THE LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1941, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 34, p. 23.]

APPEAL from the decision of His Honour Judge ROWLANDS, at the Lowestoft County Court. The facts are fully stated in the judgment.

M. P. Solomon for the appellants.

Valentine Holmes for the respondent (the adjustment officer).

SIMONDS, J. [delivering the judgment of the court]: On Mar. 5, 1943, an adjustment order under the Liabilities (War-time Adjustment) Act, 1941, was made by the county court at Lowestoft, in respect of David Strangward Smith, a debtor. It was an order which (*inter alia*) determined the rights of the debtor's secured creditors, including the Ipswich and Suffolk Permanent Benefit Building Society who claimed to be mortgagees of certain property of the debtor known as 3, Wash Lane, Kessingland, in the county of Suffolk. On June 29, 1943, an application was made by the society to the same county court for the variation and amendment of the adjustment order by providing for payment to them of certain mortgage interest out of the rents and profits of the property of which they were mortgagees. From the refusal of the county court judge to vary or amend the adjustment order the society appeals to this court, alleging in the first place that the adjustment order was in part at least invalid in that the county court judge was not competent under the Act to make or omit such provisions in regard to mortgagees as the order contained or omitted, and, in the second place, that the county court judge, even if he had the power to make the order, had not properly exercised his discretion in making it.

We do not think it necessary to express any opinion upon these questions, for counsel for the liabilities adjustment officer, whose duty it was to assist the court, has taken the preliminary point that the society's application, made on June 29, 1943, was out of order and should not have been entertained by the county court judge and that an appeal from his order should not be entertained by this court.

In our judgment the preliminary point succeeds. Sect. 10 (2) of the Act, provides that :

Any liabilities adjustment order or protection order may, on the application of the debtor or of any creditor whose debt has been proved or of the liabilities adjustment officer, be varied by a subsequent order . . .

The society was not a creditor whose debt had been proved and accordingly was not a person competent to apply under the subsection. Nor, indeed, if the society was a competent applicant, was the application to vary one that fell within the scope of the subsection : for in our judgment it is clear that the subsection aimed at giving the court power to vary or amend its original order where circumstances have changed or perhaps unknown circumstances have come to light. It cannot be interpreted so as to give a person who challenges the validity of an order a right of appeal from it by way of an application to vary after the time for appeal to the Court of Appeal has expired and then an appeal to the Court of Appeal from the refusal to vary. Faced by this difficulty counsel for the society has urged that the application to vary was not made under sect. 10 (2) of the Act, but under the provisions of the order itself which by cl. 10 provides that :

. . . the adjustment officer or any party hereto may apply to the court for such directions or for such variation of this order as may become necessary as he, she or they may be advised.

The society was a " party " to the proceedings in which the order was made, and we will assume without deciding that it was competent to the county court judge to reserve to them a right to apply for variation of the adjustment order, which sect. 10 (2) of the Act does not give to them. But he could not, nor does the order, when fairly interpreted, give them a right to challenge the validity of the order at any time thereafter. That is a challenge which can only effectively be made by way of appeal to the Court of Appeal from the order and can only be made within the time prescribed by the relevant rules of court or such further times as the court allows.

The preliminary objection, therefore, succeeds and the appeal must be dismissed.

Preliminary objection allowed and appeal dismissed. No order as to costs.

Solicitors : E. F. Iwi, agent for Birkett, Ridley & Cox, Ipswich (for the appellants) ; Treasury Solicitor (for the adjustment officer).

[Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.]

742 [DEC. 11, 1943] ALL ENGLAND LAW REPORTS ANNOTATED [Vol. 2
WESTERN SCOTTISH MOTOR TRACTION CO., LTD. v. FERNIE
OR ALLAM AND OTHERS.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright), **October 19, 1943.**]

Negligence—Public vehicle—Duty to standing passengers who are not holding on to part of vehicle—Omnibus driven round curve at excessive speed.

A
A passenger received fatal injuries whilst travelling on a bus operated by the appellant company. The deceased, who was standing in the bus because there were no vacant seats, was thrown through the door of the bus, which had not been closed, because the driver took a sharp curve at too great a speed. The deceased was not holding on to any part of the vehicle at the time, and no bar or strap for this purpose was provided. The appellants contended that, with regard to their duty of care towards passengers, the driver of the bus was only under an obligation to drive in a manner which was safe for seated passengers, and standing passengers who were holding on to some part of the vehicle; and they alleged contributory negligence on the part of the deceased:—

B
HELD: on the facts of this case the driver was negligent and there was no contributory negligence on the part of the deceased.

C
[EDITORIAL NOTE. It was argued in this case that the driver was entitled to ignore the position of passengers who were standing in the omnibus and were not holding on to some part of the vehicle in order to avoid being thrown down or even out of the bus as happened in this case. The House has, however, decided that the duty to take care imposed on the driver extends to all passengers, whether or not they are holding on to some part of the omnibus.]

AS TO DEGREE OF CARE TO BE EXERCISED BY CARRIERS OF PASSENGERS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 60-62, paras. 89-94; and FOR CASES, see DIGEST, Vol. 8, pp. 71-75, Nos. 479-526, pp. 78-80, Nos. 533-553.]

D
APPEAL by the defendants to an action for negligence. The facts are sufficiently stated in the opinion of VISCOUNT SIMON, L.C.

G. R. Thomson, K.C., and R. H. Sherwood Calver for the appellants.

J. L. Clyde, K.C., and George S. Reid for the respondents.

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VISCOUNT SIMON, L.C.: My Lords, both the Lord Ordinary (LORD RUSSELL) and the judges of the First Division have reached the conclusion that the appellants, who operate a service of motor buses in Ayrshire, are liable, on the ground of negligence of their driver, for the fatal injuries caused to the deceased, when a passenger in one of the appellants' motor buses, by his being precipitated into the road out of the open door of the vehicle when it was being driven round a sharp curve, and that the respondents are not debarred from recovering damages on the ground that the deceased contributed to the accident by his own negligence. These conclusions, reached by both courts in Scotland, are conclusions of fact.

There is no doubt that this House is competent to reverse findings of fact in the courts below, but in the present case there was adequate evidence to support the findings that the omnibus was being driven at an improperly rapid speed round the curve and that the defendant was not guilty of contributory negligence; and there was no error in law.

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The case must be decided on its particular facts, as to which the courts below have pronounced, and I have no intention of laying down any more general proposition. On one point, however, it is necessary to be definite. Counsel for the appellants argued that the driver of the bus was entitled to sway round the corner at what speed he liked as long as the speed was safe for passengers who were seated inside the bus and for passengers who were standing but were at the same time holding on to some portion of the vehicle to steady themselves. This seems to amount to saying that the driver is at liberty to disregard the risk of standing passengers being thrown off their feet if they are not at the moment "holding on." I must not be taken as accepting such a proposition as correct. In point of fact this type of vehicle does not appear to be provided with rails or straps for the purpose of enabling all standing passengers to steady themselves against a sudden sway—no doubt because in time of peace passengers are not allowed to remain standing. Now, under war conditions, the appellants are both permitted and urged to carry a full load of additional passengers who have to stand when the seats are already occupied. There may well be cases—

the case of a person, for example, with a baby in his arms - in which a standing passenger has no free hand with which to anchor against the consequences of a sudden and pronounced swerve, and I agree with the view that the duty of reasonable care owed by the driver to those on board extends to all passengers, whether they are "holding on" or not.

A I wish to repeat that we are deciding nothing in this case except that, on the facts of this shocking accident, the conclusion of negligence against the appellants should not be disturbed, and further that there is no adequate ground on which we should reverse the conclusion that the deceased was not proved to have been guilty of contributory negligence.

I move that this appeal be dismissed with costs.

LORD THANKERTON : My Lords, I concur in the reasons given by VISCOUNT SIMON, L.C., for the conclusions at which he has arrived, and also in the conclusions, and find it unnecessary to add anything.

B LORD RUSSELL OF KILLOWEN : My Lords, I also concur.

LORD MACMILLAN : My Lords, I concur.

LORD WRIGHT : My Lords, I agree.

Appeal dismissed with costs.

Solicitors : *Caporn & Campbell*, agents for *Ross & Ross*, Edinburgh (for the appellants) ; *H. H. Wells & Sons*, agents for *Balfour & Manson*, Edinburgh, and *Waddell & MacIntosh*, Troon (for the respondents).

C [Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Re AN ARBITRATION BETWEEN PARKER AND OTHERS AND GREAT WESTERN RAILWAY CO.

[KING'S BENCH DIVISION. (Tucker, J.), **October 18, 1943.**]

D *Railways—Amalgamation—Compensation of employees—Practice of former railways to retain employees after 60—Dismissal at 60 by amalgamated company—Railways Act, 1921 (c. 55), Sched. III.*

E The respondents were members of the clerical staff of the Cardiff Railway Co., at the time when under the Railways Act, 1921, that company was amalgamated with the Great Western Railway Co., and were transferred into the service of the latter company. The Cardiff company had a practice of not retiring its clerical staff when they reached the age of 60 years but of retaining them so long as they were able to perform their duties. The practice of the Great Western company was to dismiss such staff at the age of 60 years and the respondents were dismissed in accordance with this practice in 1941. They claimed compensation under the provisions of the Railways Act, 1921, Sched. III, para. 3 (1) (f) as having suffered direct pecuniary loss by reason of the amalgamation :—

F **HELD** : any loss due to dismissal in such circumstances 20 years after the amalgamation could not be said to be a direct loss by reason of the amalgamation.

G **[EDITORIAL NOTE.]** The contention in this case is that the conditions of service were altered upon the amalgamation and that the fact that this particular change in the conditions of service does not operate to produce a loss or give rise to a claim for compensation until 20 years later does not make it any the less a result of the amalgamation. The argument is rejected because there was nothing to prevent the old company at any time discontinuing the practice here spoken of. It is not as though the matter of which complaint is made had arisen under the contractual terms of the men's employment. It is a mere voluntary practice of the company.

AS TO COMPENSATION FOR LOSS ON AMALGAMATION, see HALSBURY, Halsbury's Laws of England, Vol. 27, pp. 117, 118, para. 267 ; and FOR CASES, see DIGEST, Vol. 38, p. 339, Nos. 500-503.]

H **MOTION** to set aside the award, dated May 4, 1943, of the standing arbitrator under the Railways Act, 1921, Sched. III. The facts are fully set out in the judgment.

H. J. Wallington, K.C., and *N. R. Fox-Andrews* for the applicants, the Great Western Railway Co.

H. M. Pratt for the respondents.

Wallington, K.C. : The facts found do not bring the cases within the schedule to the Act at all. The dismissals were not a consequence of the reorganisation of the company on amalgamation. The same sum could not be recoverable

alternatively under paras. 3 and 4 and under para. 5 of the schedule. The arbitrator could not, therefore, have assessed the company on the right principles. The award under paras. 3 and 4 was based on an alleged customary practice in the amalgamated company at the date of the transfer, that is at the date when it came into existence, but it is impossible that at that time the company could already have established a customary practice. The customary practice relied on was the condition of service which involved dismissal: but it is impossible to interpret the words in para. 3 as to customary practice as applicable to tenure of office since that would be to apply a customary practice in complete derogation of a legal term, for tenure of office is governed by a contract binding in law without any qualification. If, as alleged, the dismissal was in pursuance of the customary practice of the amalgamated company, then the dismissal and the pecuniary loss suffered thereby could not have been the result of the amalgamation.

Pratt: The arbitrator has found as a fact that the conditions of service were worsened as a result of the transfer and that the claimants came within the provisions of para. 3 and were, therefore, entitled to compensation. In order to succeed in setting the award aside it is necessary for the applicants to show that no award could be made on either of the two alternative branches. Even if the applicant succeeded in showing that the claim could not be made under paras. 3 and 4, the claimants would be entitled to succeed under para. 5, since the arbitrator has found as a fact that as a consequence of their dismissal the claimants have suffered direct pecuniary loss by reason of the amalgamation. There is no difficulty arising out of the fact that the amounts awarded are the same under paras. 3 and 4 as they are under para. 5.

Wallington, K.C., in reply.

TUCKER, J.: The respondents in the arbitration were four former servants of the appellant railway company who had prior to the amalgamation of the Cardiff Railway with the appellant company been in the employ of the Cardiff Railway Co. and had by virtue of the provisions of the Railways Act, 1921, and the consequent amalgamation of the two companies become servants of the appellant company until dismissed by that company on attaining the age of 60. In 1941 they claimed compensation from the appellants under cl. 3 and 4, and alternatively under cl. 5 of the Third Schedule to the Act of 1921, and their claims were by consent heard together and dealt with in one award.

Before reading the award it will be convenient to refer to the provisions of the Third Schedule of the Act of 1921, which by sect. 3 (1) (f) of the Act is incorporated in every amalgamation scheme under the Act. The Schedule reads as follows:

The following provisions shall apply in respect to persons who at the date of the passing of this Act are, and for a period of not less than five years have been, officers or servants of any constituent company or subsidiary company, and who shall not, prior to the amalgamation or absorption of such constituent or subsidiary company, have become pensioners or annuitants in accordance with the rules of any railway pension or superannuation fund of which they may be members, or have voluntarily retired, or have been removed from the service of any such constituent or subsidiary company by reason of misconduct or incapacity (all of which officers and servants are in this Schedule hereinafter referred to as "existing officers and servants"): (1) Every existing officer and servant shall, as from the date of amalgamation or absorption, become an officer or servant of the amalgamated company: (2) The amalgamated company may abolish the office or situation of any existing officer or servant which they deem unnecessary, and any existing officer or servant required to perform duties such as are not analogous or which are an unreasonable addition to those which as an officer or servant of the company from whom he was transferred he was required to perform may relinquish his office or situation: (3) No existing officer or servant so transferred shall, without his consent, be by reason of such transfer in any worse position in respect to the conditions of his service as a whole (including tenure of office, remuneration, gratuities, pension, superannuation, sick fund or any benefits or allowances whether obtaining legally or by customary practice of the constituent or subsidiary company) as compared with the conditions of service formerly obtaining with respect to him: (4) If any question arises as to whether the provisions of the last foregoing paragraph have been complied with, the question shall be referred to a standing arbitrator or board of arbitration appointed by the Lord Chancellor, and, if the arbitrator or board consider that those provisions have not been complied with, and that the officer or servant has thereby suffered loss or injury, they shall award him such sum to be paid by the amalgamated company as they think sufficient to compensate him for such loss or injury: (5) Every

existing officer or servant whose office or situation is so abolished or who so relinquishes his office or service or whose services are dispensed with on the ground that they are not required or for any reason not being on account of any misconduct or incapacity, or whose salary, wages, or remuneration are reduced on the ground that his duties have been diminished, or who otherwise suffers any direct pecuniary loss by reason of the amalgamation or absorption (including any loss of prospective superannuation or other retiring or death allowances and allowances payable to his widow or orphan children, whether obtaining legally or by customary practice of the constituent or subsidiary company), shall be entitled to be paid compensation for such pecuniary loss, to be determined and paid by the amalgamated company, subject to appeal to such standing arbitrator or board of arbitration as aforesaid, in accordance with the provisions contained in the Local Government Act, 1888, s. 120, relating to compensation to existing officers, and those provisions shall apply accordingly as if they were herein re-enacted with the necessary modifications.

I turn now to the award, which, omitting the formal parts is as follows :

(1) The above named claimants (hereinafter referred to as the claimants) were previous to the amalgamation next hereinafter referred to in the service of the Cardiff Railway Co. (2) Under and by virtue of the 1921 Act an amalgamation (hereinafter referred to as the amalgamation) was duly effected of the Cardiff Railway Co., the Great Western Railway Co., and certain other railway companies and for the purpose of such amalgamation the respondents (hereinafter referred to as the respondent company) were constituted the amalgamated company. (3) In the year 1941 each of the claimants made a claim against the respondent company under the provisions of the Third Schedule to the 1921 Act for compensation for loss or injury alleged to have been suffered by him. Each of such claims was disputed and disallowed by the respondent company and was accordingly referred for determination to me as such standing arbitrator as aforesaid. (4) In accordance with the directions given by me in each of the cases, points of claim and points of defence were formulated and exchanged on behalf of the claimant and the respondent company respectively. (5) The claim of William Marsham Parker first came before me for hearing and at an early stage in the proceedings in that case it was agreed between each of the claimants and the respondent company that, with a view to economy and expedition, all four claims should be heard together and should be dealt with by me together in one award. The proceedings were carried on before me on this footing. (6) In the course of such proceedings oral and documentary evidence was adduced on both sides and for the purposes of this my award I have duly examined and considered such evidence and the contentions and arguments of the solicitor appearing for the claimants and counsel appearing for the respondent company and have had regard to all the circumstances in question. (7) Upon the evidence adduced before me or admissions in the pleadings I make the following findings of fact, namely : (a) At the date of the amalgamation each of the claimants was and for many years previously thereto had been employed by the Cardiff Railway Co., as a member of its clerical and office staff. Each of them was at the date of the amalgamation one of the "existing officers and servants" of that company within the meaning of that expression in the Third Schedule to the 1921 Act and accordingly was transferred to and became an officer or servant of the respondent company. (b) Each of the claimants continued in the service of the respondent company as a member of its clerical and office staff until his dismissal as next mentioned. In the case of each of the claimants the respondent company gave him approximately six month's notice to terminate his service on the date of his attaining sixty years of age. Each of the claimants Davey and Thomas was actually dismissed on such date but in the case of each of the claimants Parker and Matthews the operation of the notice and his actual dismissal was, as a matter of grace and to avoid special hardship, postponed for a period thereafter. (c) At the time of and previously to the amalgamation, in the case of members of the clerical and office staff of the Cardiff Railway Co. who were of good conduct it was the customary practice that the company apart from very exceptional circumstances (which did not in fact exist in the case of any of the claimants at the time of his dismissal) to retain their services so long as they were capable of properly performing their duties. Such practice formed part of the conditions of each of the claimants' service with the Cardiff Railway Co. (d) At all material times it was the customary practice of the respondent company in the case of every member of its clerical and office staff of any of the claimants' grades (notwithstanding that he was of good conduct and still capable of properly performing his duties) to dismiss him on his attaining the age of sixty years unless there was some special reason in the interests of the company for retaining his services longer. (e) Each of the claimants was without his consent dismissed by the respondent company in pursuance of its customary practice as last mentioned. Each of them was at the time admittedly of good conduct and still capable of properly performing his duties. (f) Each of the claimants during his service with the respondent company became without his consent by reason of his transfer to the respondent company in a worse position in respect to the conditions of his service as a whole compared with the conditions of service with the Cardiff Railway Co. formerly

obtaining in respect to him and the provisions of para. 3 of the Third Schedule have not in his case been complied with and he has thereby suffered loss or injury. (g) Each of the claimants has in consequence of his dismissal suffered direct pecuniary loss by reason of the amalgamation.

The arbitrator then awarded compensation to the claimants and made provision for costs.

Counsel submits on behalf of the appellants that this award contains manifest errors of law on its face. He puts his case in several different ways, but I think his points can be summarised as follows: (i) The facts found do not bring the case within the schedule at all. (ii) The arbitrator has treated the dismissal as giving rise to the claim for compensation, whereas the dismissal took place in the ordinary course of practice of the appellant company and was not directly caused by the transfer as required by cl. (3) or by reason of the amalgamation as required by cl. (5). (iii) The arbitrator has awarded the same sum alternatively under cl. (3) and (4) and under cl. (5) and has thereby shown that he treats the claims as interchangeable and capable of combination so that the same facts may justify an award under either clause of the schedule, and paras. 7(e) and 7(g) of the award show that the sum so awarded is arrived at on the basis of compensation or damages for dismissal.

Counsel for the respondents rightly points out that the award, being in the alternative, cannot be set aside unless it is shown that on its face that there is necessarily some error in law with respect to each limb, even if one alternative is bad the other may still stand, and, whilst supporting the award under each alternative, I think he relied rather more strongly on cl. 3 and 4 than on cl. 5 as its justification.

I have come to the conclusion that the submissions of counsel for the appellants are well-founded. It seems to me to be clear that the sums awarded are awarded as compensation for dismissal, whereas the amalgamation was not the direct cause of the dismissal and the consequent pecuniary loss following therefrom. In my view, therefore, cl. 5 of the schedule is inapplicable. But once it is apparent that the sums awarded have been arrived at on the basis of loss resulting from dismissal some twenty years after the transfer, I think it is clear that the award cannot stand under cl. 3 and 4. Assuming, without deciding, that there are facts in the award which might justify compensation under cl. 3 and 4 assessed as at the date of transfer, taking into consideration the chances that the practice of the Cardiff Railway Co. with regard to the age of 60 and that the practice of the Great Western Railway at the date of transfer might alter to their advantage before that time, and further taking into consideration the chances of the claimants being still alive in the appellants' service at the age of 60, none the less when I find, as I think I am bound to find, that the compensation has in fact been awarded on the basis of the actual pecuniary loss resulting from dismissal twenty years later and assessed as at that date, then I think it follows that the award cannot stand on the alternative basis of cl. 3 and 4.

In the result the award must be set aside with costs to be paid by the claimants.

Award set aside with costs.

Solicitors: *P. W. Pine* (for the appellants); *Ince, Roscoe, Wilson & Glover*, agents for *Allen Pratt & Geldard*, Cardiff (for the respondents).

[Reported by R. BOSWELL, Esq., Barrister-at-Law.]

WILLIAMS v. WILLIAMS.

[COURT OF APPEAL (Lord Greene, M.R., Luxmoore and du Parc, L.JJ.),
November 2, 3, 24, 1943.]

Divorce—Desertion—Petitioner's adultery—Effect on deserting spouse's mind—Continuance of desertion—Onus of proof.

In Aug., 1938, the husband, having by chance met a Miss H. on the train, stayed for 2 nights at the same hotel with her on his arrival in London and afterwards for the same period at Brighton. On each occasion they stayed at the hotels in their own names and occupied separate rooms and the husband's statement that adultery had not been committed was accepted by the judge. When the husband returned home on Sept. 1, 1938, his wife insisted on his leaving the matrimonial home, honestly believing, in spite of his denial, that adultery had been committed. For the next 8 or 9 months, while the husband was living at a hotel in the same street, he tried

repeatedly but with no success to persuade his wife to allow him to return to her. In Aug., 1939, and again in Aug., 1941, the husband and Miss H. spent a holiday together during which they admittedly lived together as man and wife. On Oct. 16, 1942, the husband filed a petition for divorce on the ground that his wife had deserted him without reasonable cause for a period of 3 years immediately preceding the date of the petition. The wife put in no answer and did not appear. It was contended on behalf of the husband that the wife had deserted him without reasonable cause before any adultery took place, and that the wife's knowledge of the subsequent adultery had not affected her mind in any way so as to put an end to the desertion which continued up to the date of the hearing:—

HELD : (i) the husband had failed to discharge the onus which lay upon him of showing that the wife's desertion was without reasonable cause.

(ii) even if he had established that the desertion was originally without reasonable cause, the husband had not satisfied the court that the subsequent adultery had had no effect on his wife's attitude towards him.

EDITORIAL NOTE. It was decided in *Herod v. Herod* (1) and approved in *Earnshaw v. Earnshaw* (2) that when a deserted spouse commits adultery, the desertion is not thereby *ipso facto* terminated. It must be considered whether the adultery has any effect upon the mind of the deserting spouse. The judgments herein consider the case where the deserting spouse has ended the cohabitation upon an unfounded belief in the adultery of the other spouse. The question is, of course, largely one of fact, but the application of the existing law to such a state of facts is important.

As to DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-659, paras. 963-970; and FOR CASES, see DIGEST, Supp., Husband and Wife, Nos. 2977a, 2977b.] Cases referred to:

* (1) *Herod v. Herod*, [1939] P. 11; [1938] 3 All E.R. 722; Digest Supp.; 108 L.J.P. 27; 159 L.T. 530.

* (2) *Earnshaw v. Earnshaw*, [1939] 2 All E.R. 698; Digest Supp.

(3) *Haswell v. Haswell and Sanderson* (1859), 1 Sw. & Tr. 502; 27 Digest 373, 3609; 29 L.J.P. & M. 21; 1 L.T. 69.

(4) *Ousey v. Ousey and Atkinson* (1874), L.R. 3 P. & D. 223; 27 Digest 322, 3004; 43 L.J.P. 35; 30 L.T. 911.

(5) *Wickins v. Wickins*, [1918] P. 265; 27 Digest 348, 3292; 119 L.T. 268.

(6) *Fletcher v. Fletcher* (1915), 31 T.L.R. 306; 27 Digest 277, 2469.

(7) *Greene v. Greene*, [1916] P. 188; 27 Digest 277, 2465; 85 L.J.P. 224; 115 L.T. 127.

(8) *Bowron v. Bowron*, [1925] P. 187; 27 Digest 561, 6168; 94 L.J.P. 33; 132 L.T. 773.

(9) *Cohen v. Cohen*, [1940] A.C. 631; [1940] 2 All E.R. 331; Digest Supp.; 109 L.J.P. 53; 163 L.T. 183.

(10) *Marshall or Wilkinson v. Wilkinson*, [1943] 2 All E.R. 175.

APPEAL of the petitioner from an order of HENN COLLINS, J., dated May 24, 1943. The facts are fully set out in the judgment of LUXMOORE, L.J.

Gilbert Beyfus, K.C., and *Colin Duncan* for the appellant.

The respondent did not appear and was not represented.

Beyfus, K.C. : In *Herod v. Herod* (1) it was laid down by SIR BOYD MERRIMAN, P., that it was a question of fact whether or not the matrimonial offence of a petitioner had contributed to the continuance of the respondent's desertion. SIR BOYD MERRIMAN, P., also laid down that, if the deserted spouse was the petitioner, the burden of proof lay upon him or her to show that the matrimonial offence which that spouse had committed during the desertion had not contributed to the continuance of the desertion. The burden should not be upon the deserted spouse to prove more than the fact of desertion and the burden should then shift to the deserting spouse to show that there was reasonable cause for the desertion. Assuming that I am wrong as to the burden of proof, I say that HENN COLLINS, J., did not draw the correct inferences from the evidence. He said that he could not hold that the actual adultery had no effect on the mind of the wife in view of the effect of a mere suspicion of adultery. That was not the right view having regard to the facts of the present case. The wife had put an end to the marriage in substance before my client committed adultery. In my submission the indiscretion of a husband in merely staying at a hotel with a young woman is not sufficient to constitute reasonable cause in a wife for abandoning her husband. *Fletcher v. Fletcher* (6) and *Greene v. Greene* (7) show that the court has been very loth to consider quite deplorable behaviour, short of a matrimonial offence, as sufficient cause for desertion.

A person who refuses to listen to an explanation cannot be said to act reasonably. When I prove the commencement of desertion without reasonable cause, there is a presumption that it continues without reasonable cause, so long as it continues, until the opposite is proved. There is no reason why the onus of proving a negative should be placed upon the petitioner when once he has established desertion. Assuming the rule as to onus of proof is correctly laid down in *Herod v. Herod* (1), however, I ask the court to act as it acted in *Earnshaw v. Earnshaw* (2) and say that the husband's conduct did not operate upon the mind of the wife. [Counsel referred to *Bowron v. Bowron* (8), *Cohen v. Cohen* (9), and *Marshall or Wilkinson v. Wilkinson* (10).]

LORD GREENE, M.R.: In this case, HENN COLLINS, J., found himself unable to draw what was the crucial and necessary inference before the petitioner could succeed. The inference which it was necessary to draw was that the subsequent misconduct of the petitioner, which was known to the respondent, did not affect her attitude towards him in the way of impeding a possible reconciliation in future. I have had some doubts about this case, but I have had an opportunity of reading the judgments prepared by LUXMOORE and DU PARCQ, L.JJ., and in all the circumstances I do not see my way to differ from the conclusion to which they have come, namely, that that inference ought not, upon the facts, to be drawn. In the result the appeal will be dismissed.

LUXMOORE, L.J.: In my opinion, HENN COLLINS, J., came to the right conclusion in dismissing the husband's petition for divorce. The facts of the case are unusual and peculiar. The petitioner was married to the respondent in April, 1928. The marriage was apparently a normally happy one and the husband and wife lived together at Hereford until the end of August, 1938. The husband was throughout this period employed as an assistant in a grocer's business in Hereford, but he and his wife carried on at the matrimonial home in Hereford a small grocer's business in which they were jointly interested. This business was managed by the wife. In August, 1938, the husband wanted his wife to go with him for a holiday and he suggested that they should go for a short tour in their motor car. The wife was for some reason unwilling to go and consequently the husband decided to visit the Grocers' Exhibition then being held in London. He accordingly went to London. His story is that on the train he met without any pre-arrangement a Miss Hooper who was a friend of the husband and wife. They stayed at the same hotel in London for two or three days spending their time together. This apparently gave them so much satisfaction that they decided to spend the following Thursday and Friday together at Brighton.

The husband avers that both in London and Brighton no impropriety of any sort took place. He and Miss Hooper registered at the hotels in their own names and occupied separate rooms. The husband and Miss Hooper returned to Hereford on Saturday, Sept. 1, 1938. When the husband arrived at the matrimonial home his wife told him she knew that he had stayed with Miss Hooper both in London and at Brighton and that Miss Hooper's mother had told her all about it. She said she had packed up his luggage and he could go. The husband says that he tried to explain that there had been no impropriety. The wife refused to accept his statement and insisted on his leaving. In the end the husband reluctantly left and took himself and his luggage to a small private hotel on the opposite side of the street and lived there by himself for some 8 or 9 months, during which time he repeatedly tried to explain to his wife that he had done nothing wrong. She persistently refused to listen to him and ultimately he left the private hotel and went to live with a married friend. From this time onward he apparently made no further effort to persuade his wife to allow him to return to her. In August, 1939, he openly left Hereford for a holiday with Miss Hooper and he admits that on his holiday he and Miss Hooper lived together as man and wife. He and Miss Hooper followed the same course in August, 1941. On Oct. 16, 1942, the husband presented a petition against his wife asking that their marriage should be dissolved on the statutory ground that the wife had deserted him without reasonable cause for a period of at least three years immediately preceding the date of the petition, to wit from Sept. 1, 1938. The husband lodged with his petition a statement pursuant to the Matrimonial Causes Rules, 1937, r. 28. This statement, omitting formal parts, is as follows:

The facts which require the discretion of the court to be exercised are: (1) That in the summer of 1939 at Teignmouth and at Paignton, both in the County of Devon, I committed adultery with Dorothy Alice Hooper (spinster) when we were on holiday together and stayed at various addresses as man and wife. (2) I also committed adultery with the said Dorothy Alice Hooper in the month of August, 1941, at Weston-super-Mare when we were on holiday together during a period of 5 days. Apart from the above-mentioned occasions, I have not committed adultery with the said Dorothy Alice Hooper or any other person. (3) That my wife deserted me on the 1st day of September, 1938, and has since refused to allow me to live and cohabit with her. (4) I am desirous of marrying the said Dorothy Alice Hooper.

The wife put in no answer, and the petition came before HENN COLLINS, J., on Feb. 26, 1943, when the wife did not appear and was not represented. In the course of the argument, after hearing the evidence offered, HENN COLLINS, J., said:

I take it for the purposes of your argument she [that is, the wife] was wrong in the assumption she originally made that the husband had committed adultery, but the husband must prove that the subsequent adultery with the same woman did not affect the wife's mind.

Counsel for the husband admitted this was so and referred to the decision in *Herod v. Herod* (1). HENN COLLINS, J., said:

He has got to prove affirmatively that either his wife did not know of the subsequent adultery, in which case it could not affect her mind, or that she did know and did not care, in which case it could not have affected her mind; but the burden is upon him to satisfy me of one or other of those facts. He sets out to prove that she did not know, but all he can say is that "So far as I know she did not know"; and I cannot blind my eyes to the fact that she may have known. Living in a little town, he goes off with the very girl who was in suspicion. If she did not keep an eye on her I should be very surprised. It may be she did not care, and it may be that evidence to that effect might be forthcoming, but on the present material I can only say I am not in a position to grant the petition. I will either dismiss it or adjourn it for further evidence.

Counsel for the husband accepted the second alternative and the petition stood over for further evidence to be obtained. The petition came on for further hearing on May 24, 1943. On this occasion the managing clerk of the firm of solicitors acting for the husband gave evidence. The material part of his evidence is as follows:

Did you ask Mrs. Williams the express question whether she knew of her husband's adultery with Miss Hooper since the occasion in 1938 when she had refused to have anything further to do with him?—I did.

Tell my Lord what she said as to that?—Her reply to that was: "Of course I know he has been off with her twice since then." That referred to Sept., 1938.

Those are the two occasions which Mr. Williams referred to in this court?—She said: "Of course I know he has been off with her twice since then."

What did you ask her then?—I asked whether this knowledge made any difference with regard to her attitude towards her husband.

What did she say?—She said: "No, not the least; he went off with her before, and he has been away with her since; and I suppose he will keep on going with her. If he prefers her to me, he can have her, for all I care."

Did you then ask Mrs. Williams what the position would have been if in fact her husband had not gone away with Miss Hooper on those two occasions?—I did.

What did she say to that?—She then said: "They went away together before and thought they were very clever in keeping it from me; but they were not smart enough. That was the end, so far as I was concerned. I had finished with him from then."

After hearing this evidence, HENN COLLINS, J., said:

It is a question whether I ought to exercise the discretion of the court, and accepting his story—as against the belief of the wife—that he did not in fact commit adultery with this lady, there is no question, to my mind, unless he can dislodge it, but that his association with that lady, which the wife believed was adulterous, was the cause of the breakdown of the marriage.

Counsel for the husband asked to be allowed to recall the husband and after hearing his further evidence, counsel said:

What I shall respectfully ask your Lordship to conclude in this case is this—assuming your Lordship accepts Mr. Williams' evidence; as I think I am entitled to believe your Lordship does, from what your Lordship said on the previous occasion—however indiscreet he may have been, however foolish and strange a course he may have taken as a result of his wife's refusing to spend a holiday with him, when he returned and his wife refused to have him back and refused to hear any explanation of what happened at all, she from that date started a course of desertion in law.

In answer to this argument, HENN COLLINS, J., said:

I am prepared to accept that view; but my difficulty begins later. My difficulty

is this. When the wife, after the last hearing, is asked about this position, in effect what she says is this: "When he went away with her, that was the end of it, so far as I was concerned." Now, if that be right, how can I infer that knowledge of the adultery would not have affected her mind. She said in terms that it would, and that is the end of it.

Later, HENN COLLINS, J., said:

But the wife's reaction to the adultery we know. That is your trouble. Her reaction to her husband's adultery, as she thought it, is perfectly clear. She had no more to do with him. Quite true, I am accepting the view that that was a false charge on her part; but then, when she gets knowledge of adultery in fact, how can I possibly infer that her reaction would be a totally different one? It would be against nature.

He ultimately dismissed the petition.

The husband has appealed to this court. The argument here is that the wife deserted the husband without reasonable cause before the subsequent adultery and that the wife's knowledge of that fact did not affect the wife in any way so as to put an end to the desertion which continued up to the date of hearing and still continues. The facts to be established are, first, that there was desertion, second, that there was no reasonable cause for that desertion, and thirdly that the subsequent adultery did not affect the wife's mind so as to end the desertion without reasonable cause.

There can be no doubt that the wife refused to share the matrimonial home with her husband on Sept. 1, 1938, and that she has persisted in her refusal ever since. No doubt the first question must be answered in the affirmative, but was the desertion "without reasonable cause"? Obviously the husband had acted with the utmost indiscretion and he at any rate could not say that his wife's reaction on his return on Sept. 1, 1938, was unreasonable. I asked counsel for the husband in the course of the argument if he contended that the wife's conduct on Sept. 1, 1938, constituted desertion without reasonable cause on that date. He said quite frankly that he could not so contend. I then asked him when the desertion became unreasonable and he said at some time during the period the husband was living at the private hotel. Speaking for myself, I am unable to find positively on the evidence before the court that the wife's conduct was unreasonable during any part of this period. It is, to my mind, noteworthy that the husband did not in the course of his evidence condescend to give any particulars of his attempts to persuade his wife to hear his explanation. There is no suggestion that he either gave up his association with Miss Hooper or offered to give it up. In the absence of any such evidence I should think the proper inference to be drawn from the rest of the evidence is that the association continued and there was no offer on the husband's part to break it. In my judgment, it is impossible to hold on the evidence that the desertion has been shown at any time during these 8 or 9 months to be without reasonable cause and I would have dismissed the petition on this ground alone; but assuming I am wrong in this conclusion, I find it impossible to read the evidence of the solicitor's managing clerk as an admission by the wife that, if she had been wrong in her original belief, the knowledge of her husband's subsequent adultery would not have affected her mind. Quite plainly the wife honestly believed that her husband had been guilty of adultery with Miss Hooper in August, 1938, and this was equally plainly the reason why she refused to live with her husband. I read her so-called admission not as a statement that, if she had been satisfied that no adultery had taken place in August, 1938, she would not have cared whether the husband committed adultery with Miss Hooper in 1939 and 1941. I read the so-called admission as a statement by the wife that she regarded the subsequent adultery of which she had knowledge, as complete confirmation of her original belief and to that extent it did not affect her previous decision which was founded on that belief.

In my judgment, the husband has failed to discharge the onus which is on him of satisfying the court first that the desertion was without reasonable cause and second that assuming that the desertion was originally without reasonable cause the subsequent adultery would have had no effect on the wife's attitude towards her husband.

For these reasons I think the appeal should be dismissed.

DU PARCQ, L.J.: In this case HENN COLLINS, J., held that the petitioner had not sufficiently proved the contents of his petition. The ground of the petition was an allegation that the petitioner's wife had deserted him without

cause for a period of at least 3 years from and since Sept. 1, 1938, the date of the petition being Oct. 16, 1942. It was submitted on behalf of the petitioner that HENN COLLINS, J., erred in law with regard to the burden of proof and further, or alternatively, that he drew a wrong inference from the facts. HENN COLLINS, J., followed the decision of SIR BOYD MERRIMAN, P., in *Herod v. Herod* (1). Counsel for the husband invited us to say that the view there expressed as to the burden of proof was erroneous. The proposition which counsel for the husband attacked has, however, already been expressly approved in this court: *Earnshaw v. Earnshaw* (2). It is, in my opinion, clearly correct in principle. When it is apparent that facts existed which, if they influenced the deserting spouse, were a sufficient cause to excuse the desertion, it is for the deserted spouse to prove, to the reasonable satisfaction of the tribunal, that those facts did not operate to cause the desertion or its continuance.

A There is more to be said about the remaining question, which is purely one of fact. The petitioner admits that, during the statutory period of 3 years he twice committed adultery. The respondent knew that he had committed adultery. The only question left for the judge to decide was whether the evidence showed that this knowledge did not affect the respondent's conduct. HENN COLLINS, J., was not satisfied on this point. This court ought not to reverse his decision unless it is possible to come to a clear conclusion that he took a wrong view of the facts. In my opinion, the view which he took was right.

C This case in no way resembles those in which one spouse has wholly abandoned another for no better reason than weariness of married life, or, as commonly happens, the forming of some new attachment. Then, indeed, subsequent adultery committed by the deserted spouse may often be seen to have had no effect on the conduct of the deserter. Here there is no doubt that, when the wife first separated herself from her husband, she believed, as she still firmly believes, that her husband had already committed adultery. HENN COLLINS, J., has found that this belief was not justified by the facts, although it must be admitted that the circumstances were such as to arouse suspicion and, even if the most innocent possible construction be placed on them, some degree of resentment. Until the wife learned of her husband's indiscretion in August, 1938, and drew the inference that he had shown himself unfaithful to her, there is nothing in the evidence to suggest that she had any desire to part from him.

D They had been married for 10 years. They had a child, and their life together, according to the petitioner, had been "reasonably happy." The petitioner makes no complaint at all of his wife's conduct during these years, unless, indeed, his statement that she was "very strong-willed" is to be regarded as a complaint. It is true that, shortly before his visit to London and Brighton in August, 1938, she had been unwilling to accompany him on a motor tour which he had proposed, but the petitioner makes no grievance of this incident. It led to no quarrel or unpleasantness between them, and, as he seems to have attached no importance to it, I am satisfied that we should disregard it. It seems plain, then, that it was a genuine belief that her husband had committed adultery which induced the respondent to refuse to live with him. If one were to leave out of consideration the answers which she gave to the questions addressed to her by the solicitor's clerk, it appears to me that the conclusion would be inevitable that the petitioner's avowed adultery must have hardened her resolution to live apart from him. Much reliance was placed on these answers in the argument of the petitioner's counsel, and I must now deal with them.

E The first question put to the wife was whether her knowledge of her husband's adultery in 1939 and 1941 "made any difference with regard to her attitude towards her husband." The second question was what the position would have been if in fact her husband had not gone away with Miss Hooper on those two occasions. I need not now set out the answers. I have very carefully considered them, and in particular the words: "That was the end, so far as I was concerned. I had finished with him from then."

F Both the questions which were put, and I think quite fairly put, by the solicitor's clerk, were hypothetical questions. The two hypotheses are (i) that the wife had been ignorant of what in fact she knew, (ii) that the petitioner had not committed adultery when in fact he did commit it. Questions of this character are often difficult to answer accurately at the best of times. In some circumstances and for some persons, I think that the task of giving accurate

answers to them is well-nigh impossible. The present case is a good illustration of the difficulty which hypothetical questions present. The respondent believes that her husband committed adultery with Miss Hooper in 1938. Probably nothing will ever convince her that he did not. Now it is hardly possible for any human being who looks back at a past event to ignore, or to be unaffected by, the knowledge and experience which he has gained in the interval. The respondent can hardly be expected at this date to regard her husband's conduct in August, 1938, as anything but the first overt act of a series of guilty acts, all springing from an infatuation with Miss Hooper, the young woman whom he now wishes to marry. In her eyes, each of those acts, if it stood alone, would be enough to justify the course which she has taken. Her answers were precisely what might be expected in those circumstances. In effect she was saying, as I understand her, that, since her husband broke the marriage tie once and for all in 1938, his subsequent misconduct could have no further effect: the harm was done. Whatever may be thought of this attitude, it must be remembered that, if she were right on the question of fact, the law would be on her side: it is not in doubt, I think, that, if in fact there had been adultery in August, 1938, her desertion would have been excused from that time on.

The question is whether, because of her firm refusal to justify her desertion of her husband by anything subsequent to the events of 1938, it can be said with reasonable certainty that what happened later made no difference to her conduct. For myself, I find it impossible to say that, if the petitioner had kept aloof from Miss Hooper for a longer period, and if he had persevered in his attempts at reconciliation, or continued to desire it, for as long as even one year out of the statutory period of 3 years, his wife would still have refused inexorably to receive him back. No one can say with certainty either that she would, or that she would not, have relented, and it is after all the act of the petitioner which has made it impossible to give a certain answer. His relations with Miss Hooper had progressed so far by August, 1939, that they then left Hereford, apparently quite openly, to take the holiday together during which adultery was first committed. Like HENN COLLINS, J., I remain unconvinced that the petitioner has discharged the burden which rests upon him of proving that his adultery had no effect on his wife's conduct. Let it be granted that the wife behaved unreasonably and unfairly in 1938, though, for my own part, I prefer not to pass judgment upon her without a fuller knowledge of the facts. There is no presumption of law or fact that a person who acts unreasonably for 12 months or less will continue to do so for a full 3 years, and 3 years is the period for which desertion without cause must continue in order to found a petition for divorce. Desertion without cause is no technical offence. It is nothing less than a total repudiation of the obligations of marriage. The law can never regard it lightly. The court should always insist that it must be strictly proved.

I have assumed throughout this judgment that HENN COLLINS, J., would have been prepared to hold that, but for the proof of adultery, the respondent would have been guilty of deserting her husband "without cause" for the statutory period. In the circumstances of this case that might have been a correct decision. Counsel for the husband suggested, however, that as a general rule there could not be reasonable cause or excuse for desertion unless some matrimonial offence on the part of the deserted spouse were proved. This suggestion is wholly erroneous. Conduct which falls short of adultery may excuse desertion, and so in some circumstances may the honest though mistaken belief of one spouse that he or she has been wronged by the other. This seems to me to be plain as a matter of construction and good sense, and the courts have always so held: see *Haswell v. Haswell* (3), *Ousey v. Ousey* (4), and *Wickins v. Wickins* (5). I only refer to the point lest it may be thought that I have accepted this part of counsel's argument.

As, in my view, the petitioner has failed to establish his case, the question whether the discretion of the court should have been exercised in his favour, if he had succeeded, does not arise, and I express no opinion on it. In my judgment the appeal should be dismissed.

Appeal dismissed.

Solicitors: Barlow, Lyde & Gilbert, agents for T. A. Matthews, Hereford (for the appellant).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

Re HALL, PUBLIC TRUSTEE v. MONTGOMERY

[CHANCERY DIVISION (Uthwatt, J.), November 5, 1943.]

Wills. Discretionary trust. Forfeiture. Annuity payable to Custodian of Enemy Property by operation of law—Whether annuity forfeited.

By her will the testatrix directed her trustees to pay, *inter alia*, out of the income of a trust fund an annuity for life to the Comtesse G. de P.; she further directed that, if the annuitant should alienate or charge her annuity or become bankrupt or do or suffer any act or thing whereby the said annuity or any part thereof would or might become vested in or payable to any other person, such annuity should cease to be payable and the trustees might at their discretion pay such annuity or part thereof to the annuitant or any of the persons being a then living person named in the will. The testatrix died on Mar. 12, 1941. G. de P. was a French subject and at all material times was resident in metropolitan France. The Trading with the Enemy (Specified Areas) Order, 1940, brought the Trading with the Enemy Act, 1939, into operation with respect to metropolitan France whereby the annuity would become payable to the Custodian of Enemy Property. The question to be determined was whether the discretionary trusts arose under the forfeiture clause contained in the will:

HELD: on the true construction of the clause, the word "suffer" meant the permitting of a certain class of acts. The annuitant could not be said to have done or to have permitted the doing of any of those acts by reason of the operation of the statute.

[EDITORIAL NOTE.] The abolition of restraint on anticipation has made the introduction of protective trusts practically common form in many cases and their construction is a matter of considerable importance. It is for this reason a little unfortunate that these trusts do not always take the same form and the question of whether in particular circumstances a forfeiture is incurred is a question of construction in each case. In *Re Gourju*, [1942] 2 All E.R. 605, it was held that a forfeiture was incurred where the income became payable to the Custodian of Enemy Property, but the trust was in the statutory form which is in different terms from that here considered. Whether there is any distinction between "permit" and "suffer" was the subject of certain *dicta* in *Barton v. Reed*, [1932] 1 Ch. 362, at pp. 375, 376, but the whole question was left open and probably the better view is that it is a matter of construction in each particular case.

AS TO PROTECTED LIFE INTERESTS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 597-600, para. 870: and FOR CASES, see DIGEST, Vol. 40, pp. 558-562, Nos. 987-1009.]

SUMMONS by the trustees of the will to determine a question of construction arising thereunder. By her will the testatrix directed her trustees to pay out of the income of a trust fund two annuities, one of which was to the Comtesse G. de P. for life; the will further provided that, if the annuitants:

... shall alienate or charge their respective annuities or become bankrupt or do or suffer any act or thing whereby the said annuities or any part thereof would or might but for this present provision become vested in or payable to any other person or persons such annuities shall cease to be payable and my trustees may in their absolute discretion pay such annuity or annuities or any annuity or annuities of a smaller amount or amounts to any or either of them the said annuitant or any other person being a then living person whose name is referred to in this my will.

The testatrix died on Mar. 12, 1941. The Comtesse was at all material times resident in occupied France and, in consequence, if the discretionary trusts did not arise, the annuity would be payable to the Custodian of Enemy Property.

Sir Norman Touche for the trustees.

H. O. Danckwerts for the Board of Trade.

W. F. Waite for the residuary legatees.

J. Pennyuck for another annuitant.

UTHWATT, J.: At the date when the Trading with the Enemy (Specified Areas) Order, 1940, brought the Trading with the Enemy Act, 1939, into operation with regard to metropolitan France, the Comtesse was living in metropolitan France. The effect of the provisions of the Trading with the Enemy Act, 1939, was that the annuity would become payable to the Custodian of Enemy Property. Now the question is whether that being the result which flows from the Act, it can be said that the Comtesse has done an act or suffered anything whereby the annuity has become forfeited, with the result that it is not payable

to the Custodian. The condition is a condition subsequent and must be construed strictly. Reading it as a whole, it seems to me that it is directed to the forfeiture of the annuity in the event of the annuitant doing personally certain classes of things, such as alienating or charging, or permitting an act to be done whereby she is deprived of her annuity. It appears not to be directed to the case where the annuity is subject to an alienation which is not the result of her own act. I do not think it can be said that the Comtesse has done any act whereby the annuity has not become payable to the Custodian. She was in France, the normal place for a French subject, when her property became subject to the provisions of the Act, and I fail to see how the fact that she was in France can really be said to amount to the doing of an act of the kind which is contemplated by the clause in the will. It is no more extravagant to say that her mere existence is such an act. I have found the question whether she has "suffered" anything more difficult. The word "suffer" is capable of more meanings than one, and I have come to the conclusion that the proper construction to put on the word "suffer" is "permit." I think it is clear that she has not permitted anything to be done. Nothing therefore has happened to bring this condition subsequent into operation. The annuity as matters stand is by reason of the statute and the regulations made thereunder payable to the Custodian of Enemy Property, for there is no suggestion that the Comtesse has at any time alienated or charged her annuity. I do not propose to state any opinion as to what would be the effect hereafter of any future alienation or charge. That is a future question.

Declaration accordingly.

Solicitors: *Joynton Hicks & Co.* (for the trustees); *Solicitor to Board of Trade* (for the Board of Trade); *Field, Roscoe & Co.* (for the residuary legatees); *Lee, Bolton & Lee* (for another annuitant).

[Reported by R. L. ZIAR, ESQ., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. OSWALD.

[KING'S BENCH DIVISION (Macnaghten, J.). **October 21, 22, 25, 1943.**]

Income Tax—Mortgage interest—Mortgage of reversionary interest—Capitalisation of interest at option of mortgagee—Whether mortgagor assessable to income tax in respect of capitalised interest—Income Tax Act, 1918, (c. 40), All Schedules Rules, r. 21.

The mortgagees of the reversionary interest under a settlement exercised the option given by the mortgage deed and capitalised the interest due on the principal sums. They then claimed the sum representing the capitalised interest together with the principal sums as the amount due to them under the mortgage. The mortgagor was assessed to income tax under All Schedules Rules, r. 21, in respect of the balance of the fund remaining after payment of the principal sums on the footing that it was payable in respect of arrears of interest:—

HELD: the interest due under the mortgage deed had been converted into principal money and was not assessable to income tax.

I.R.C. v. Lawrence, Graham & Co. (1) followed.

[EDITORIAL NOTE.] The decision in *Inland Revenue Comrs. v. Lawrence, Graham & Co.* (1) is here followed. In that case the mortgage provided for the capitalisation of the sum due in respect of interest but the deed in the present case provided for the capitalisation of "the interest" *simpliciter*. It was contended that while the expression in the earlier case clearly meant the net interest, the words here used in their natural meaning referred to the gross interest.

AS TO LIABILITY UNDER ALL SCHEDULES RULES, r. 21, see HALSBURY, Hailsham Edn., Vol. 17, pp. 235, 236, para. 474; and FOR CASES, see DIGEST Supp., Income Tax, Nos. 369e-380c.]

Cases referred to:

- *(1) *Inland Revenue Comrs. v. Lawrence, Graham & Co.*, [1937] 2 K.B. 179; [1937] 2 All E.R. 1; Digest Supp.; 106 L.J.K.B. 772; 157 L.T. 219; 21 Tax Cas. 158.
- (2) *Cross v. London & Provincial Trust, Ltd.*, [1938] 1 K.B. 792; [1938] 1 All E.R. 428; Digest Supp.; 107 L.J.K.B. 423; 158 L.T. 217; 21 Tax Cas. 705.
- (3) *Paton v. Inland Revenue Comrs.*, [1938] A.C. 341; [1938] 1 All E.R. 786; Digest Supp.; 107 L.J.K.B. 354; 158 L.T. 426; 21 Tax Cas. 626.
- (4) *Rye & Eyre v. Inland Revenue Comrs.*, [1935] A.C. 274; Digest Supp.; 104 L.J.K.B. 401; 152 L.T. 493; 19 Tax Cas. 164.

APPEAL by the Crown against a decision of the Special Commissioners discharging an assessment to income tax made on the respondent. The facts are fully set out in the judgment.

All Schedules Rules, r. 21 (1) provides as follows :

A Upon payment of any interest of money, annuity, or the annual payment charged with tax under Sched. D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.

The *Attorney-General* (Sir Donald B. Somervell, K.C.), and *Reginald P. Hills* for the appellant commissioners.

J. Millard Tucker, K.C., and *J. S. Scrimgeour* for the respondent.

B The *Attorney-General* : The capitalisation clause in the deed, "all interest which shall fall due," must refer to the gross sum and the authority of *I.R.C. v. Lawrence, Graham & Co.* (1) is inapplicable where the covenant provides for the capitalisation of the gross sum. Neither is it applicable where the capitalisation is at the option of the mortgagee, for in such a case it cannot be assumed that the mortgagor has deducted tax. [Counsel referred to *Cross v. London and Provincial Trust, Ltd.* (2), and *Paton v. I.R.C.* (3).]

C *Tucker, K.C.* : The money paid was not interest under r. 21, but the balance of past interest which remained after tax had been deducted. There was no liability to tax in *I.R.C. v. Lawrence, Graham & Co.* (1) from which this case is indistinguishable. [Counsel referred to *Rye and Eyre v. I.R.C.* (4).]

D The *Attorney-General*, in reply : The wording of the covenant in this case is different from that in *I.R.C. v. Lawrence, Graham & Co.* (1). There is a distinction between the words "interest" and "the sum due in respect of the half-year's interest." In this case the mortgagee was entitled to add the whole interest, whereas in *I.R.C. v. Lawrence, Graham & Co.* (1) he was only entitled to add the net interest.

MACNAGHTEN, J. : This is an appeal by the Commissioners of Inland Revenue from a decision of the Special Commissioners discharging an assessment to income tax for the year 1939-40 made upon the respondent, Major K. A. Oswald, D.S.O., under r. 21 of the General Rules applicable to All Schedules. The respondent is the sole surviving trustee of a settlement dated June 8, 1885, made on the marriage of a Mr. R. W. Cosier to a Miss Farrer, whereby the sum of £10,000 was settled on the spouses and the issue of the marriage. R. W. Cosier died on June 23, 1894, and under the provisions of his will a Mrs. Elfrida Beyfus became entitled, in the events that happened, to the funds comprised in the settlement, subject to the life interest of his widow. Mrs. Beyfus subsequently executed the following charges on her reversionary interest under the settlement. By deeds dated Apr. 21, 1899, and Mar. 26, 1901, she mortgaged her reversionary interest to a Mrs. Liberty to secure the repayment of the sums of £2,300 and £500 with interest thereon at 5 per cent. per annum. On Jan. 10, 1905, she assigned to Jonas Wolfe, Abraham Wolfe and Alexander Wolfe £500, part of her reversionary interest, subject to the charges previously created in favour of Mrs. Liberty. By a deed dated May 18, 1905, she executed a further charge in favour of Mrs. Liberty to secure a further advance of £300, and by that deed it was provided that the interest on the sums of £2,300 and £500, as well as the £300, should thenceforth be at the rate of 5½ per cent. per annum, payable quarterly on Feb. 18, May 18, Aug. 18, and Nov. 18, reducible, however, to 5 per cent. if payment were made within 21 days of the due date. The deed further provided that if the interest were not paid within 21 days after it became due, it might at the option of the mortgagee be capitalised as from the date when it became due. No interest was paid by Mrs. Beyfus after Aug. 18, 1906. She died on Jan. 11, 1933, and no representation has been taken out to her estate. On May 7, 1920, Mrs. Liberty, then Lady Liberty, died, and her will has been duly proved by the executors named therein. On June 29, 1938, the widow of R. W. Cosier died, and Mrs. Beyfus's reversionary interest fell into possession.

The fund in the hands of the respondent as the sole surviving trustee of the settlement was amply sufficient to pay the £500 due to Messrs. Wolfe and the sums of £2,300, £500 and £300 advanced by Lady Liberty, and in these circumstances the assessment in question was made upon the balance

remaining after payment of those principal sums on the footing that it was payable to the Liberty trustees in respect of arrears of interest, and therefore assessable to income tax.

By an instrument dated Aug. 9, 1935,* the trustees of Lady Liberty's will exercised the option given by the deed dated May 18, 1905, and capitalised :

"... so much of the interest fallen due on the principal sums of £2,300, £500 and £300 as is now capable of being capitalised by virtue of the provisions therein contained "

and by another instrument dated Sept. 13, 1938, they capitalised the interest that had fallen due since Aug. 18, 1935. The interest so capitalised and the principal sums of £2,300, £500 and £300 together amounted to £8,301 8s. 2d., and the trustees made claim to that amount as the capital sum due to them under the charges created in favour of their testatrix. The Special Commissioners held that that claim was well founded, and discharged the assessment. They were of the opinion that the present case could not be distinguished in any material respect from the case of the *Comrs. of Inland Revenue v. Lawrence, Graham & Co.* (1). In that case the Legal and General Assurance Society had advanced a sum of £10,000 on the security of certain reversionary interests, and the borrower had agreed to pay interest on the advance at such a rate per cent. per annum (varying with the rate for the time being of income tax) that after deduction of income tax from each periodical payment of interest there would remain a net sum equivalent to interest at $5\frac{1}{2}$ per cent. per annum on punctual payment. The borrower failed to pay any interest, and the society, exercising rights conferred upon them by the mortgage deed, sold the reversionary interests. The price paid for those interests was received by Messrs. Lawrence, Graham & Co., the society's solicitors, and was more than sufficient to pay all that was due to the society. Messrs. Lawrence, Graham & Co. paid the amount of the advance and the capitalised interest to their clients and then paid the balance to a second mortgagee of the reversionary interests. The Inland Revenue Commissioners made an assessment under r. 21 of the General Rules upon Messrs. Lawrence, Graham & Co. on the footing that the provisions in the deed for the capitalisation of interest payable to the society could not deprive the Crown of the right to income tax on the interest so capitalised. The case was taken to the Court of Appeal, and the judgment of the court (consisting of LORD WRIGHT, ROMER, L.J., and GREENE, L.J.,) was delivered by ROMER, L.J. He pointed out that under the covenant in that case the power to capitalise unpaid interest was limited to the net interest, meaning by that expression the amount of the interest payable to the society after deducting the tax payable thereon. The case, therefore, established that a covenant conferring upon the mortgagee the right to capitalise the net interest is valid, and by the exercise of that right the net interest is converted into principal money, and is not assessable to income tax under r. 21.

The Attorney-General contended that the present case differs from the case of *Lawrence, Graham & Co.* (1) in that the deed of May 18, 1905, did not provide that the unpaid interest should be accumulated willy-nilly : it merely gave the mortgagee an option to capitalise it ; but I do not think that is a distinction that makes any difference for the present purpose. The other suggested distinction between the two cases is that whereas in the *Lawrence Graham* case (1) the interest to be capitalised was the net interest, the covenant in this case provided for the capitalisation of "the interest," an expression which might mean either the gross interest or the net interest. The Liberty trustees purported to capitalise "so much of the interest fallen due on the principal sums as is now capable of being capitalised," and their claim of £8,301 8s. 2d. was made up by capitalisation of the net interest. They did not claim any right to capitalise the gross interest.

In those circumstances it seems to me that the Special Commissioners were right in saying that the present case cannot be distinguished from the case of *Lawrence Graham* (1). I think, therefore, that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Solicitors of Inland Revenue* (for the appellants) : *Ranger, Burton & Frost* (for the respondent).

[Reported by GWYNEDD LEWIS, Barrister-at-Law.]

SUMMERS v. ROBERTS.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Macnaghten and Tucker, JJ.), **November 24, 1943.**]

Medicine—Sale of medicine—Sale in shop—“Shop”—Shops Act, 1912 (c. 3), s. 19—Pharmacy Act, 1941 (c. 42), s. 12 (2).

A The appellant sold some medicine at a temporary stall in the uncovered part of Leeds City Market. He occupied this space not more than twice a week and sold the medicine from a stall consisting of trestles and a plank. He did always occupy exactly the same pitch. It was contended that this was a sale otherwise than in a shop within the meaning of the Pharmacy Act, 1941, s. 12 (2) :—

B HELD : for the purposes of the above Act, “shop” means some sort of structure where regular business is carried on and the stall in question was not a shop within the meaning of the section.

[EDITORIAL NOTE. In some cases it may well be that a shop simply means a place where trade is carried on, but it is held here that, having regard to the Act as a whole, shop here means some kind of premises. Further, the Act also requires more continuity in the activity than attending between certain hours on two days a week.]

AS TO SALE OF MEDICINES, see HALSBURY, Hailsham Edn., Vol. 22, p. 378, paras. 803-805 ; and FOR CASES, see DIGEST, Vol. 34, pp. 567, 568, Nos. 243-253.]

C Cases referred to :

(1) *Pope v. Whalley* (1865), 6 B. & S. 303 ; 33 Digest 555, 377 ; 34 L.J.M.C. 76 ; 11 L.T. 769.

(2) *Wallace v. Dixon*, [1917] 2 I.R. 236 ; 24 Digest 928, case P.

* (3) *Dennis v. Hutchinson*, [1922] 1 K.B. 693 ; 24 Digest 930, 209 ; 91 L.J.K.B. 584 ; 126 L.T. 669.

(4) *Inland Revenue v. Caplan*, [1930] S.C. (Ct. of Sess.) 512 ; Digest Supp.

D APPEAL by way of case stated from a decision of the Stipendiary Magistrate for the city of Leeds, dated Mar. 30, 1943. The facts are sufficiently referred to in the judgment of VISCOUNT CALDECOTE, L.C.J.

C. R. Havers, K.C., and *J. M. McLusky* for the appellant.

E. Holroyd Pearce for the respondent.

E VISCOUNT CALDECOTE, L.C.J. : This case raises the question what is the meaning of the word “shop” in the Pharmacy and Medicines Act, 1941. I confine myself entirely to the question which is the only question raised by the special case as to the meaning of the word “shop” in the Act in which it appears. The special case sets out the very short facts which are material. The appellant sold by retail at a stall—a plank or board upon two trestles—situate in the uncovered portion of the Leeds City Market some medicine of a particular type which it is not material to describe. Under the Pharmacy Act, 1941, s. 12 (2), F it is made an offence to sell by retail an article of the sort sold in this case unless the sale is effected at a shop, and, therefore, it appears plainly that no offence could have been committed if the sale was effected at a shop. The question then arises as to the meaning of the word “shop,” and by sect. 17 of the 1941 Act, “shop” has the same meaning as in the Shops Act, 1912. That interpretation simply has the effect of lifting into the Pharmacy Act, 1941, the two G lines of print which are to be found in the Shops Act, 1912, s. 19 (1) :

The expression “shop” includes any premises where any retail trade or business is carried on . . .

At this point I finish my consideration of or reference to anything in the Shops Act, 1912. Our decision may perhaps, probably will, have some effect in cases which may arise under the Shops Act, 1912, but for the purposes of this present case I think it is right to treat the word “shop” and interpret it in precisely H the same way as if, instead of what I may call the shorthand of the interpretation section of the Pharmacy Act, 1941, the words had been reproduced and actually reprinted in that Act instead of only being there by reference.

Finding, therefore, as I do, the interpretation words actually in the Pharmacy Act, 1941, it seems to me that the word has to be interpreted or considered with reference to the objects of the Act and its scope. In *Pope v. Whalley* (1), at p. 310, BLACKBURN, J., approaches the question he had to consider in that way :

The question is, what is meant by the expression “shop” in this section ? Looking

at the object of the Act it was to introduce such clauses as would now be proper to be put into the grants in local statutes relating to markets. What did the legislature intend with reference to such object?

In other words, I think it is not right merely to look at the definition apart from every other provision in the Act, but it is proper to consider the words of interpretation which I call the definition in relation to the objects of the Act and its other provisions. In other words, the word "shop" being interpreted in accordance with the interpretation section, has to be considered in the setting in which it is found in the Pharmacy Act, 1941. That Act seems to me clearly to provide machinery by which, to use an expression which has been used in the course of the argument, the status of the profession or the trade would be raised or maintained. There are provisions which may be found almost at a glance appearing in many places in the Act which seem to suggest that the legislature contemplated that the premises or the shop which was dealt with in the Act should be a place defined by precise limits upon which or upon part of which, there was some sort of a structure. For instance, there is a provision in the Act which requires premises to be registered. The Act as a whole contemplates a permanent place where a regular business is carried on in a place which has limits which can be precisely identified.

That leads me to this conclusion. The word "shop" is interpreted, as I have pointed out, as including any premises where any retail trade or business is carried on, and an argument has been addressed to us with the object of showing that the only test, the only matter at which you want to look, is to see whether or not a retail trade is carried on. Counsel for the appellant starts with the submission that the word "shop" has a natural meaning, but that the interpretation clause has given it an extended and unnatural meaning, to use the language which PIM, J., used in an Irish case to which we have been referred, *Wallace v. Dixon* (2). But I think that, in addition to considering the question whether any retail trade is carried on, it is necessary to consider whether there are any premises in the proper significance of the word at which a retail trade is carried on. I think that, looking at the scope of the Act and the obvious intentions as I find them in the Pharmacy Act to deal with places of the character I have described, that is to say, defined premises with a structure upon them, the definition given by the Act must be read as including, in addition to that which would be clearly and primarily a shop, a place defined by precise limits with some structure upon it at which a retail trade is carried on.

I have been dealing so far with the matter as one of pure construction, apart from any authority which there may be on the subject. I do not think that cases which decide what is the meaning of the word "shop" used alone are of much assistance to the court; but there has been cited to us one case where it was necessary to consider the same definition as that with which we have to deal, *Dennis v. Hutchinson* (3). There the real question which the court was considering was whether a place, to use a neutral word, where some sort of amusement or game took place was a place which satisfied the interpretation clause with reference to the part of the interpretation which refers to the carrying on of a retail trade or business, and it was decided on very clear grounds that the place in that case where games of chance and skill were carried on was not a place where retail trade was carried on. In the course of considering that question there is no doubt that observations were made by LORD TREVETHIN, L.C.J., and by AVORY, J., which at first sight seemed to give some support to the argument addressed to us on behalf of the appellant. For instance, LORD TREVETHIN, L.C.J., says, at p. 697:

Prima facie a shop is a place where goods are sold by retail and stored for sale. . . .
On p. 698, AVORY, J., says:

It seems to be quite clear that the ordinary dictionary meaning of "shop" is a place where ordinary retail selling and the serving of customers takes place . . .

For the reasons which I have mentioned, I think something more has to be looked at than the word "shop," or something more than the reference to the carrying on of a trade or business, and that is the word "premises." I do not think that the court, either LORD TREVETHIN, L.C.J., or AVORY, J., in *Dennis v. Hutchinson* (3) was intending to deal with the question which we have to consider as to what is the meaning of the word "shop" with reference to any

other matter than that which they were considering, namely, the difference between a game of chance and skill and retail buying and selling. For that reason, I do not think that the view I have formed is in any way affected by the *dicta* or the expressions used by LORD TREVETHIN, L.C.J., or by AVORY, J.

One other case, which is not really an authority, was cited to us, and that is *Inland Revenue v. Caplan* (4), where LORD HUNTER, a judge of great authority in a dissentient judgment says :

A All that was necessary was that there should be a place—it might be an open yard—where retail business was carried on.

With the greatest possible respect to LORD HUNTER, is that intended to be a complete definition of the word “shop”? It might be accurate or it might be one which I should respectfully adopt if the only question was the meaning of the word “shop,” but I do not think it is a satisfactory statement with reference to a shop interpreted as the word has to be interpreted in the place where it is found in the Pharmacy Act, 1941.

B The only other authority was that which I have already mentioned, *Wallace v. Dixon* (2), where three judges had to consider the definition of the word “shop” in the Shops Act, 1912, and there the question was whether a coal merchant’s branch office, in which no coal was kept, and only orders were dealt with, was a shop and whether a particular attendant who took the orders was a shop assistant within the meaning of that subsection. In the course of the full judgment given by the three members of the court expressions are to be found which support the argument that the definition in sect. 19 includes a retail shop where orders only are taken. But that is not the question which we have to consider in this particular case, and I find very little, if anything, in the decisions given there which ought to affect our decision in this case except that which seems to be quite obvious :

D . . . that the legislature meant to give an extended and unnatural meaning to the word “shop”, a meaning that went far beyond the popular and recognised meaning of the word.

That is a citation from the judgment of PIM, J., at p. 247. Now accepting that statement, as I do, as accurate, and, indeed, as the obvious effect of the interpretation section, I do not find that the words which are used, namely, “premises where a retail trade is carried on”, are so wide as to require us to find that a

E place in no way limited or bounded by any ascertainable marks or fences, with no structure upon it except two trestles and a board, with no continuity or regularity except that business took place twice a week, is a shop for the purposes of the Pharmacy Act, 1941. I think, therefore, that the decision from which this appeal is brought is a right one, and that the place or space, or whatever you call it, in this place was not a shop within the meaning of the Act.

F MACNAGHTEN, J. : I agree.

TUCKER, J. : I also agree.

Appeal dismissed.

Solicitors : *Corbin, Greener and Cook* (for the appellant) ; *Thompson Quarrel & Co.* (for the respondent).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

G ATTORNEY-GENERAL v. GRETTON AND SHRIMPTON.
[KING’S BENCH DIVISION (*Macnaghten, J.*), **October 28, 29, November 1, 1943.**]

Estate and other Death Duties—Cesser of annuity—Annuity bequeathed by will—Substitution of smaller annuity secured by deed of compromise—Whether “granted for full consideration in money’s worth”—Finance Act, 1894 (c. 30), s. 3 (1).

H By a deed of compromise, made in 1883, an annuitant agreed with the residuary legatees that, in consideration of their withdrawing their threatened opposition to the probate of the will, she would take an annuity of £5,000 in satisfaction of the annuity of £6,000 bequeathed to her and that she would for 5 years release the right given her by the will to require the trustees to purchase such an annuity in her name. The trustees contended that the annuity of 1883 was granted by the residuary legatees and not by the testator and that the annuitant’s consent to the reduction of her

annuity by £1,000 and to the postponement for 5 years of her right to require the purchase of an annuity represented full consideration in money's worth paid to the grantors for their own use and benefit within the exception provided by sect. 3 (1) of the Finance Act, 1894 :—

HELD : the annuity was taken under the will. It could not be said that the residuary legatees were the grantors or that they received full consideration in money's worth for their own use and benefit. Estate duty was, therefore, payable on the determination of the annuity. A

[EDITORIAL NOTE. Where difficulties arise under a will, it is not unusual for the parties to agree to a variation of the provisions made by the testator. If this includes the reduction of the amount of an annuity, it cannot be said that the annuity is granted by the parties to the arrangement in consideration for some benefit which they obtain thereunder. The testator is still the grantor of the annuity and upon its cesser estate duty is payable in respect of the slice of the estate represented by the annuity.

AS TO EXEMPTION FROM ESTATE DUTY WHERE MONEY CONSIDERATION IS GIVEN, see HALSBURY, Hailsham Edn., Vol. 13, p. 251, para. 244 ; and FOR CASES, see DIGEST, Vol. 21, pp. 17-19, Nos. 97-107.] B

Case referred to :

**(1) Re Gretton's Indenture, Re Ratcliff & Brinckman's Trusts, Hood v. Byron (Lady), [1923] 1 Ch. 77 ; 28 Digest 76, 411 ; 92 L.J.Ch. 49 ; 127 L.T. 817.*

INFORMATION to recover estate duty on the cesser of an annuity. The facts are fully set out in the judgment. C

The Attorney-General (Sir Donald B. Somervell, K.C.), and J. H. Stamp for the Crown.

Cyril King, K.C., and A. P. Vanneck for the defendants.

MACNAGHTEN, J. : By his will dated Aug. 26, 1882, Frederick Gretton bequeathed to Fanny Lucy Radmall, who first married a Mr. Brinckman and, secondly, Lord Byron, and afterwards became Lady Houston : D

... the clear yearly sum or annuity of £6,000 British sterling per annum during her life free of legacy duty income tax and all other duties whatsoever . . .

and he directed his trustees at any time, if the said Fanny Lucy Radmall should so desire, to lay out a sufficient portion of the estate in the purchase of such an annuity in her name, either from the Commissioners for the Reduction of the National Debt or from any insurance or other public company or corporation approved of in writing by her. He gave also an annuity of £75 to his manservant William Pawsey for his life, and subject to these annuities of £6,000 and £75, he gave, devised and bequeathed all his estate and property, both real and personal, unto and equally between his two sisters Frances Gretton and Clara Gretton. E

Frederick Gretton died on Nov. 15, 1882. His brother, John Gretton, the father of the first-named defendant, the Rt. Hon. John Gretton, was his heir-at-law. Frederick Gretton's sole next-of-kin were his brother John Gretton and his three sisters Frances Gretton, Clara Gretton, and Mary, the wife of Lewis Wigan. After the death of Frederick Gretton, his brother John and his sisters, Frances and Clara, threatened that they would contest the validity of his will, but by an indenture dated Feb. 14, 1883, and made between John Gretton of the first part, Frances Gretton of the second part, Clara Gretton of the third part and Fanny Lucy Radmall of the fourth part, they agreed to withdraw their opposition to the will on the terms therein set out, and the will was proved by the executors named therein on Apr. 26, 1883. The gross and net values of the testator's estate were £412,659 15s. and £350,910. F

The indenture of Feb. 14, 1883, after reciting *inter alia* that John Gretton, Frances Gretton and Clara Gretton had threatened to contest with Fanny Lucy Radmall the validity of the will of Frederick Gretton, and that, in order to prevent any litigation and to compromise and settle all questions between the parties thereto in reference to her rights under the will, Fanny Lucy Radmall, while insisting that the will was a good and valid testamentary disposition in all respects, had agreed to the arrangement thereafter contained, provided as follows : G

(1) In lieu and satisfaction of the annuity of £6,000 by the said recited will given to her the said Fanny Lucy Radmall will accept an annuity of £5,000 clear of legacy duty income tax and all other duties whatsoever which said annuity shall be received by her out of the estate of the said Frederick Gretton as mentioned in the said will H

or out of the shares of the said estate as hereinafter mentioned but nothing herein contained shall be taken to impose any personal liability on the said Frances Gretton and Clara Gretton or either of them to pay the said annuity or any part thereof. The said annuity shall accrue as from the 15th day of November, 1882, and be payable quarterly the first payment to be made as on the 15th day of February, 1883, and the said Fanny Lucy Radmall will for the period of five years from the day of the date hereof waive and release the right by such will given to her of calling upon the trustees thereof to purchase the annuity thereby provided for her or any part thereof.

A (2) Provided always and it is hereby agreed and declared that it shall be lawful for the said Frances Gretton Clara Gretton or any or either of them or their or any or either of their executors or administrators at any time within the period of five years from the day of the date hereof to purchase or transfer into the names of two trustees the one to be chosen by the person or persons making such purchase or transfer and the other by the said Fanny Lucy Radmall such a sum of stock of the Government of Great Britain the interest or dividends whereof will amount to the total of the said annuity of £5,000 and the tax and duties thereon as aforesaid say £5,300 And the said trustees shall hold the said stock in trust in the first place to pay the said annuity tax and duties and subject thereto as part of the residuary estate of the said Frederick Gretton.

B (4) Provided further that if such purchase or transfer as aforesaid shall be made within the said period of five years then the right by the said recited will given to the said Fanny Lucy Radmall to call upon the trustees thereof to purchase an annuity shall absolutely cease and determine and the said Fanny Lucy Radmall will if the persons or person making such purchase or transfer shall so require and at their his or her expense execute a release of such right and after such purchase or transfer the said annuity of £5,000 and the tax and duties thereon as aforesaid shall be payable exclusively out of the income of the funds purchased or transferred or if such income shall be insufficient then out of the corpus thereof and after such purchase or transfer the remainder of the estate of the said Frederick Gretton shall be absolutely released and exonerated from the same annuity and from all claim and demands in relation thereto.

C D The indenture further provided that John Gretton, Frances Gretton and Clara Gretton thereby withdrew all opposition to the admission of the will to probate. By a deed poll dated June 8, 1888, under the hands and seals of Robert Ratcliff and the Rev. Arthur Brinckman expressed to be supplemental to the indenture of Feb. 14, 1883, after reciting that Clara Gretton had died on Sept. 8, 1887, and that the annuitant was then the wife of Theodore Francis Brinckman, and that the annuity had been paid to her without deduction down to Feb. 5, 1888, and that, pursuant to the power reserved by the said indenture of Feb. 14, 1883, Frances Gretton and John Gretton within the period of 5 years from Feb. 14, 1883, had purchased and in part transferred into the names of Robert Ratcliff, a trustee chosen by them, and Arthur Brinckman, a trustee chosen by the annuitant, the sum of £176,700 3 per cent. Consolidated Bank Annuities, the dividends whereof at the time of the purchase amounted to the yearly sum of £5,300, and that that sum had been converted into 2½ per cent. Bank Annuities and was then standing in the names of Robert Ratcliff and Arthur Brinckman, and that, for the purpose of declaring the trusts upon which they held the same, the said Robert Ratcliff and Arthur Brinckman had agreed to execute the said deed poll, it was thereby witnessed that, in pursuance of the said agreement the said Robert Ratcliff and Arthur Brinckman thereby declared that they and the survivor of them would stand possessed of the sum of the annuity standing in their names in trust, in the first place, to pay the said annuity of £5,000 payable by the said indenture of Feb. 14, 1883, and subject to the payment of the said annuity, income tax and duties, they would hold the said sum and the dividends thereof as part of the residuary estate of Frederick Gretton. The defendants are the present trustees of the trust fund.

E F G H The annuitant, then Lady Houston, died on Dec. 23, 1936, and this information is brought by the Crown to establish and enforce a claim to estate duty on the cesser of the annuity. In answer to the information the defendants rely on the Finance Act, 1894, s. 3 (1), which provides that estate duty shall not be payable in respect of the determination of any annuity for lives granted for full consideration in money or money's worth paid to the grantor for his own use and benefit. It is said that Frances and Clara Gretton were the grantors of the annuity of £5,000, and that they granted it for full consideration in money or money's worth paid to them for their own use and benefit. I apprehend that Frances and Clara Gretton would have been astonished beyond measure if they had been told that they had granted an annuity to Miss Radmall. They cer-

tainly had no desire to do so; it is plain that their object in threatening to oppose probate of the will was to deprive Miss Radnall of the annuity she was to take under it.

The matter, as it seems to me, is concluded by the judgment of ROMER, J., as he then was, in *Re Ratcliff and Brinckman's Trusts*; *Hood v. Lady Byron* (1). The increase in the income tax which took place during the last war rendered the income derived from the trust fund insufficient to pay the annuity free of tax, and recourse was had to the principal, that is, to the fund which would on the death of the annuitant, then Lady Byron, form part of the estate of Frederick Gretton. The question, therefore, was raised by the persons interested in that estate as to whether, on the true construction of the deed of Feb. 14, 1883, the obligation to pay the annuity free of tax was not invalid owing to the provisions of the Income Tax Act, 1842, s. 103.

In the course of his judgment, ROMER, J., after setting out the terms of the will and the material clauses of the deed of Feb. 14, 1883, and the deed poll of June, 1888, dealt with the question at issue between the parties. After pointing out that the provisions of sect. 103 have no application to an annuity given by a will because in such a case there is no contract, covenant or agreement, he proceeded at pp. 87, 88:

The direction in the testator's will that Lady Byron's annuity of £6,000 should be free of income tax was therefore valid in law, and, if the parties to the deed of Feb. 14, 1883, had confined themselves to the agreement set out in the first clause of the operative part of that deed, the stipulation in that clause that the annuity of £5,000 should be clear of income tax would not, in my opinion, have been rendered invalid by sect. 103 of the Act. For Lady Byron would, I think, have taken the annuity of £5,000 under the will, and the will alone, the effect of the deed being merely an agreement on her part to give up a portion of the £6,000 annuity bequeathed to her by the will. But the effect of the provisions contained in cl. (2) and (4) of the deed if, as subsequently happened, they were resorted to, was in my judgment to secure to Lady Byron an annuity which could no longer be regarded as an annuity derived under the will alone, but was an annuity that became payable by virtue of those clauses. It was admitted before me, on behalf of Lady Byron, that those clauses and the deed poll of June, 1888, which gave effect to them, constitute an agreement within the meaning of that word in sect. 103, but it was contended that they were not in contravention of the section.

Then ROMER, J., went on to say that, in his opinion, they were in contravention of the section, and, therefore, that the agreement contained in those clauses (2) and (4) was, in the language of the section, utterly void. If, under cl. (1) of the agreement, Frances and Clara Gretton were not the grantors, they could not become the grantors by the provisions contained in cl. (2) and cl. (4).

As to the suggestion that Clara and Frances Gretton had received full consideration in money or money's worth, counsel for the defendants relied upon the fact that Miss Radmall, as she then was, consented to the reduction of her annuity by £1,000, and that the two Miss Grettons, entitled as they were, subject to the annuities of £6,000 and £75, to the whole of the testator's estate, did thereby receive money or money's worth to that extent; and he also relied upon the postponement for 5 years of the annuitant's right to require the purchase of an annuity as being consideration moving from Miss Radmall to the Miss Grettons, ignoring the fact that there was the consideration moving from the Miss Grettons to the annuitant that they withdrew their opposition to the probate of their brother's will. Whether the bargain made by the annuitant was a good one for her no one can say; that depends upon what the result of the threatened probate action would have been; but apparently Miss Radmall thought it worth while to sacrifice £1,000 a year to make sure of the rest of the annuity, and the Miss Grettons thought it was worth while to consent to the annuity of £5,000.

In my opinion, it cannot be said that either Frances or Clara Gretton were grantors of the annuity, nor can it be said that they received full consideration in money or money's worth for their own use and benefit. Therefore, judgment must be entered for the Crown, with costs.

Judgment for the Crown with costs.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Radcliffes & Co.* (for the defendants).

[Reported by GWYNEDD LEWIS, Barrister-at-Law.]

LONDON SACK & BAG CO., LTD. v. DIXON & LUGTON, LTD.

[COURT OF APPEAL (Scott, MacKinnon and du Parcq, L.JJ.), November 9, 10, December 6, 1943.]

Arbitration—Written submission—Contention that rules of a trade association applicable—Articles of association as contract between members of company—Companies Act, 1929 (c. 23), s. 20.

A The respondents bought from the appellants 5,000 used cotton flour bags and on delivery complained that the goods were not up to description and claimed repayment with interest and damages. There was no arbitration clause in the written contract but none the less the appellants took out a summons under the Arbitration Act, 1889, s. 4, to stay the action, relying upon the contention that there was a written submission within the Act for the following reasons: (i) both parties were members of the United Kingdom Jute Goods Association, Ltd.; (ii) that company had rules binding upon all members, No. 1 of which provided that "all disputes arising out of transactions connected with the trade . . . shall be referred to arbitration"; (iii) the transaction in question was concerned with the jute trade; (iv) the Companies Act, 1929, s. 20, made a binding agreement between the members of the association in the terms of the articles and rules regulating the association and the rules were, therefore, a sufficient submission to arbitration. The respondents opposed any stay on the grounds that (i) the appellants had proved no written submission and (ii) the appellants had taken a step in the action:—

HELD: the appellants had failed to prove that they and the respondents had made a binding submission to arbitration.

D [EDITORIAL NOTE. For certain purposes the articles of association are by the Companies Act, 1929, s. 20, made a binding contract between members. This, however, it seems, can relate only to their rights as members of the company and not to their rights in an ordinary business contract having nothing to do with the company. It is here sought to make the articles with the rules of the company, which was a trade association, a written submission to arbitration.

AS TO WHAT AMOUNTS TO A SUBMISSION IN WRITING, see HALSBURY, Hailsham Edn., Vol. 1, pp. 623-625, para. 1072; and FOR CASES, see DIGEST, Vol. 2, pp. 313-318, Nos. 5-50.]

E Cases referred to:

* (1) *Hickman v. Kent or Romney Marsh Sheepbreeders' Assocn.*, [1915] 1 Ch. 881; 9 Digest 86, 341; 84 L.J.Ch. 688; 113 L.T. 159.

* (2) *Welton v. Saffery*, [1897] A.C. 299; 9 Digest 197, 1230; 66 L.J.Ch. 362; 76 L.T. 505.

(3) *Wood v. Odessa Waterworks Co.* (1889), 42 Ch.D. 636; 9 Digest 87, 344; 58 L.J.Ch. 628.

F (4) *Borland's Trustee v. Steel Bros. & Co., Ltd.*, [1901] 1 Ch. 279; 9 Digest 100, 423; 70 L.J.Ch. 51.

(5) *Baker v. Yorkshire Fire and Life Assurance Co.*, [1892] 1 Q.B. 144; 2 Digest 315, 24; 61 L.J.Q.B. 838; 66 L.T. 161.

(6) *Re Tavarone Mining Co., Pritchard's case* (1873), 8 Ch. App. 956; 9 Digest 86, 342; 42 L.J.Ch. 768; 29 L.T. 363.

(7) *Pitchers, Ltd. v. Plaza (Queensbury), Ltd.*, [1940] 1 All E.R. 151; Digest Supp.; 162 L.T. 213.

G (8) *Metropolitan Tunnel & Public Works Co. v. London Electric Ry. Co.*, [1926] Ch. 371; Digest Supp.; 95 L.J.Ch. 246; 135 L.T. 35.

APPEAL by the defendants from an order of CROOM-JOHNSON, J., dated July 30, 1943. The facts are fully set out in the judgment of SCOTT, L.J.

A. S. Comyns Carr, K.C., and Ivan Horniman for the appellants.

C. B. Guthrie for the respondents.

H *Comyns Carr, K.C.*: There is nothing to prevent a company from adopting an article which allows a man to become a member of a company without his having to buy a share. Both parties in the present case signed something which must be read as adopting the memorandum and articles of association and the rules of the United Kingdom Jute Goods Association, Ltd. An agreement in writing to arbitrate is satisfied, although the agreement is not signed by the parties, if it can be identified as their agreement. In general, no signature is required to a written agreement to arbitrate. If signature is required, it is to be found in the present case by reason of the Companies Act, 1929, s. 20.

Signature is to be found also by reason of the application for membership of the association as a result of which the parties became members and became bound by the rules. One cannot have a clearer agreement than that. Either no signature is required or I have it. *Hickman v. Kent or Romney Marsh Sheep-breeders' Association* (1) connects together all the authorities on the points which arise in the present case. Dealing in used cotton flour bags is a transaction connected with the jute trade. That is not disputed. *Baker v. Yorkshire Fire and Life Assurance Co.* (5) shows quite clearly that signature is not necessary to a submission to arbitration. [Counsel referred to *Welton v. Saffery* (2), *Wood v. Odessa Waterworks Co.* (3), *Borland's Trustee v. Steel Bros. & Co., Ltd.* (4), *Re Tavarone Mining Co.* (6), *Pitchers, Ltd. v. Plaza (Queensbury), Ltd.* (7) and *Metropolitan Tunnel & Public Works Co. v. London Electric Ry. Co.* (8).]

Guthrie : In the present case the appellants have taken a step which defeats their claim to apply for a stay. On the facts the present case is distinguishable from *Metropolitan Tunnel & Public Works Co. v. London Electric Ry. Co.* (8). Before the appellants can avail themselves of the Companies Act, 1929, s. 20, or the memorandum and articles and the rules which apply to arbitration, they must show that the parties are members of the association. It is impossible in law to admit to membership of a limited company anyone who is not a shareholder. If the rules contemplate members of a company who are not shareholders, the rules are *ultra vires* the Companies Act. The appellants say that in the present case the two companies who are parties to this action are members of the association through their respective directors. That, however, is not possible in law. [Counsel referred to BUCKLEY ON THE COMPANIES ACTS, 11th Edn., s. 20, pp. 34 and 35]. [He was stopped by the court].

SCOTT, L.J. : By writ issued on June 8, 1943, the respondent company (to whom I will refer as the buyers) brought an action against the appellant company (to whom I will refer as the sellers). The dispute arose out of a contract for the sale of 5,000 used cotton flour bags. The contract was made by a letter dated May 18, 1943, from the buyers to the sellers, and a letter and telegram both dated May 20, 1943, from the sellers to the buyers. The price was 2s. per bag payable in advance. The buyers paid the £500, but on delivery complained that the goods were not up to description and claimed to get their money back with interest and damages. There was no arbitration clause in that written contract—either set out in the letters or printed on the back or expressly incorporated in it in any way, as is so usual with contracts made by members of commercial associations. But the sellers none the less took out a summons under the Arbitration Act, 1889, s. 4, to stay the action relying on the contention that there was a written submission within the Act for the following reasons. (i) Both companies, the sellers allege, are members of the United Kingdom Jute Goods Association, Ltd., a company incorporated in 1909 ; (ii) that company has rules binding on all members, r. 1 of which provides that :

... all disputes arising out of transactions connected with the trade ... shall be referred to arbitration ...

(iii) a sale of used cotton flour bags is, as proved by an affidavit, a transaction connected with the jute trade. How they sought to spell out a written submission from membership of the association I will explain in a moment. The buyers opposed any stay, (i) because, as they submitted, the sellers had proved no written submission ; and (ii) because they contended that the sellers had taken a step in the action. With this I will deal later.

The sellers sought to reach their goal of a written submission by a devious route. They relied on the following steps in their argument. The Companies Act, 1929, s. 20 (1), provides as follows :

Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.

The memorandum of association of the United Kingdom Jute Goods Association, Ltd., contains *inter alia* the following objects :

(3) (i) To promote and protect the character, status and interest of the jute goods trade, to make rules and regulations for its conduct ... (iii) To make rules and regulations

for the admission of members not necessarily shareholders of this association . . . (v) To maintain uniformity in rules, regulations and usages of the jute goods trade.

The articles of association provide as follows :

3 The shares shall be under the control of the directors, who may allot or otherwise dispose of the same to such persons on such terms and conditions and at such times as the directors think fit. 5 No person shall be recognised by this association as holding any share upon any trust. 6 Every member shall without payment be entitled to one certificate under the seal specifying the shares held by him. 12 (1) Every application of membership of this association shall be made in writing signed by the applicant and his proposer and seconder, both of whom must be members, and addressed to the secretary. (4) Every person upon being elected a member of this association shall be entitled to have allotted or transferred to him one share in this association . . .

The acquisition of one share shall be made a condition precedent to admission to membership. (5) No shares held by any member in a representative capacity shall confer upon him any rights or privileges except as expressly provided herein. (8) Registered joint stock companies may be admitted to this association. They must be represented by one or more of their directors whose names must be submitted to this association for approval at the time when the company is proposed for election, but the company shall have the right at any future time, with the approval of the association, to substitute other representatives. Every such director must acquire one share of this association. As distinct from its director a company need not acquire a share.

The association's register of members pursuant to the Companies Act, 1929, s. 95 (1), was not in evidence.

Their contention was that both the selling company and the buying company were members of the association under art. 12 (8) ; and that the first of the rules of the association, made pursuant to the articles, was thus binding upon both, and that there was therefore a written submission within the meaning of the Arbitration Act, even though not signed by the parties to that "arbitration agreement," as the submission is defined by sect. 27 of the Act. In answer to the court, counsel for the appellants went so far as to contend that a purely oral agreement expressed to include a printed arbitration clause pasted up on the wall would satisfy the statute. I reject this contention. The arbitration clause must be in the written submission. It cannot be said that there is a written agreement to arbitrate unless there is a clear reference in the written contract between the parties to the alleged arbitration clause and that reference must amount to an incorporation of it. His second contention was a roundabout one. He submitted that sect. 20 creates a contract between the members of a company *inter se*, and cited the chief cases dealing with that topic such as *Hickman v. Kent or Romney Marsh Sheepbreeders' Assn.* (1), *Welton v. Saffery* (2), *Wood v. Odessa Waterworks Co.* (3), and *Borland's Trustee v. Steel Bros. & Co., Ltd.* (4).

I am not satisfied that he has interpreted those decisions correctly. It may well be, even as between ordinary members of a company who are also in the nominal way shareholders, that sect. 20 adjusts their legal relations *inter se* in the same way as a contract in a single document would if signed by all ; and yet the statutory result may not be to constitute a contract between them about rights of action created entirely outside the company relationship, such as trading transactions between members. I notice that HALSBURY, LAWS OF ENGLAND, Hailsham Edn., Vol. 5, p. 142, para. 256, says this :

While the articles regulate the rights of the members, *inter se*, they do not it would seem constitute a contract between the members, *inter se*, but only a contract between the company and its members, and, therefore, the rights and liabilities of members as members under the articles can only be enforced by or against the members through the company.

The importance of that paragraph is that any doubt about the written submission being quite clearly established is, in my view, a sufficient reason for the judge's exercising his discretion against a stay : and *a fortiori* a reason for our not disagreeing with him.

There is an even stronger point against allowing the appeal. Even if the cases which counsel for the appellants cited amounted to the enunciation of a clear rule that, as between shareholding members—*i.e.*, ordinary members of a company having a capital interest in the company by reason of their shares—there is a written contract for what may be called the purposes of company law,

it does not in the least follow that the rule applies to extrinsic purposes such as individual trading. But in the present case that objection may be pushed even further. The two companies parties to this litigation are not ordinary members of the company at all; they are only members in the same sense that members of a proprietary club who have no shares in the company owning the club, are given certain rights of members, *e.g.*, to frequent the club for meals, or golf, or reading. I cannot think that the principle of the cases cited to us can be extended to such members as these two companies are. Their directors are required to hold a share in order to represent them, but no trusts are recognised by the articles; and I do not think the cases in question have any bearing on the issue we have to decide. I am not satisfied that it is possible to spell a written submission out of the memorandum and articles of association and the rules, even with the help of the Companies Act, 1929, s. 20.

That decides the appeal and renders consideration of the other point superfluous. I will only add that, on the facts, I should be doubtful whether a step had been taken which would bar the right to a stay if there were a written submission. The appeal must be dismissed with costs.

I should add that I have read the judgments of *MACKINNON* and *DU PARCQ*, *L.JJ.*, and I am satisfied that the rights of the parties in regard to pleading a defence that the article acts as a condition precedent are not affected by this decision.

MACKINNON, L.J.: The plaintiffs by their writ and statement of claim sued the defendants for an alleged breach of a contract to sell 5,000 cotton flour bags in good sound condition. The contract relied on was contained in a letter of May 18, 1943, and a letter and telegram of May 20. On July 9 the defendants took out a summons asking that the action be stayed pursuant to the Arbitration Act, 1889, s. 4. and stating that the plaintiffs and the defendants were bound by an agreement to refer to arbitration matters in respect of which the action was commenced. This application was refused and the defendants appealed to the judge in chambers, who dismissed the appeal, but gave leave to appeal to this court. By their notice of appeal the defendants ask for an order:

That all further proceedings in this action be stayed pursuant to the Arbitration Act, 1889, s. 4.

To succeed under that section the defendants must establish that there is, as regards the claim put forward by the plaintiffs, a written submission to arbitration binding upon both of them. There is no suggestion whatever that the contract in the letters and telegram on which the plaintiffs base their claim contains any such submission or says a single word about arbitration.

For the submission in writing on which they rely the defendants refer to the memorandum and articles of association of the United Kingdom Jute Goods Association, Ltd., and the rules and regulations of that association as to disputes and arbitrations. Of the latter, r. 1 says:

All disputes arising out of transactions connected with the trade, or between parties to contracts made subject to the rules of this association shall be referred to arbitration.

There seems no definition in this rule of "the trade," but r. 2 refers in four places to "a dispute arising out of a transaction or transactions in connection with the jute goods trade, and presumably "the trade" in r. 1 refers to "the jute goods trade." R. 21 provides that:

No action shall be brought in respect of any dispute falling within the meaning of these rules until such dispute shall have been decided by an arbitration award . . . and the obtaining of such an award shall be a condition precedent to the right of any party to bring any action . . . in respect of such dispute against the other party.

To establish that in these rules there is a submission or agreement to arbitrate any dispute arising out of the contract sued on by the plaintiffs, the defendants must prove (i) that the plaintiffs and defendants made a binding contract with each other to abide by and be subject to these rules, and (ii) that the dispute involved in this action arises out of a "transaction connected with the jute goods trade."

In my opinion, they failed to prove either of these propositions. For the first reliance was placed on the memorandum and articles of the association.

Art. 12 of the latter provides for individuals becoming members by purchasing a share. It also provides that :

Registered joint stock companies may be admitted to this association. They must be represented by one or more of their directors . . . Every such director must acquire one share.

A It is asserted that the plaintiff company and the defendant company have been "admitted to the association," being represented by a director or directors holding a share. No doubt articles of association may create a contract between the member-shareholders. Indeed, it is so provided by the Companies Act, 1929, s. 20. But I think it is impossible to contend that, by reason of these articles, the plaintiff company and the defendant company have made a contract to submit disputes to arbitration because each has a director who is a shareholder and the companies have been admitted to the association—whatever B that may mean.

As to (ii) the affidavit in support of the summons says airily that "the goods in question are within the category of jute goods . . ." and "the dispute is one connected with the jute trade within the meaning of rr. 1 and 21." But this is a matter of construction, not a question of opinion. The goods in question are described as "cotton flour bags." Is that "a transaction in connection with the jute goods trade"? Jute is the fibre from certain Indian plants. C Cotton is a fibrous substance which clothes the seeds of the cotton plant. As a matter of construction I am satisfied that a sale of "cotton flour bags" is not "a transaction in connection with the jute goods trade."

If the defendants' contention is correct, r. 21 will provide them with a complete defence to the action. It is significant of the confidence of the plaintiffs in the error of that contention that they are apparently content to run the risk of this defence being pleaded. If it is pleaded by the defendants, the issue D must be determined by the judge at the trial. And I do not think our decision on this summary application to stay the action ought to be taken as having decided that issue in the action in favour of the plaintiffs.

The plaintiffs also relied on a contention that the defendants had taken a step in the action because on July 9 they issued a summons asking for further time to deliver their defence. The facts are that, on July 9, they took out the summons E to stay the action. As the return day for that summons would be after the date when they should deliver their defence, they took out the summons for time on the same day, and on July 12 got the master to extend their time until the hearing of the summons to stay on July 16. In these circumstances, I do not think the plaintiffs can say that the defendants took a step in the action so as to debar them from pursuing their application to stay the action.

F This appeal must be dismissed with costs.

DU PARCQ, L.J.: I have had the advantage of reading the judgments of SCOTT and MACKINNON, L.JJ., and agree with them that this appeal should be dismissed. The evidence which was advanced before this court and before the judge has not satisfied me that the parties ever agreed to refer to arbitration the matter in dispute in the action. At the same time, I wish to make it plain G that I concur in the opinion expressed by MACKINNON, L.J., that our decision on this summary application is not to be taken to have decided in favour of the plaintiffs the issue which may be raised at the trial under r. 21. The judge who tries the action may have evidence before him which is not before us. I have only to add that I prefer to express no opinion on the question whether the defendants can be said to have taken a "step in the proceedings."

Appeal dismissed with costs.

H Solicitors: Woodcock, Ryland & Co., agents for Lancashire, Humphreys & Grundy, Manchester (for the appellants); Bell & Ackroyd (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

Re SCHEBSMAN, Ex parte THE OFFICIAL RECEIVER. THE TRUSTEE v. CARGO SUPERINTENDENTS (LONDON), LTD. AND OTHERS.

[COURT OF APPEAL (Lord Greene, M.R., Luxmoore and du Parcq, L.JJ.),

October 18, 19, 20, December 6, 1943.]

Bankruptcy—Agreement to pay sums on retiring employee's death to his widow and daughter—Bankruptcy and death of employee within two years—Whether sums interceptable by bankrupt's trustee in bankruptcy—Whether agreement a settlement void under Bankruptcy Act, 1914, s. 42—Bankruptcy Act, 1914 (c. 59), s. 42.

Contract—Implied term—Contract to pay sum to third party—Right to intercept payment to third party—Implication of term that payment should be made as party directs.

S. was for many years employed by a Swiss company and its subsidiary, an English company. His employment came to an end on Mar. 31, 1940, and by an agreement dated Sept. 20, 1940, made between S. and the two companies, it was agreed that, in consideration of his loss of employment, the English company would pay to S. the sum of £2,000 immediately and a further sum of £5,500 by instalments over a period of 6 years and that, if he should die within that period, certain sums would be paid to his widow over a number of years, and, if she should die during that time, payments would be made to his daughter. S. was adjudicated bankrupt on Mar. 5, 1942, and died on May 12, 1942. His trustee in bankruptcy claimed that the sums payable under the agreement to the widow or possibly the daughter formed part of the deceased bankrupt's estate. The contention was based on the ground that S. always had the right to intercept the sums in question and this right was now vested in the trustee in bankruptcy. Alternatively, it was contended that the provision made by the agreement for the widow and the daughter was a voluntary settlement and void under the Bankruptcy Act, 1914, s. 42, by reason of S.'s bankruptcy within two years of the date of the settlement :—

HELD : (i) in respect of the payments to the widow and daughter, S. was neither a trustee nor an agent of those persons to receive those sums on their behalf.

(ii) the terms of the contract itself, the circumstances in which it was made and the objects to which it was directed made it impossible to imply a term under which S. or his sequels in title could have a right to intercept the payments, and, therefore, the trustee in bankruptcy had no right to intercept them.

(iii) S. had not become entitled in respect of the sums in question to anything except the right to require payments of those sums to third parties, and there was, therefore, no property settled by him within the meaning of the Bankruptcy Act, 1914, s. 42.

Decision of UTHWATT, J. ([1943] 2 All E.R. 387) affirmed.

[EDITORIAL NOTE.] The Court of Appeal in this matter have affirmed the decision of UTHWATT, J., and have rejected the trustee's claim for substantially the same reasons. The main argument below was that the contract upon its proper construction was one to pay as the debtor should direct. In the Court of Appeal it was suggested that there was an equity by which the debtor could compel payment to himself. The court is, however, clear that no such equity exists. The terms of the contract are binding unless released by a new agreement between the parties. Upon the point under the Bankruptcy Act, 1914, s. 42, the Court of Appeal have adopted the judgment of UTHWATT, J.

AS TO EFFECTS OF BANKRUPTCY ON RIGHTS ARISING OUT OF CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 2, p. 214, para. 282; and FOR CASES, see DIGEST, Vol. 5, pp. 930-934, Nos. 7616-7632.]

Cases referred to :

*(1) *Re Stapleton-Bretherton, Weld Blundell v. Stapleton-Bretherton*, [1941] Ch. 482; [1941] 3 All E.R. 5; Digest Supp.; 110 L.J.Ch. 197; 166 L.T. 45.

*(2) *Re Engelbach's Estate, Tibbetts v. Engelbach*, [1924] 2 Ch. 348; 43 Digest 567, 165; 93 L.J.Ch. 616; 130 L.T. 401.

(3) *Cleaver v. Mutual Reserve Fund Life Assn.*, [1892] 1 Q.B. 147; 43 Digest 657, 806; 61 L.J.Q.B. 128; 66 L.T. 220.

- (4) *Re Sinclair's Life Policy*, [1938] Ch. 799; [1938] 3 All E.R. 124; Digest Supp.; 107 L.J.Ch. 405; 159 L.T. 189.
- (5) *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A.C. 239; 42 Digest 989, 180; 74 L.J.K.B. 525; 92 L.T. 710.
- (6) *Burges v. Wickham* (1863), 3 B. & S. 669; 29 Digest 188, 1465; 33 L.J.Q.B. 17; 8 L.T. 47.
- (7) *Fowkes v. Pascoe* (1875), 10 Ch. App. 343; 20 Digest 462, 1878; 44 L.J.Ch. 367; 32 L.T. 545.
- A (8) *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.*, [1915] A.C. 847; 12 Digest 207, 1662; 84 L.J.K.B. 1680; 113 L.T. 386.
- (9) *Re Webb, Barclays Bank, Ltd. v. Webb*, [1941] Ch. 225; [1941] 1 All E.R. 321; Digest Supp. 1.
- (10) *Re Mathieson*, [1927] 1 Ch. 283; Digest Supp.; 96 L.J.Ch. 104; 136 L.T. 528.
- (11) *Re Harrison & Ingram, Ex parte Whinney*, [1900] 2 Q.B. 710; 5 Digest 841, 7095; 69 L.J.Q.B. 942; 83 L.T. 189.
- B (12) *United Australia, Ltd. v. Barclay's Bank, Ltd.*, [1941] A.C. 1; [1940] 4 All E.R. 20; Digest Supp.; 109 L.J.K.B. 919.
- (13) *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32; [1942] 2 All E.R. 122.
- (14) *Re Flavell, Murray v. Flavell* (1883), 25 Ch.D. 89; 12 Digest 47, 257; 53 L.J.Ch. 185; 49 L.T. 690.
- (15) *Ashby v. Costin* (1888), 21 Q.B.D. 401; 25 Digest 312, 169; 57 L.J.Q.B. 491; 59 L.T. 224.
- C (16) *Re Davies, Davies v. Davies*, [1892] 3 Ch. 63; 23 Digest 463, 5349; 61 L.J.Ch. 595; 67 L.T. 548.
- (17) *Re Huggins, Ex parte Huggins* (1882), 21 Ch.D. 85; 5 Digest 725, 6296; 51 L.J.Ch. 935; 47 L.T. 559.
- (18) *Lloyd's v. Harper* (1880), 16 Ch.D. 290; 43 Digest 791, 2290; 50 L.J.Ch. 140; 43 L.T. 481.

D APPEAL by the trustee in bankruptcy from an order made by UTHWATT, J., dated July 12, 1943, reported [1943] 2 All E.R. 387. The facts are fully set out in the judgment of LUXMOORE, L.J.

R. F. Roxburgh, K.C., and *J. Pennycuik* for the appellant, the trustee in bankruptcy.

A. T. Denning, K.C., and *G. R. F. Morris* for the respondents, the widow and daughter of the debtor.

W. A. L. Raeburn for the respondent companies.

- E *Roxburgh, K.C.*: The payments provided for by the agreement are compensation for loss of employment by the bankrupt and consideration for the restrictive covenant contained in the agreement. There could be no suggestion that in this document the bankrupt constituted himself trustee or was contracting as agent or nominee for his wife. The promisee is entitled to insist upon payment to the payee, but he is entitled to recover the amount of the money from the payee after it has been received.
- F If the wife has any equitable interest in the money, she is entitled to keep it. There would then be a trust and the Bankruptcy Act, 1914, s. 42, would be applicable. I ask the court to say that the decision in *Re Stapleton-Bretherton* (1) is wrong in principle. If the payer chooses to adopt an impartial attitude and pay into court, there is no possible way in which the widow could get anything. Sect. 42 of the Bankruptcy Act may have some bearing upon the matter. If there is no trust and the widow is held entitled to retain the payments, one asks the reason. Of course,
- G if the true view be that the money is a gift from the payer, the Bankruptcy Act will not apply. Where there is a gift, the gift comes from the person who provides the consideration. It is impossible to say that this is a provision made by the employer because there would then be a resulting trust. It is because it is a provision made by the husband that there is not a resulting trust. There is no doubt that the husband provided the consideration. When the wife
- H receives the money, there is an equitable obligation upon her to hand it over. If the conclusion is arrived at that it was a provision made by the husband for his wife, it is difficult to see that there was not a settlement. If there is no trust, all the authority is harmonious that the husband can release or vary the contract and the widow has no right to retain the money if it is paid to her and the husband's trustee in bankruptcy can obtain payment to him. [Counsel referred to *Cleaver v. Mutual Reserve Fund Life Assn.* (3), *Re Engelbach's Estate* (2), *Re Sinclair's Life Policy* (4), *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.* (8), and *Re Webb, Barclay's Bank v. Webb* (9).]

Pennycuik (following on the same side) : If we are wrong on the main point, the applicability of the Bankruptcy Act, 1914, s. 42, arises for consideration. The payments to the bankrupt and to his wife and daughter were made for consideration and that consideration moved from the bankrupt himself. If I am wrong, it would follow that the bankruptcy law could always be defeated by a bankrupt transferring all his assets to a friend on the friend's promising to pay the bankrupt's widow an annuity. That cannot possibly be the law. In the present case the bankrupt takes the benefit of a contractual obligation which he disposes of to his wife. For the purposes of sect. 42, the court is bound to look at the nature of the transaction and see whether or not the bankrupt has made a transfer of property for the benefit of somebody else. [Counsel referred to *Re Mathieson* (10) and to *Re Harrison & Ingram, Ex p. Whinney* (11).]

Denning, K.C. : It is a fundamental principle that a party is entitled and bound to perform his contract according to its terms. In the present case, therefore, the contracting party is entitled and bound to comply with the provisions for payment to the widow unless the contract, on its true construction, allows payment to be made to somebody else. On the construction of the contract in the present case, there is no such provision. Once payment has been made to the widow there is nothing requiring her to pay it over to anyone else. As regards remedies, the widow cannot sue because she is not a party to the contract. The personal representatives, however, can sue, but they do not sue as trustees for the widow and she could not compel them to sue on her behalf. In point of law the personal representatives could probably recover the full amount. The good sense of the matter is that there should not be only nominal damages, but that the contract should be enforced. If the personal representatives can recover the full amount, they can only recover as trustees for the widow. That is inconsistent with the view that the widow is a trustee for the personal representatives. The Bankruptcy Act, 1914, s. 38, determines what property vests in the trustee. [Counsel referred to *Lloyd's v. Harper* (18), *United Australia, Ltd. v. Barclay's Bank, Ltd.* (12), *Fibrosa Spolka v. Fairbairn Lawson Combe Barbour, Ltd.* (13), *Re Flavell, Murray v. Flavell* (14), *Ashby v. Costin* (15), *Re Davies, Davies v. Davies* (16), *Re Huggins, Ex parte Huggins* (17), and *Re Stapleton-Bretherton* (1).]

Raeburn : The trustee in bankruptcy relied upon the Bankruptcy Act, 1914, s. 42. In order to make out his case he must establish that there was a settlement by the debtor of the debtor's property. There never was anything capable of being construed as a settlement by the debtor. If it were to be construed as a settlement, it would be a settlement by the two companies and not by the debtor. The benefits are benefits which the companies wished to confer. It must be borne in mind that, in the present case, the debtor was living separate and apart from his wife.

LORD GREENE, M.R. : The facts are clearly stated in the judgment of UTHWATT, J., and I need not repeat them. Objection is taken to the oral evidence which is summarised in the judgment, but I do not find it necessary to discuss the question of its admissibility. I will deal first with the situation apart from the Bankruptcy Act, 1914, s. 42.

The first question which arises is whether or not Schebsman was a trustee for his wife and daughter of the benefit of the undertaking given by the English company in their favour. An examination of the decided cases does, it is true, show that the courts have on occasions adopted what may be called a liberal view on questions of this character. But in the present case, I cannot find in the contract anything to justify the conclusion that a trust was intended. It is not legitimate to import into the contract the idea of a trust when the parties have given no indication that such was their intention. To interpret this contract as creating a trust would, in my judgment, be to disregard the dividing line between the case of a trust and the simple case of a contract made between two persons for the benefit of a third. That dividing line exists, although it may not always be easy to determine where it is to be drawn. In the present case I find no difficulty. I will now turn to the other questions which arise.

At the outset of his address, counsel for the appellant suggested that the trustee in bankruptcy as claiming through Schebsman could claim all sums

paid by the English company to Mrs. Schebsman or her daughter as money had and received to his use. As the discussion proceeded, this argument was abandoned by counsel for the appellant and rightly so. The transaction gave rise to no such privity between these ladies and Schebsman as would support a claim against them for money had and received. It was also conceded that at common law the English company is bound, as between itself and the trustee, to make payments to Mrs. Schebsman or her daughter in accordance with the contract: and that the trustee as claiming through Schebsman has no right at common law to require the company to pay these sums to himself. The contract was tripartite and its terms could only be varied by the consent of all three parties. Mrs. Schebsman and her daughter have, of course, no right to demand payment from the English company since they are no parties to the contract. When the company makes a payment to one of them it is, as between the company and the payee, a gratuitous payment made with the intention of passing the property in the money paid and this is sufficient to give to the payee at common law a good title to the money against the whole world. The question, what damages could be recovered by the representatives of Schebsman if the company were to break its contract has no bearing on anything that we have to decide.

The argument of counsel for the appellant, as he developed it, rested entirely on equitable principles. It may be summarised as follows. Schebsman provided the whole of the consideration for the English company's undertaking to make the payments to his widow and daughter. These payments must, therefore, be regarded in the same light as voluntary gifts. In the case of a completed transfer of property by a man to his wife or daughter a presumption of advancement arises. But in the present case the transfer was not completed since Mrs. Schebsman and her daughter have no title to demand payment to themselves. It was, therefore, possible for Schebsman in his lifetime and for the trustee as his representative to intervene at any time and to assert as against Mrs. Schebsman and her daughter that any payments thereafter made to either of them would be held by the payee on behalf of the estate of Schebsman. The effect of such intervention, it was said, makes it impossible to treat any money in fact received thereafter by Mrs. Schebsman or her daughter as an advancement. If, notwithstanding the intervention, the company makes a payment to either of them, there will be a resulting trust for the trustee as representing Schebsman. As a corollary to this it was said that, in properly constituted proceedings, the English company can be compelled to make the covenanted payments direct to the trustee. The case, it was said, is analogous to that of an uncompleted gift or that of an imperfectly constituted trust. Mrs. Schebsman and her daughter are mere volunteers and equity will do nothing to assist them.

This argument is attractive, but, in my opinion, fallacious. It is important to bear in mind at the outset that, as between himself and the English company, Schebsman had no right to intervene and direct the company to make the payments to someone other than Mrs. Schebsman or her daughter. As between the three parties to the contract, its terms were that the payments should be made to Mrs. Schebsman and her daughter and made to them, clearly, for their own benefit. If, therefore, Schebsman in his lifetime had directed the company to make these payments to his executors, the company would have been entitled to ignore the direction. The proposition that, in properly constituted proceedings, the trustee could obtain direct payment to himself, depends for its validity upon the truth of the proposition that, as between himself and Mrs. Schebsman and her daughter, the trustee is entitled to claim the money as his own. The former proposition cannot, therefore, be relied on in order to establish the latter proposition which must be made good, if at all, on its own merits. Indeed, the former proposition relates to procedure only and means nothing more than that, if A is proposing to pay money to B which as between B and C belongs in equity to C, C can join A as a defendant in his action against B and thus procure payment by A direct to himself. It throws no light on the question which, for our purposes, is the relevant one, namely, as between B and C, does the money belong in equity to C?

We must, therefore, consider the position as between Schebsman and his wife and daughter. I do not think that any help is obtained by considering the cases

of uncompleted gifts or imperfectly constituted trusts. Indeed, these analogies seem to me to be misleading. If A instructs an agent to carry a present to B, the agent's authority is in its nature revocable and A can revoke his instructions at any time before the present is delivered. Similarly, if A is minded to create a trust in favour of B, a volunteer, and fails properly to constitute the trust, B has no remedy. But the present case is quite different. When he made the contract Schebsman did not constitute the English company his mandatory to transfer property of his own to his wife and daughter. Not only was the money in question never his property, but, once having made the contract, he had, as I have already pointed out, no right to call on the company to make the payment to his estate. In making the contract, he set in motion a piece of machinery which he had no power to stop by his own unilateral action save by releasing the company from the contract. Its operation would inevitably result in money reaching the hands of his widow and daughter assuming, as we must assume, that the English company would perform its contract. This, therefore, was no revocable mandate, nor was there any lack of completeness in the constitution of the machinery devised for securing these benefits for the widow and daughter. When he made the contract, Schebsman intended that his widow should receive those benefits for herself: it was part of the bargain between himself and the two companies that she should receive them: and he reserved to himself no right to call for payment to himself. The trustee could, presumably, release the company from its undertaking, but this would do no more than deprive the trustee of the right to sue for damages for its breach. The fact that such a release can be effected is no argument for saying that the trustee can claim the moneys as his own. A

The question, therefore, is not will equity help the widow and daughter to retain the sums which will inevitably be paid to them, but will equity help the trustee in bankruptcy to recover them from the payees? I can find no principle which calls for an affirmative answer to this question. If it were otherwise, the result would be a curious one. Schebsman makes a contract intended to secure benefits to his wife and daughter after his death. It is true that they obtain no right to call for those benefits, but Schebsman with good reason trusts the company to make them. The company cannot avoid making them unless it is prepared to break its contract. In this confidence, let me assume, Schebsman makes his testamentary dispositions and dies with the satisfaction of knowing that the contract makes provision for his widow and daughter. It is said that his representative can abrogate his intention and call on his widow and daughter to pay over to his estate any sums they may receive and that equity will compel them to do so. In my opinion, no principle of equity requires this to be done. B

It is, of course, true that Schebsman provided part of the consideration for which the English company gave its undertaking to make the payments. But he did so with the intention that the money paid should belong to the recipients beneficially, and in this sense the provision secured by the contract for the widow and daughter may perhaps be regarded as being an advancement to them. This was clearly his intention at the date of the contract. It is true that at that date and down to the date of his death all that Mrs. Schebsman and her daughter had was an expectancy, they had no legal rights whatever. But it was an expectancy that would necessarily mature into actual payment, subject always to the possibility that the three parties to the contract or their representatives might put an end to the contract by mutual consent and the possibility that Schebsman or his successors in title might release the company from its obligation. This being so, the advancement must, in my opinion, be regarded as completed when the contract was made since it was not in the power of Schebsman to change his mind and prevent it from becoming effective unless he could secure the agreement of both the other two parties to the contract or was prepared to release the company. I do not see how there can arise a resulting trust for Schebsman of money that was never his, the receipt of which by the payees he had no power by himself to prevent save by a release. C

To say that there can be no effective advancement unless and until either the subject-matter reaches the hands of the person to be advanced or that person acquires a legal title to claim it, appears to me to be too narrow a proposition. I see no reason why in principle an advancement should not be regarded D

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as complete and effective where the person desiring to make it sets in train for that purpose a process which it is out of his power to control by his own action. If the process is one which he can by his own action control as, for example, where he uses a mandatory to deliver the subject-matter of the advancement to the person whom he desires to benefit, the case is, of course, different. But where a person has done everything which the nature of the subject-matter permits to ensure that it will reach the object of his bounty and the nature of the transaction precludes the possibility of any subsequent intervention or change of mind on his part, the advancement must, in my opinion, be regarded as complete. In the present case the special nature of the transaction satisfies these tests. The circumstances that the three parties to the contract could put an end to it by mutual consent and that the company could be released are immaterial. They mean no more than that limited powers of revocation are provided. If, and only if, one or other of those powers is exercised can the intended advancement be prevented from taking effect. Cases of advancement made by such methods as these may be rare. But that is no reason for refusing to give effect to them when they occur.

There appears to me to be an additional reason why equity should not interfere. It is a fair inference from the form and substance of the contract that the two companies had themselves an interest in seeing that the widow and daughter of their employee should be provided for. The manner in which compensation should be provided for the loss by Schebsman of his employment was agreed between the three parties to the contract. The contract on its face could only mean that the sums payable to Mrs. Schebsman and her daughter are to be paid to them for their own benefit. How can Schebsman claim them for himself without breaking his contract? I do not see how he can, and, if this view be correct, it cannot be that, as between himself and the payees Schebsman can be heard to assert in a court of equity a claim the enforcement of which involves a breach of contract even when that contract is one to which Mrs. Schebsman and her daughter were not parties.

The only case cited to us which bears any resemblance to the present on the facts is a recent decision of SIMONDS, J., in *Re Stapleton-Bretherton* (1). In that case two brothers, Frederick and Edmund, executed a deed of covenant under which (i) Frederick covenanted with Edmund that, if he, Frederick, succeeded as tenant for life to certain settled property, he would during his life pay to Edmund and after the death of Edmund to his widow the annual sum of £1,000, (ii) Edmund covenanted with Frederick that, in certain events, if Edmund should succeed to the settled property as tenant for life, he would pay certain annual sums during his life to the widow and daughters of Frederick. The events mentioned in Edmund's covenant took place and he succeeded to the settled property. The executors of Frederick claimed that the sums payable by Edmund were payable to the estate of Frederick. The widow and daughters claimed payment to themselves. SIMONDS, J., held, in the first place, that no trust was created in favour of the widow and daughters of Frederick. He answered the question raised by the amended summons by declaring that the executors of Frederick were not entitled to direct Edmund to pay the covenanted sums to them instead of to the persons named in the deed. Now it is to be observed that the only question which SIMONDS, J., decided was whether Edmund was entitled to perform his covenant according to its terms or whether the executors of Frederick were entitled to require Edmund to perform it in a different way, namely, by payment to themselves. Regarded strictly, the decision does not on its face determine the question whether the wife and daughters, when they received payment, would hold the sums paid in trust for the executors of Frederick. No such claim was in terms put forward. Counsel for the executors argued that, as they alone could enforce the covenant, they alone could give a valid receipt and, therefore, that they were entitled to require payment to themselves. He did not suggest that, if that argument failed and Edmund was entitled to pay the widow and daughters, the latter would hold the sums as trustees for the estate under a resulting trust, no doubt because it was realised that, once the right of the executors to claim payment to themselves was negatived, it followed as a matter of course, that payments received by the widow and daughters would belong to them beneficially. This must have been the significance which SIMONDS, J., attached to his decision. If it

were not so, the decision would have been of no practical value to anyone. All the parties interested were before the court and the question of a resulting trust in favour of the executors could and ought to have been raised and decided. Nevertheless, it must be conceded that, however obvious the view of SIMONDS, J., was that sums paid to the widow and daughters would belong to them beneficially, he did not in terms decide the point nor was it argued before him. But I find in the decision much support for the view which I take in the present case, both because the facts present a substantial similarity in essential respects and because of what SIMONDS, J., must have visualised as the inevitable result of the decision. A

We were referred to several cases in which insurance policies were taken out in favour of third persons. I do not propose to examine them in detail. The distinction between those cases and the class of case which we have to consider is pointed out by SIMONDS, J., in *Re Stapleton-Bretherton* (1). His reasoning commended itself to UTHWATT, J., and it commends itself to me. But there is one case which was particularly relied on by counsel for the appellant, namely, *Re Engelbach's Estate* (2), a decision of ROMER, J., as he then was. In that case a testator had taken out an endowment policy under which a sum was expressed to be payable to his daughter (described in the policy as "the nominee"), her executors, administrators or assigns if she should survive a certain date, which was in fact one month after her 21st birthday, she being aged one month at the date when the policy was taken out. In the proposal form the testator inserted his own name as proposer "for his daughter aged one month." The testator died some years before the stated date, the policy having in the meanwhile been converted into a fully-paid policy. All premiums payable under the policy had been paid by the testator. The contest arose between the trustees of the testator's will and the trustees of a settlement to whom the daughter had purported to assign the policy moneys. It was held that the moneys belonged to the trustees of the will. ROMER, J., held that the testator entered into the contract "in his own name and on his own behalf but for the benefit of his daughter" by which expression he meant to negative the argument that the testator was acting as trustee or agent for his daughter. He also held at p. 353, relying on observations made in this court in *Cleaver v. Mutual Reserve Fund Life Association* (3) that : B

... the mere fact that the policy moneys are expressed to be paid to somebody other than the assured does not make the assured a trustee of the policy or of the policy moneys for the person so nominated. C

I do not question the correctness of the decision upon the particular facts of that case and I agree with the explanation of it and the other insurance cases given by SIMONDS, J., in *Re Stapleton-Bretherton* (1). The passage in the judgment in *Re Engelbach's Estate* (2) upon which counsel for the appellant relied is on p. 351 and is as follows : D

... the daughter could of course successfully claim these moneys if she had at the death of the testator a legal right to them, that is to say, a right at law to recover the moneys from the society, because, although that legal right might have been given to her purely voluntarily by her father, still there would be no resulting trust in favour of the father, seeing that there would be a presumption of advancement. E

If this means, as counsel for the appellant says it means, that there cannot be a case of advancement unless either the subject-matter is delivered to the person to be advanced or that person is given a legal right to claim it, I must respectfully disagree with it for reasons which I have already given earlier in this judgment. F

It will be seen that my reasons for agreeing with the decision now under appeal follow different lines to those upon which it was based by UTHWATT, J. The reason is that, before us the case for the appellant was founded on arguments different apparently from those with which UTHWATT, J., dealt in his judgment. I agree with the reasoning of UTHWATT, J., but I have had to deal with the case from a different angle. G

The other argument on behalf of the trustee was based on the Bankruptcy Act, 1914, s. 42. I agree with the decision of UTHWATT, J., on this point and adopt his reasons as my own. The sums in question were never the property of Schebsman : he never had any right to them either at law or in equity, and I cannot see how he can be said to have settled them on his wife and daughter. H

True it is that the effect of the contract, assuming that the company performed it, was to bring these sums into the hands of the widow and daughter and that the machinery provided has resulted in a benefit to them. But this does not mean that they were Schebsman's property or that the contract was a settlement within the meaning of the section. The section clearly deals with property which, but for the settlement, would have been available to pay the debts of the settlor. These sums never would have been available for that purpose.

A The appeal is dismissed with costs.

LUXMOORE, L.J. : The questions raised by this appeal are concerned with the rights of one John William Schebsman deceased (hereinafter called the debtor) and the trustee in his bankruptcy on the one hand and the debtor's widow and daughter on the other arising under an agreement dated Sept. 20, 1940, made between a Swiss company of the first part, an English company associated in business with the Swiss company of the second part and the debtor of the third part. The recitals in the agreement state (as the facts were) that (a) the debtor had originally been in the service of the Swiss company, (b) that company had lent the debtor's services to the English company, (c) the arrangement had subsisted for many years before Sept. 20, 1940, and (d) the agreement was entered into to define the terms on which the debtor's employment with the Swiss and English companies should be terminated by mutual consent.

C The agreement provided that (i) an immediate payment of £2,000 should be made by the English company to the debtor, but out of this sum £600 was to be applied by the English company in discharging certain liabilities of the debtor, (ii) the English company should pay to the debtor by way of compensation for loss of employment a sum of £5,500 which was to be paid in the manner specified in the schedule to the agreement, (iii) the 3 parties to the agreement should mutually release each other from "all sums of money accounts actions proceedings claims and demands whatsoever which any of them at any time had or has up to Sept. 20, 1940, against the other for or by reason of any act matter cause or thing save as provided" in the agreement, (iv) the debtor agreed that for a defined period he would not either directly or indirectly carry on or be engaged concerned or interested in the business of a cargo superintendent or permit his name to be used in such a business, (v) if the debtor should commit a breach of any of the stipulations under head (iv) the English company was to have the right to withhold payment in whole or in part of the moneys referred to in the schedule for such period as it should think fit, (vi) the English company would make "all payments due to" the debtor's widow or daughter under the terms of the agreement, and (vii) so long as the debtor should remain indebted to a company identified in the agreement the debtor would pay certain premiums in respect of a policy of insurance on his life specified therein, and, if at any time any such premium should be in arrear and unpaid, the Swiss company or the English company should have the right itself to make such payment and to withhold payment of any moneys due to the debtor under the agreement until the Swiss company or the English company, as the case might be, should have reimbursed itself.

G The schedule to the agreement provided for the payment of the sum of £5,500 obviously to the debtor, though he is not specifically mentioned, by six annual instalments each payable on Mar. 31 during the years 1941 to 1946 inclusive. It also provided that (a) if the debtor died on or before Mar. 31, 1941, the English company should pay to his widow £500 for each of the four years ending on Mar. 31, 1941 to 1944 inclusive, and £375 for each of the years ending on Mar. 31, 1945 to 1948 inclusive, (b) if the debtor died during the years 1941-1942, 1942-1943, 1943-1944, each ending on Mar. 31, the payments to the widow should extend over a period ending Mar. 31, 1948, (c) if the debtor died during the years 1944-1945, 1945-1946, the payments to the widow should extend over a period ending Mar. 31, 1950, (d) the payments to the widow were to be made by equal weekly instalments, (e) if the widow died at any time before Mar. 31, 1950, the schedule should after the death of the widow be read as if the name of the debtor's daughter appeared therein instead of that of the widow, and (f) all payments under the agreement should cease on the death of the survivor of the debtor, the widow and the daughter. It will be observed that, if the debtor survived Mar. 31, 1946, he would or ought to have himself received

under the agreement the total sum of £5,500 in addition to the £2,000 which was payable on the signing of the agreement and neither the widow or the daughter would be entitled to receive any payment whatsoever, but, if the debtor died before Mar. 31, 1946, the widow or the daughter provided one or other of them survived the requisite period would be entitled to receive payments which might, in the aggregate, with any sums paid to the debtor during his life, be less than or in excess of the £5,500. The minimum aggregate sum payable to the debtor the widow and the daughter provided one of them survived during the whole of the requisite period would be £3,500 and the maximum might be £6,625. While, if the debtor his wife and daughter should all die before Mar. 31, 1941, nothing would be payable beyond the original £2,000.

The agreement was subsequently varied by a supplemental agreement dated Oct. 7, 1940, and made between the same parties as the original agreement. It is immaterial to refer to the terms of this agreement, and I only call attention to it because it demonstrates that the parties recognised that they had full power by mutual consent to alter the terms of the original agreement. The debtor was adjudicated a bankrupt on Mar. 5, 1942, and died on May 12, 1942. On Apr. 9, 1943, the trustee in bankruptcy launched a motion to which the English company and the debtor's widow and daughter were respondents, claiming a declaration that all sums payable by the English company under the agreement of Sept. 20, 1940, form part of the estate of the debtor. The date of the receiving order does not appear to have been disclosed in the proceedings, but this is immaterial so far as the arguments addressed to the court are concerned. The motion came on for hearing before UTHWATT, J. It was argued on behalf of the trustee in bankruptcy that the debtor's estate was entitled to the benefit of all provisions in the agreement for payment of moneys to the widow or daughter and reliance was placed on *Re Sinclair's Life Policy* (4) and *Re Engelbach's Estate* (2). It was argued in the alternative that the debtor, on entering into the agreement became entitled to a chose in action, namely, the obligation to pay money undertaken by the English company and that the assignment of that chose in action was effected by the debtor simultaneously with the procuring of it, that the assignment of the interest took the form of choosing the wife and daughter to receive the payments for their own benefit and that the assignment constituted a settlement of property which is avoided by the Bankruptcy Act, 1914, s. 42 (1). For the widow and daughter it was contended that, on the true construction of the agreement, a trust was constituted under which the widow and daughter were the *cestuis que trustent*, or alternatively the debtor was the agent of the widow and daughter to procure their respective benefits under the agreement. The English company contended that, although neither the widow or daughter could sue it for performance of the contract, the company was entitled to insist on the strict compliance with the terms of the agreement by making the stipulated payments as and when they fell due to the widow or daughter. UTHWATT, J., held that no trust was created by the agreement nor did the debtor enter into it so far as the benefits for the widow or daughter are concerned as agent for either of them. He further held that all payments made to the widow or daughter, although they were strangers to the agreement, were in due performance of it unless, on the true construction of the agreement, there ought to be implied a term entitling the debtor or his sequels in title to intercept the payments agreed to be made to them. In so holding, he followed and applied the decision of SIMONDS, J., in *Re Stapleton-Bretherton* (1). He further held that, in construing the agreement, it was irrelevant to consider what might be the legal consequences of non-performance, and that, on its true construction, no such term as suggested on behalf of the trustee in bankruptcy could be implied. He further decided that there was no settlement of property in favour of the wife or daughter which could be avoided under the Bankruptcy Act, 1914, s. 42 (1). In the result he dismissed the motion with costs.

The trustee in bankruptcy has appealed to this court. The arguments here differed in some particulars from those submitted in the court below. Counsel for the appellant first argued that all payments under the agreement, when made to the widow or daughter, were recoverable by the trustee in bankruptcy as money had and received on behalf of the debtor. After some discussion he abandoned (and as I think rightly) this argument, and relied on two contentions

which he put in the form of a dilemma. He claimed that there was in equity a resulting trust in favour of the debtor and his sequels in title in respect of any moneys paid to the widow or daughter because the debtor had provided the whole of the consideration for such payments and that there could be no advancement in favour of the wife or daughter because, before the payments sought to be recovered were made, the trustee in bankruptcy had required that all future moneys payable to the widow or daughter were to be paid to him. If he was wrong in the contention that there was no completed advancement to the wife or daughter, he urged that the debtor had made a settlement of property within two years of his bankruptcy and that this was avoided by the Bankruptcy Act. He argued that he must succeed on one or other head. Counsel for the appellant contended that, in a properly constituted action to which the widow and daughter and the English company were parties and after having called on the widow and daughter to account for all payments made to them, the trustee in bankruptcy could obtain either an order of the court restraining the English company from paying any moneys under the agreement otherwise than to himself or an order directing the widow and daughter to account to him for all moneys payable to them. He conceded, as I think he was bound to do, that, at common law, the English company was entitled to perform the precise terms of the contract by making the stipulated payments to the widow or daughter, as the case might be, but he said that the position was different in equity.

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- The whole of these arguments are based on the contention that the consideration for the payments to the widow and daughter was provided solely by the debtor, and the widow and daughter must be treated as if the debtor had purchased these benefits for them respectively. If this foundation fails, as I think it does, then the arguments fail with it. In my judgment, the consideration for the agreement was mutual and was contributed by each party to it. Both the English company and the Swiss company agreed to release the debtor in respect of certain matters to which I have already referred, and it would be impossible for the debtor's sequels in title to insist on payment of any of the moneys agreed to be paid to the widow or daughter unless the agreement were altered by mutual consent. In face of the refusal of the English company to depart from its terms the English company can properly insist on carrying out the contract literally. It appears to me that the provision for the widow and daughter are the result of the mutual agreement and that the debtor had, in conjunction with the English company and the Swiss company, done all that was necessary to complete the title of the widow and daughter to whatever might be payable to them or either of them under the agreement. On payment to the widow or daughter the legal title to each payment was complete and I can see no equity to support the contention that there is any resulting trust in favour of the trustee in bankruptcy, for the payments result from the mutual agreement and not from a purchase or quasi-purchase by the debtor.

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- Reliance was placed by counsel for the appellants on the decision of ROMER, J., in *Re Engelbach's Estate* (2). In that case an endowment policy was taken out by a father. In the proposal form the father inserted opposite the words "Full name and description of the Proposer" the words "Edward Coryton Engelbach for his daughter Mary Noel aged one month." By the policy the sum assured was expressed to be payable to the testator's daughter (therein called "the nominee"), her executors, administrators or assigns if she should survive a specified date. The father died before that date, the daughter survived it and the insurance company paid the sum assured to the daughter. ROMER, J., held that this sum formed part of the father's estate and ordered it to be paid to his executors. The basis of this decision appears to be that, on the true construction of the policy the insurance company was nothing more than the mandatory of the father in making the payment to the daughter, and on this footing the decision has no application to the present case.

The other points argued in the case, including that arising under the Bankruptcy Act, 1914, s. 42 (1), were dealt with by UTHWATT, J., in his judgment. I agree with the conclusions he came to with regard to them and with the reasons he gave for those conclusions, and I see no necessity for attempting to restate them. I am content to adopt them as my own.

I agree that this appeal fails with the usual consequences.

DU PARCQ, L.J. : It is, in my opinion, convenient to approach the problems

raised in this appeal by first considering the position of the parties at common law. It is clear that Mrs. Schebsman, who was not a party to the agreement of Sept. 20, 1940, acquired no rights under it and has never been in a position to maintain an action upon it. It is common ground, also, that the personal representatives of Schebsman (whom I will call the debtor) could not have recovered any sums which had been paid to Mrs. Schebsman under the agreement as money had and received or by any process known to the common law. It is not disputed that the English company, which, under the agreement was liable to make the payments, properly performed that agreement by paying into the hands of Mrs. Schebsman those sums which it had bound itself to pay to Mrs. Schebsman, and, at common law, could not be called upon to pay them to the personal representatives of the debtor. Nor, I think, is it disputed, and it may be said to be self-evident, that the English company's agreement to pay these moneys into the hands of Mrs. Schebsman was a valid agreement, a breach of which would be regarded by the courts as an "unlawful act" and a "legal wrong." I borrow these expressions from a well-known passage in the speech of LORD LINDLEY in *S. Wales Miners' Federation v. Glamorgan Coal Co.* (5). The rules according to which damages for breach of contract are assessed sometimes allow a person guilty of the legal wrong constituted by the breach to escape very lightly, but that fact does not affect the illegality of his act.

So far there is general agreement. I may now express my own agreement with a proposition submitted by counsel for the appellant. He said that the duty to pay into the hands of a nominated person is discharged when the money has been paid to that person, and that the party bound to make a payment has no control over its destination. As a general proposition, that is true and can hardly be questioned. In the case before us Mrs. Schebsman, being no party to the contract, is clearly under no obligation to the English company to apply the money in any particular way, nor is the English company concerned with any agreement which she may choose to make with third parties binding herself to apply it in a particular manner. But the proposition, accurate as it is, may be misleading unless it is considered together with another proposition which I take to be equally unexceptionable and which I will now state.

It is open to parties to agree that, for a consideration supplied by one of them, the other will make payments to a third person for the use and benefit of that third person, and not for the use and benefit of the contracting party who provides the consideration. Whether or not such an agreement has been made in a given case is clearly a question of construction, but assuming that the parties have manifested their intention so to agree, it cannot, I think, be doubted that the common law would regard such an agreement as valid and as enforceable (in the sense of giving a cause of action for damages for its breach to the other party to the contract), and would regard the breach of it as an unlawful act. If the party from whom the consideration moved somehow succeeded in intercepting a payment intended for the named payee, he would be guilty of a tort, and, in certain circumstances, of a crime, and he would also be breaking his contract, since it would be implicit in his agreement with the other party that he would do nothing to prevent the money paid from reaching the payee. If he sought to argue that, because he had himself provided the consideration, he alone was interested in the destination of the money, the answer would be that the other contracting party had not agreed (and perhaps might never have thought of agreeing) to make a payment either to him or for his benefit. If he can persuade the payee to hand the money over to him by lawful means, he is, of course, at liberty to do so, and there may be circumstances *dehors* the contract which would give him rights against the payee. Subject to that qualification, he can never, in the case of such a contract as I have supposed, lawfully claim payment of the money for himself while the contract remains unaltered. That the common law allows it to be varied nobody doubts. At any time the parties may agree that payment shall in future be made not to the payee named in the contract, but to the party from whom the consideration moved, or, for that matter, to any other person. But in the case of such a contract there cannot be a variation at the will of one of the parties, any more than a condition introduced into a contract for the benefit of both parties can be waived by only one of them.

I have said that the question whether a contract imposes a liability on one of the parties to confer a benefit on a third party, not privy to the contract, is

always one of construction. From the point of view of the common law, with which alone I am now dealing, I have no doubt that the general rule of construction laid down by BLACKBURN, J., in *Burges v. Wickham* (6), must be applied. According to the general law of England, the written record of a contract must not be varied or added to by verbal evidence of what was the intention of the parties.

A I now turn to the agreement in the present case, in order to seek in the document itself the answer to the question whether the parties intended that, after the debtor's death, the company should be under an obligation to make payments to Mrs. Schebsman for her own benefit, and the debtor's personal representatives under a corresponding obligation to accept payment to Mrs. Schebsman for her own benefit as a fulfilment of the contract. It seems to me to be plain upon the face of the contract that this was the intention of the parties. In this connection the most striking feature of the agreement, in my opinion, is that, after the deaths of Mrs. and Miss Schebsman (assuming that the debtor were to predecease them, as in fact he did), all payments were to cease, even though a large part of the amount payable by the company might remain unpaid. This provision points clearly, as it seems to me, to the conclusion that both parties were concerned with benefiting Mrs. Schebsman and the daughter, and that the company did not intend to bind itself to pay a penny for the benefit of the debtor's estate after the death of these ladies. It is impossible, in my judgment, to regard this as in effect an aleatory contract, under which the amount of payments intended to accrue for the benefit of the debtor's estate was to be dependent on events so uncertain as the duration of the two lives. Further, it is, I think, proper to have regard to the fact that, in the circumstances disclosed by the agreement itself, both parties might be expected to wish to confer a benefit on the debtor's dependants. Lastly, I attach some importance to the language of cl. 6 which speaks of payments "due to" Mrs. and Miss Schebsman.

D I may now summarise the position at common law as follows: (i) It is the right, as well as the duty, of the company to make the prescribed payments to Mrs. Schebsman and to no other person. (ii) Mrs. Schebsman may dispose of the sums so received as she pleases, and is not accountable for them to the personal representatives of the debtor, or to anyone claiming to stand in the shoes of the debtor. (iii) If anyone standing in the shoes of the debtor were to intercept the sums payable to Mrs. Schebsman and refuse to account to her for them, he would be guilty of a breach of the debtor's contract with the company. E (iv) The obligation undertaken by the company cannot be varied at the will of the other party to the contract, but may be varied consensually at any time although the debtor is no longer living, as it could have been in his life-time.

It now remains to consider the question whether, and if so to what extent, the principles of equity affect the position of the parties.

F It was argued by counsel for the appellant that one effect of the agreement of Sept. 20, 1940, was that a trust was thereby created, and that the debtor constituted himself trustee for Mrs. Schebsman of the benefit of the covenant under which payments were to be made to her. UTHWATT, J., rejected this contention, and the argument has not satisfied me that he was wrong. It is true that, by the use possibly of unguarded language, a person may create a trust, as Monsieur Jourdain talked prose, without knowing it, but unless G intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention. I have little doubt that, in the present case, both parties (and certainly the debtor) intended to keep alive their common law right to vary consensually the terms of the obligation undertaken by the company, and, if circumstances had changed in the debtor's life-time, H injustice might have been done by holding that a trust had been created and that those terms were accordingly unalterable. On this point, therefore, I agree with UTHWATT, J.

It was contended by counsel for the appellant in an attractive and (to me) instructive argument, that, although the company might be bound to make payments to Mrs. Schebsman, she must necessarily be held liable in a court of equity to hand over the money she received to the debtor's representatives on the ground that the debtor had provided all the consideration for the payments so that there was a resulting trust in his favour. If I am right in the views which

I have expressed as to the position of the parties at common law, it seems to me plain that this contention cannot prevail. Counsel for the appellant submitted that, on facts identical with the present, notice having been given to the company that the debtor's representative required payment to be made, not to Mrs. Schebsman, but to himself, a court of equity before the Judicature Acts (i) would have been prepared to restrain the company from making a payment to Mrs. Schebsman, or (ii) supposing that, notwithstanding the notice, the company had made the payment, would have treated Mrs. Schebsman as a bare trustee and compelled her to pay the money which she had received to the debtor's estate. Now it follows from what I have already said that, by taking the first course the court of equity would have prevented the company from doing what the contract permitted and required it to do. By taking the second course, the court of equity would have permitted and assisted the debtor's representative to break the contract which he was bound to perform. There is, I believe, no instance in which equity compels a man to pay money to someone other than the person to whom alone, and for whose sole benefit, he has bound himself to pay it. Counsel for the appellant sought to find an analogy in the case of an equitable assignment, but what a court of equity did in such a case was not to compel the debtor to pay the assignee, but to compel the assignor to allow the assignee to sue in the assignor's name. There is certainly no case in which a court of equity has given its protection to a suitor asking to be relieved from the due performance of a contract which was neither unlawful nor unconscionable. To put the matter bluntly and, in my view of the common law is right, fairly, equity, which mends no man's contracts, will not assist any man to commit a breach of contract and so to do an "illegal act." In such a case as that now before us, there cannot be a resulting trust since the party who provided the consideration is bound by the terms of his bargain to permit the payee to retain the money, and would be acting unconscionably if he diverted it to himself against the will of the payee, save with the consent of the other contracting party.

Even if I am wrong in thinking that the present contract is, on the face of it, to be construed as imposing on the company an obligation to confer a benefit on Mrs. Schebsman, and on the debtor an implied obligation to do nothing to deprive her of that benefit, the same result follows when it is conceded (as it was rightly conceded at the Bar in this case) that, at common law no action could be maintained against Mrs. Schebsman for money had and received, or, in other words, that according to the common law she is entitled to retain the money paid to her as against the debtor's estate. When an attempt is made to recover such payments on equitable principles, I am of opinion that the strict rule of evidence, to which I have referred as prevailing when the sole issue is the construction of the contract, is no longer to be applied, and that the court may, and often should, look beyond the four corners of the document. In the words of SIR W. M. JAMES, L.J., in *Fowkes v. Pascoe* (7), at p. 349 :

Where the Court of Chancery is asked, on an equitable assumption or presumption, to take away from a man that which by the common law of the land he is entitled to, he surely has a right to say : " Listen to my story as to how I came to have it, and judge that story with reference to all the surrounding facts and circumstances."

On this principle UTHWATT, J., in the present case, and SIMONDS, J., in *Re Stapleton-Bretherton* (1), were right to admit evidence as to the surrounding facts. When that evidence is considered, it seems to me impossible to escape from the conclusion that, as matters now stand, anyone standing in the shoes of the debtor would be guilty of a breach of faith if he contrived to intercept the payments due to Mrs. Schebsman. I need hardly add that there is no equitable doctrine on which, in such circumstances, he could be permitted to rely. On the contrary, there is one known to every student which would disqualify him from access to equity.

It now remains to consider whether the trustee in bankruptcy is entitled to the advantage which he seeks to obtain from the Bankruptcy Act, 1914, s. 42. In my opinion, he is not. On the view which I take of the transaction, the debtor never acquired a right to the sums which were to be paid to Mrs. Schebsman. All he acquired was a right to insist on those payments being made, not to himself, but to her. If it is said that he named her as the person to whom he wished the payments to be made, it may equally well be said that the company

named her as a person, and, in certain events, the only person, to whom, and for whose benefit, they would promise to make the payments. The fact is that she was the person whom both parties agreed to make the beneficiary of the contract. The money payable to her was never the "property" of the bankrupt, and it was never in his power to "transfer" it to her.

For these reasons, I agree with the conclusion at which UTHWATT, J., arrived. My reasons do not, I think, differ much in substance from his, though I fear that I have expressed them at greater length. I have done so partly in deference to the very able argument of counsel for the appellant, who put forward the criticism that UTHWATT, J., had not considered or sufficiently dealt with the question whether, after receiving the money, as she lawfully might, Mrs. Schebsman was entitled in equity to retain it. I have endeavoured to deal fully with that aspect of the case. I have only to add, with reference to one of the arguments of counsel for the appellant, that no suggestion was made in this case against the good faith of the parties to the contract. A debtor with an eye to a future bankruptcy might, of course, find a complacent friend who would assist him by entering into a colourable agreement, under which the debtor's earnings were to be put out of his creditors' reach. Fraud commonly simulates honesty. That is no reason for refusing to give full effect to an honest agreement. The law has ample power to deal with cases of fraud. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Tarry, Sherlock & Holmes* (for the appellant); *Albert M. Oppenheimer* (for the respondents, the widow and daughter); *Morris, Ward-Jones, Kennett & Co.* (for the respondent companies).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

D

Re AFFAIRS OF FARQUHAR.

[COURT OF APPEAL (Lord Greene, M.R., Luxmoore and Goddard, L.JJ.),
November 24, 1943.]

Emergency Legislation—Application for adjustment order—Landlord a judgment creditor for rent—Inland Revenue a creditor for Sched. A tax—Application by debtor for reduction of judgment debt by amount of Sched. A income tax—Jurisdiction of court—Liabilities (War-Time Adjustment) Act, 1941 (c. 24), s. 4 (1).

The applicant applied for an adjustment order under the Liabilities (War-Time Adjustment) Act, 1941. He had been employed by two companies and had derived his income from them. Owing to war circumstances the companies could not continue trading and the applicant consequently found himself in financial difficulties. The applicant owned the head lease of the premises in which one of the companies had carried on business and, owing to the failure of the company to pay its rent to him, the applicant was unable to pay the rent due to the superior landlord. The landlord took proceedings and recovered judgment for the amount due and he also obtained an order for possession. There was owing a sum which represented Sched. A income tax on the same premises and the collector had proved for the amount in the adjustment proceedings. The applicant was not able to deduct the amount of this tax from the rent because the rent had merged in the judgment and as the landlord had obtained possession it could not be deducted from any future payment of rent. There were no other creditors. The applicant therefore applied for the judgment debt to be reduced by the amount of the Sched. A tax :—

HELD : the court had no jurisdiction to reduce the amount of the judgment debt and the applicant therefore remained liable to satisfy in full both the amount of the Sched. A tax and also the judgment debt.

[EDITORIAL NOTE.] This case points out a difficulty in the case of a tenant sued for the rent. The Act of 1941 is one for the relief of debtors, but it does not extend to relief from injustice which the law would place upon them in any event.

FOR THE LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1941, s. 4 (1), see HALSBURYS' COMPLETE STATUTES OF ENGLAND, Vol. 34, p. 29.]

APPEAL by the applicant from an order of UTHWATT, J., dated June 24, 1943.

The applicant had been employed by two companies, each carrying on a tailoring business. Each company had a capital of £500 and the applicant owned one share in each of them. Business fell off owing to the war, and the applicant applied for a protection order. A protection order was made on Nov. 25, 1941, and the affairs of the applicant were referred to the liabilities adjustment officer for investigation and report. An order was made for the transfer of the applicant's affairs to the High Court by reason of the fact that one of the companies had applied for similar relief. The company's affairs, however, were settled out of court. The applicant's affairs came before UTHWATT, J., on June 24, 1943. The only creditors were the collector of taxes, who claimed £75 13s. 3d. in respect of Sched. A income tax, and the landlord of the premises in respect of which that tax was payable, and he claimed a sum of £253 10s. 3d. in respect of rent. In the normal course of relationship of landlord and tenant the amount of the Sched. A tax paid by the tenant would be deducted from the next succeeding payment of rent. Owing to war circumstances, neither the tax nor the rent had been paid. The landlord took proceedings and recovered judgment for the rent and also obtained an order for possession. As the amount owing in respect of the rent had merged in the judgment, the tax could no longer be deducted. The judge found that the applicant's circumstances arose from the war. The judge also found that it was practicable to make an order but he dismissed the application on the ground that it was not proper to do so. The judge decided that as the law as to taxation in general and in regard to Sched. A in particular gave the applicant no assistance and as the bankruptcy law did not help the applicant the provisions of the Liabilities (War-Time Adjustment) Act, 1941, ought not to be used to give relief which was not provided under any other jurisdiction.

Patrick M. O'Connor for the applicant.

LORD GREENE, M.R.: The point raised by this appeal is a curious one. The appellant applied for and obtained a protection order under the Liabilities (War-Time Adjustment) Act, 1941, and in due course he applied for a liabilities adjustment order. We are told by counsel, and accept the point, that the judge said that the case was one in which it was practicable to make an order, but that the case was not one with which it was proper to deal under the Act. The relevant facts are as follows. The applicant derived the whole of his income from his association with two tailoring companies by whom he was employed and the judge found that the difficulties in which the applicant found himself were due to war circumstances having affected the businesses and having affected the income received by the applicant. The premises of one of the companies were held by sub-lease from the applicant who owned the head-lease. We are told that the inability of the applicant to pay the rent of the head-lease was due to the inability of the company to pay its rent to him. Be that as it may, the landlord took proceedings against the applicant and recovered judgment in the amount of £253 10s. 3d.

The applicant, not having paid the rent, of course could not deduct the Sched. A tax amounting to £75 13s. 3d. because, under the Income Tax Acts, the tax must be deducted from the next instalment of the rent and, as possession was also recovered by the landlord, no future rent would become payable. It is not permissible to deduct the Sched. A tax when satisfying a judgment because the payment is not rent. The applicant, therefore, finds himself accountable to the revenue for the tax, but he has not the right to deduct the tax from the rent payable to the superior landlord. Of course, when the tenant deducts the income tax from the rent, he is the tax-gatherer for the revenue. The tax which he deducts is the landlord's tax. The landlord, in the present case, is put in this advantageous position in that his tenant cannot deduct the tax, but must pay in full the amount of the judgment. The result is that the landlord will get that part of his income tax free. He therefore gets a windfall. The only debts which are now in question are the debt to the revenue and the debt to the landlord. All other obligations were stated to have been satisfactorily got rid of. The object of the application to UTHWATT, J., was to obtain an adjustment order under which the amount owing to the landlord should be sealed down by deducting from it the amount of the Sched. A tax. In other words, putting it bluntly, the object of the application was to obtain an improve-

ment of the legal position by giving the applicant a right to deduct the tax from the judgment debt, which right the law has not thought fit to confer upon him. In short, the applicant wishes to use the machinery of the Liabilities (War-Time Adjustment) Act to do what the law has not thought fit to do. It seems to me unfair that the landlord should get a windfall of this kind. The question is whether the court has any jurisdiction to use the machinery of the Act to put right what may be described as an injustice. The section relied upon is sect. 4 (1), which is as follows :

Subject to the provisions of this section and to the provisions of this part of this Act relating to the priority of debts, the court shall provide in a liabilities adjustment order for the payment of the debts proved in the proceedings, either in full or to such an extent as the court considers practicable . . .

It is said that that language entitled the court to say that a particular debt ought, on grounds of fairness, to be scaled down. It is said that the court has jurisdiction so to provide. In my opinion, the language is not wide enough to cover such a general proposition. The words are not "to such an extent as the court considers equitable" or "fair" or "reasonable." It may not be fair that a man should pay out money to provide his landlord with a windfall. The word used is "practicable," and I cannot construe that as meaning that the court is to consider whether payment in full is a reasonably proper thing or payment of a modified amount is in the circumstances possible. It is clear that, if a man has only a small income, it would not be practicable to order him to pay debts running into thousands of pounds. The court may well say that it will scale all these debts down because that is the only practicable way of dealing with the situation. What we are told is that there is a proposal to pay £52 a year by instalments. If the amount of the landlord's debt is to be scaled down as proposed, there would be 5 years' instalments. If it is not scaled down, there would be 6½ years' instalments at the same rate. I can see nothing on the facts of this case impracticable about that. If the applicant can pay £52 a year for 5 years, I cannot see that there is anything impracticable in his paying for 6½ years. The applicant is entitled to an order for payment by instalments of these two liabilities.

LUXMOORE, L.J. : I agree.

GODDARD, L.J. : I agree.

Solicitors : *Murray, Napier & Co.*

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

MAUD v. SANDARS.

[KING'S BENCH DIVISION (Lewis, J.), November 12, 1943.]

Landlord and Tenant—Repair—Covenant to repair and yield up in repair—Whether breach excused by regulations prohibiting repair above certain cost without licence—Defence (General) Regulations, reg. 56A, para. 2, Sched. VI, Pt. III—Control of Building Operations Order, 1941 (S.R. & O., 1941, No. 1986), para. 2.

The plaintiff was the landlord and the defendant the tenant of certain premises. Upon the termination of the lease the plaintiff claimed from the tenant for breach of covenant to keep and yield up the premises in a state of good repair £607 the estimated cost of repairing the premises and £20 for expenses incurred in drawing up a schedule of dilapidations. The defendant admitted the breach of covenant and that the £607 was the proper assessment of the damage. He contended, however, (i) that, under the Defence (General) Regulations, reg. 56A, and the Control of Building Operations Order, 1941, he was prohibited from expending more than £100 on repair of the premises without a licence, and he was, therefore, excused by law from the breach of covenant ; and (ii) that the sum of £20 was not damages for the breach of covenant. The plaintiff argued (i) that, as to the £607 the defendant's defence was not valid unless the defendant could show that he had made an application for a licence and that it had been refused, whereas the defendant admitted that he had made no application

for a licence; (ii) that the £20 was an expense to which he had been put as a result only of the defendant's breach of covenant:—

HELD: (i) the plaintiff was not entitled to recover the £20.

(ii) the regulations did not afford a good defence to an action framed in damages for breach of covenant. Even if such a defence was available, it would only be to the extent of a claim exceeding £100 and then only where the defendant had applied for and been refused a licence.

[EDITORIAL NOTE.] It is here said that, where regulations are made with the object of conserving materials, they do not operate to restrict the right of landlords to recover damages for failure to repair. It will be noted, however, that, in the present case, the tenant made no attempt to obtain a licence to execute these repairs and, although it is probably unlikely that he would have obtained one, it seems clear that, if impossibility is to be set up, he must prove that he applied for and was refused a licence.

AS TO IMPOSSIBILITY CAUSED BY STATUTE, see HALSBURY, Hailsham Edn., Vol. 7, p. 218, para. 297; and FOR CASES, see DIGEST, Vol. 12, pp. 298-300, Nos. 2458-2470, pp. 373, 374, Nos. 3099-3102.]

ACTION by a landlord against tenant to recover damages for the tenant's breach of covenant to repair and to yield up in repair. The facts are fully set out in the judgment.

B. B. Stenham for the plaintiff.

W. A. L. Raeburn for the defendant.

LEWIS, J.: This is an action brought by a landlord, Philip Maud, against John Francis Sandars, who was at all material times the tenant of No. 62, Elm Park Gardens, Chelsea, and it is for a sum of £627, which sum is made up of three separate items, namely, £590, being the cost of repairing the premises in order to comply with the terms of the covenant of the lease, £17 for fittings and fixtures which had to be replaced or found, and the sum of £20, which is the amount of the expense which the landlord has incurred in getting out what is commonly called a schedule of dilapidations.

All the facts are agreed, and the point which I have to decide arises under two statutory rules and orders, the Defence (General) Regulations and the Control of Building Operations Order, 1941.

The lessee terminated the lease on Mar. 25, 1942, by giving proper notice, and there is no question that the lease was terminated in accordance with law; but in the lease there were two covenants in the usual form, one of which was that the lessee would, during the term, keep the premises in repair, and the other was the usual clause that he would deliver up the premises in good repair, and it is said by the plaintiff, and agreed by the defendant, that when the premises were given up the £590 and £17 together made the figure which would represent the damages payable to the lessor for loss to the reversion owing to the lessee's breach of covenant to deliver up in repair.

There is no dispute about those two sets of figures, and there is no dispute with regard to the £20, which is the cost of the schedule of dilapidations, as a figure, but it is said by the defendant that that £20 is not really damages for the breach of covenant, because it does not represent damage to the reversion, but it is a sum which the landlord incurred in order to ascertain the amount that he was entitled to claim from his tenant for the dilapidations. I will just deal quite shortly with this £20 item before I get to the real point in the case. It is said by the plaintiff, on the other hand, that these are damages which he is entitled to recover, because it was only due to the fact that the lessee had broken his covenant to deliver up in good and proper repair that he had to incur that expense in order to assess the damages to which he was entitled for the defendant's breach of covenant.

With regard to the other two items there is no dispute whatever, either in fact or in law, except that which is raised upon the statutory rules and orders to which I have already referred.

The point that is taken arises under the first of those statutory rules and orders, and it is to be found in para. (1), which is a paragraph substituting a new regulation for the Defence (General) Regulations, reg. 56A. Para. (2) provides:

Subject to the provisions of this regulation, the execution in the United Kingdom of any operation begun at any time on or after Jan. 1, 1942, which

involves the doing of any description of any work specified in Pt. III of Sched. VI to these regulations, not being an operation executed for a purpose specified in the first column of the Table set out in Pt. 1 of that Schedule, shall be unlawful except in so far as there is in force in respect thereof a licence granted by the Minister: Provided that no licence shall be required by virtue of this paragraph if the total cost of the work of that description involved in the operation does not exceed such sum as may be prescribed by order of the Minister in relation to work of that description involved in an operation begun at that time.

A Pt. III of Sched. VI, which is referred to in that paragraph, reads as follows, omitting the words which are not appropriate to this action:

Work done in the . . . repair, or decoration of a building . . .

and the £590 and the £17 in this case undoubtedly represented the cost of work done in the repair or decoration of a building, or the estimated cost of that work.

The Control of Building Operations Order, 1941, para. (2), provides:

B The sum prescribed under the proviso to para. (2) of the said regulation (which provides that no licence under that paragraph shall be required for an operation begun after Jan. 1, 1942, which involves the doing of any description of any work specified in Pt. III of Sched. VI to the Defence (General) Regulations, 1939, if the total cost of the work of that description involved in the operation, including in particular the proper proportion of any such charges as aforesaid, does not exceed such sum as may be prescribed by order of the Minister of Works and Buildings) in relation to work involved
C in an operation begun at any time on or after that date being work of the description specified in subpara. (b) of this paragraph, is the sum of £100.

Then subpara. (b) says:

The description of work hereinbefore referred to is any work falling within Pt. III of the said Sched. VI . . .

D namely, as in this case, "work done in the . . . repair or decoration of a building."

Therefore, putting it quite shortly, it is prohibited to spend more than £100 in the work of repair or decoration of a building, unless there is a licence granted by the appropriate Minister.

Although the defendant admits that he has committed a breach of his covenant to deliver up the premises in a state of good repair and that the proper damages for that breach are £590 and £17, he contends that, under the above-mentioned
E regulations it is unlawful to spend more than £100 on the repair of a house and, therefore, his breach of covenant is one excused by law.

It is conceded that no application was made at any time for a licence under the regulations; and the plaintiff contends that the defendant's argument is invalid unless the defendant can show that he made an application for the necessary licence and that it was refused.

F 'I cannot help thinking that, ingenious as the defendant's argument is, it really does not hold water. One has to bear in mind first of all the object for which these regulations were put in force, and the obvious object of these regulations was to conserve building material and things of that sort. The legislature, as far as I know, were not legislating against the rights of landlords, nor were they legislating in this particular instance for economy.

G One knows that the Government have tried to impress upon the people of the United Kingdom the necessity for strict economy, but I do not think that, in these particular regulations, they had in mind a sort of rule of thumb figure in saying that nobody was to spend more than £100 upon a house from the point of view of pounds, shillings and pence; but the reason why it was done, as is well known, was because of the shortage of building materials, and the things used in building being required for more vital purposes.

H That being so, it seems to me that it is very difficult to say, as I am asked to say, that this proviso necessarily applies to a claim for money damage. It would be a good answer if the action was framed in some way—I do not know how it could be framed—in which the plaintiff was demanding that £607 worth of materials should be put into this house; but he is not doing that; he is asking for what is admittedly the proper sum in damages for loss to the reversion which resulted from the defendant's breach of covenant.

I do not think that the defendant's argument is the proper way of looking at a claim which is not in the form of an action insisting upon the covenant being carried out, but is a form of action asking for damages for breach of it.

one of the reasons being, as I have said, that the object of these regulations was not to prevent landlords recovering in money form damages for dilapidations, but to prevent materials which were required for a more vital purpose being used for a house. Quite apart from that, I accede to the argument which was put forward on behalf of the plaintiff, that, even if I am wrong in taking that view with regard to the section, a defendant who wishes to avail himself of it must satisfy the court that he has applied for a licence to spend more than £100 and has been unable to get one.

The landlord, if the defendants are right, would certainly be entitled to £100, because it is not made unlawful to spend £100 worth of material; you can do that without any licence at all, but if you want to spend more than £100 in materials you have got to get a licence for it; and, in my view, it is for the defendant to show the court that he has been unable to obtain a licence from the Minister to the extent of anything in excess of the £100.

I do not think the £20 is recoverable by way of damages to the reversion, and I think, therefore, that the plaintiff is entitled to recover the sum of £607, that is to say, £590 and £17, which is the agreed sum. If this very interesting point of law which has been raised is not a valid one, it has been agreed that those sums represent the damage to the reversion.

Judgment accordingly with costs.

Solicitors: *Bertie F. Browne*, agent for *H. H. Harris*, Slough (for the plaintiff); *Hillearys*, agents for *Lorley, Gardner & Sewell*, Caterham (for the defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

JENKINS PRODUCTIONS, LTD. v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Macnaghten, J.), **October 18, 19, 25, 1943.**]

Revenue—Excess profits tax—Computation of standard profits—"Accounts made up for successive periods of 12 months"—Finance Act, 1937 (c. 54), s. 20 (2) (a)—Finance (No. 2) Act, 1939 (c. 109), ss. 14 (1), 22 (f).

The appellant company, which had selected the year 1935 as its standard period for the purposes of excess profits tax, had, from its incorporation in 1933, made up its accounts for each half year ended June 30 and Dec. 31. At the annual general meetings of the company held in October or November, the directors presented to the shareholders accounts for the 12 months ended on the previous June 30. These accounts were based upon the half-yearly accounts and contained copies of the words and figures in the half-yearly accounts. The respondents contended that the yearly accounts were "accounts made up for successive periods of 12 months" ending on June 30 in each year and that the standard profits should be ascertained by taking the average profits of the periods from June, 1934 to June, 1935, and from June, 1935 to June, 1936. The appellants contended that the accounts were made up for successive periods of 6 months and that the two half years of 1935 should be taken as the standard period:—

HELD: the accounts of the appellants' business were not "made up for successive periods of 12 months" within the meaning of the Finance Act, 1937, s. 20 (2) (a). They were made up for periods of 6 months only, the yearly accounts presented to the shareholders being merely an aggregation of two half-yearly accounts.

[EDITORIAL NOTE.] In computing profits the statute prescribed one method where the accounts are made up for successive periods of twelve months. It was here suggested that, where accounts were made up for each period of 6 months and yearly accounts based on these six-monthly accounts were presented to the shareholders, there were accounts made up for successive periods of twelve months and that the method of computation above referred to should be adopted. This view has, however, been rejected by the court.

FOR THE FINANCE ACT, 1937, s. 20 (2) (a), AND THE FINANCE (NO. 2) ACT, 1939, s. 14 (1), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 30, p. 358, and Vol. 32, p. 1193.]

APPEAL by the taxpayer from a decision of the Special Commissioners confirming an assessment to excess profits tax for the chargeable accounting period Apr.-June, 1939. The facts are fully stated in the judgment.

N. E. Mustoe for the appellants.

The Attorney-General (Sir Donald B. Somervell, K.C.), and Reginald P. Hills for the Inland Revenue Commissioners.

A MACNAGHTEN, J. : This is an appeal from a decision of the Special Commissioners confirming an assessment to excess profits tax made upon the appellant company under the provisions of the Finance (No. 2) Act, 1939, Pt. III, ss. 12 to 22, in the sum of £1,207 11s. 9d. for the chargeable accounting period of three months, April, May and June, 1939.

B Excess profits are the amounts whereby the profits arising from a trade or business computed in the manner directed by the Act for a chargeable accounting period exceed the standard profits of the trade or business ; and the standard profits of a trade or business are the profits computed in the same way for its standard period.

C The appellant was incorporated on Sept. 25, 1933. It took over and carried on some existing businesses of furniture-making and woodworking, and it selected—as it was entitled to do under sect. 13 (4) of the Act—the year 1935 as its standard period. It was, therefore, necessary for the purpose of the assessment in question to ascertain the standard profits of the appellant, namely, the profits of the business for the year 1935.

D Under the somewhat complicated provisions of the Finance Act, 1937, s. 20 (2), and the Finance (No. 2) Act, 1939, ss. 14 (1) and 22 (f), the ascertainment of the appellant's profits for the year 1935 depends on the question whether during the pre-war years the accounts of its business were "made up for successive periods of 12 months" within the meaning of those words in the Finance Act, 1937, s. 20 (a). The Special Commissioners held that the accounts were made up for successive periods of 12 months ending on June 30. In that case, under the statutory provisions which I have mentioned, the profits of the business for the standard year 1935 must be ascertained by adding together the profits for the two years ending June 30, 1935 and 1936, and dividing the result by two. If, on the other hand, the accounts of the business were not made up for successive periods of 12 months within the meaning of the Finance Act, 1937, s. 20 (a), it would be E for the commissioners of Inland Revenue to determine what periods, not exceeding 12 months, should be taken for the purpose of ascertaining the profits of the business in the standard year 1935.

F It so happened that, during the first 6 months of 1936 the appellant sustained a considerable loss, and the inclusion of that half year in the periods taken for the purpose of ascertaining the profits for the standard year made the standard profits less than they would have been if the profits actually made in 1935 had been taken as the standard profits. The question, therefore, at issue on this appeal is this : Were the accounts of the appellant during the pre-war years made up for consecutive periods of 12 months ? For the appellant it is said that the accounts were made up for successive periods of 6 months and were not made up for successive periods of 12 months.

G The facts as set out in para. 3 of the case stated by the Special Commissioners are as follows. From its inception the appellant had made up for each half year ended June 30 and Dec. 31, a trading and profit and loss account and a balance sheet, and the accounts included the figures of stock at the end of each half year. These half-yearly accounts were audited and were regularly placed before the board of directors and were approved by them. The annual general meetings of the company were held on some date in October or November, and at each of those meetings the directors presented to the shareholders accounts H for the 12 months ending on the previous June 30. Copies of these accounts for the years ending June 30, 1935 and 1936, are annexed to and form part of the case. It is stated in the case that these yearly accounts are based upon the half-yearly accounts ; they in fact contain copies of the words and figures in the half-yearly audited accounts. These figures copied from the half-yearly accounts are set out in parallel columns with a third column in which the figures in the first and second columns are added together. In this third column the figures for stock as at Dec. 31 are, of course, omitted ; in that column the figures for stock are the figures in the half-yearly accounts for June 30 only.

The question of law for decision on this appeal is whether these yearly accounts are "accounts made up for successive periods of 12 months" within the meaning of those words as used in the Finance Act, 1937. In my opinion, they are not. The accounts of the business carried on by the appellant have never been "made up" for any period of 12 months—they were only made up for periods of 6 months—and the accounts presented to the shareholders at the annual general meetings of the company were merely an aggregation of two half-yearly accounts. It is, therefore, for the commissioners of Inland Revenue to determine what periods should be taken for the purpose of ascertaining the standard profits of the appellants in the year 1935; but I think they can only select periods of 6 months, since the accounts of the appellants were always made up for such periods, and they are bound to select the two half years of 1935, because they cannot select a period which falls wholly outside the "standard year." In my opinion, the Special Commissioners erred in a matter of law when they held that the accounts presented at the annual general meeting of the company were "accounts made up for successive periods of 12 months" within the meaning of the Finance Act, 1937, s. 20 (2) (a), and the appeal must be allowed with costs. The case will be remitted for the revision of the assessments when the standard profits of the appellant company have been determined by the commissioners of Inland Revenue.

Appeal allowed with costs.

Solicitors: *Nordon & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[Reported by GWYNEDD LEWIS, Barrister-at-Law.]

SMITH v. BARKLEY.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Macnaghten and Atkinson, JJ.), November 18, 1943.]

Emergency Legislation—Giving false information—Necessity for statement that specific charge under Defence (General) Regulations pending—Defence (General) Regulations, reg. 82 (2).

The appellant was taken in a motor car to a destination beyond the distance which the car was allowed to go under the Motor Fuel (Rationing) Order. A police officer making inquiries with a view to charging the driver of the car with an offence under that order asked the appellant where he had been put down, merely informing him that he was inquiring into a misuse of petrol. The appellant gave a false answer and he was charged with an offence under the Defence (General) Regulations, reg. 82 (2) of furnishing false information for the purposes of the Defence (General) Regulations:—

HELD: the answer was not given for the purposes of any of the Defence (General) Regulations within the meaning of reg. 82 (2).

[EDITORIAL NOTE. The court has construed reg. 82 (2) strictly since it is a penal regulation. To come within its provision, it is held that the person charged must be specifically informed that a charge under the Defence (General) Regulations is pending.]

FOR THE DEFENCE (GENERAL) REGULATIONS, reg. 82, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 34, p. 775.]

Case referred to:

(1) *R. v. Bradley* (1894), 63 L.J.M.C. 183; 33 Digest 338, 489; 70 L.T. 379.

APPEAL by way of case stated from the decision of the magistrates sitting at Oswestry. The facts are fully stated in the judgment of VISCOUNT CALDECOTE, L.C.J.

T. F. Davis for the appellant.

Vernon Gattie for the respondent.

Davis: The appellant had been voluntarily offered a lift by Samuel. It is admitted that he made an untrue statement. He falsely said he had only been carried to a certain place near Oswestry. To make an untrue statement to a police officer, or anyone else, is not in itself a punishable offence. He was not told the reason the question was put to him before he answered it. It is submitted reg. 82 is not intended to cover an ordinary police inquiry. The regulation only applies where a person is charged with the breach of some particular order.

Gattie: No objection was taken at the hearing and it cannot be taken now. Appellant must have known what he was being questioned about. [Counsel referred to *R. v. Bradley* (1)]. The defendant was not in any way misled. It is admitted the summons should have contained a reference to reg. 52 as well as reg. 82. It is not a mistake of substance but of form which could have been amended by the justices. Anyone who gives a false reply when any officer is making inquiries about an offence under any of these regulations is guilty under reg. 82. The words are "any person."

A **VISCOUNT CALDECOTE, L.C.J.**: The appellant was convicted of an offence under the Defence (General) Regulations, reg. 82, and was fined £5. The terms of the regulation may be summarised in this way. Reg. 82 (1) makes it an offence if any person, with intent to deceive, makes or has in his possession or furnishes false documents. If he does that, he is guilty of an offence against the regulation for the purposes of which he has prepared or made the document with intent to deceive. Reg. 82 (2) creates a rather different offence, though not altogether unlike the first one to which I have referred, namely:

B If, in furnishing any information for the purposes of any of these regulations, or of any order, rule or bye-law made under any of these regulations, any person makes any statement which he knows to be false in a material particular . . . he shall be guilty of an offence against that regulation.

C The words "for the purposes of any of these regulations" appear both in 82 (1) and 82 (2).

The facts of this case are that a man was suspected of having committed an offence against the Motor Fuel (Rationing) Order. The appellant was asked whether he had been driven in a car driven by the person suspected of the offence under the Motor Fuel (Rationing) Order to a particular destination. The appellant gave an untrue reply. Of course, no one can palliate or excuse that untruth.

D Two points, however, are taken upon the case stated. The first is a point about which it is unnecessary to say anything, namely, that the untrue statement was made in reply to a question put to him by the respondent without his being previously cautioned. That point was clearly unarguable; and counsel for the appellant did not proceed with it here.

The second point was as follows:

E The respondent did not specifically inform the appellant that his inquiries related to an alleged offence under the Defence (General) Regulations, 1939, and that the latter being penal regulations must be strictly construed.

The point taken against that by the respondent was that his statement that his inquiries related to an alleged misuse of petrol constituted sufficient indication to the appellant that the information was required for the purposes of the Defence (General) Regulations.

F In the course of the discussion a question has arisen as to whether the Defence (General) Regulations, reg. 82, deals with what I may call "third parties" at all. By "third parties" I mean persons not suspected of a substantive offence, but who are only said to commit an offence because they have furnished or given information for the purpose of prosecuting the person suspected of a breach of the regulations. I think the point taken before the magistrates that the respondent did not specifically inform the appellant that his inquiries related to an alleged offence under the Defence (General) Regulations and that the latter, being penal regulations, must be strictly construed, does raise the question to which I have just referred; and, therefore, the court has to consider it.

G It is quite plain to my mind that the Defence (General) Regulations, reg. 82 (1), deals with documents which the person sending or filling up the documents is required to send or fill up. In other words, when reg. 82 (1) (a) speaks of "any document issued for the purposes of any of these regulations," I think those words mean documents which are required to be given or furnished under any obligation created by a regulation or by an order made under the regulations. If a person makes a document, which he knows he is under a duty to furnish, but which is false, and does so with intent to deceive, he then will have committed an offence against reg. 82 (1).

H When I turn to reg. 82 (2), I find first of all the words: "If, in furnishing any information." Those words seem to me to indicate primarily that the person, when furnishing the information, is under some duty to furnish it. That

impression is strengthened by the words which immediately follow, which are the same words as appear in reg. 82 (1): "for the purposes of any of these regulations." I do not think that means anything else but "for the purposes of satisfying the requirements of any of these regulations or any orders made under these regulations." If the contention advanced by the respondent is right, that the words are wide enough to include those whom I have called "third parties," it leads to this somewhat surprising result, as, indeed, is not contested by counsel for the respondent, that a person who has not the remotest connection with any offence committed under the particular regulation involved may be found guilty of an offence against that regulation, because he has told a lie as to the evidence which he is in a position to give.

I have formed a clear view that reg. 82 (2) does not cover the case like that of the person charged and convicted in this case before us. Even supposing the view I have formed is not, however, as clear as I feel it is, it must be remembered that this is a penal provision, and must be construed strictly. I should hesitate long before I found the language of this regulation so clear as to make it an offence for some person, not in any way connected with the commission of another offence, to make some statement false in a material particular about that other offence.

MACNAGHTEN, J.: I agree; and I have very little to add. It is conceded by counsel for the respondent, as, indeed, he is bound to concede, that the information in this case was defective, in that it ought to have specified the Motor Fuel (Rationing) Order, as the Order alleged to have been infringed. That the appellant was aware that the inquiry was with regard to an offence under that Order seems clear since he made a false statement with regard to the distance that he had been driven. The distance which he stated he had been driven was a distance within which the driver of the motor vehicle was entitled to go; whereas in fact on that night he had been driven to his own home at Whittington, some distance, though the exact distance is not stated, beyond the limit to which the driver of the motor vehicle was entitled to take it. It is said this was merely a technical defect which, if the attention of the court had been called to it, would have been easily remedied. It is, however, to be observed that the Motor Fuel (Rationing) Order, para. 12, provides as follows:

Every person desiring to obtain a licence under any of the provisions of this Order, or coupons for the purposes of the Order, shall furnish such information as may be requested by or on behalf of the Board of Trade; (2) or as may be prescribed by direction of the Board of Trade and any such direction may specify the form in or on which such information is to be furnished.

If the information had been amended by referring to that Order, it might have occurred to the parties concerned, and possibly to the tribunal, that the construction of reg. 82 (2) which my Lord has given is the true construction.

ATKINSON, J.: It seems to me that reg. 82 does not touch what is alleged to have happened in this case. There are many regulations and orders forbidding under penalties various acts or enterprises without special licence. For the purpose of obtaining a licence, applicants are required to furnish information of many kinds, information which may include books, accounts, documents and/or answering questions of various kinds. If false information is given for the purposes of fulfilling the requirements of a regulation, it is made an offence by reg. 82. Reg. 82 (1) deals with documents. Reg. 82 (2) deals with other information. But the gist of the whole thing is supplying false information when true information is required by the regulation or the order. In that way sense is given to the latter part of cl. 2, which says "he shall be guilty of an offence against that regulation." If somebody gets a licence by giving false information, it is quite logical and intelligible to say that he shall be guilty of that which the regulation in question forbids. But here the answer that was given to the officer was not for the purposes of any regulation at all, and I think that the summons ought to have been dismissed.

Appeal allowed with costs.

Solicitors: *Evan Davies & Co.*, agents for *Crampton Pym*, Oswestry (for the appellant); *Sharpe, Pritchard & Co.*, agents for *J. M. Whitley*, Shrewsbury (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

R. v. ARCHBISHOP OF CANTERBURY.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Charles and Hallett, JJ.), **October 21, 22, November 5, 1943.**]

Ecclesiastical Law—Right of presentation to a benefice—Objection raised by parochial church council to the presentment—Duty of the archbishop to review the bishop's refusal is administrative not judicial—Benefices (Exercise of the Rights of Presentation) Measure, 1931, s. 3.

The applicant was a clerk in Holy Orders and also the owner of the advowson of Batcombe cum Upton Noble. He presented himself for the living but the parochial church council passed a resolution disapproving of that presentation and the matter came before the bishop of the diocese under the provisions of the Benefices (Exercise of Rights of Presentation) Measure, 1931. The bishop decided against the applicant, who asked the Archbishop of Canterbury to review the decision of the bishop. The Archbishop considered the matter privately and approved the action of the bishop. The applicant contended that it was the duty of the Archbishop to follow the procedure of a judicial inquiry and that the review should take the form of an appeal in a *lis inter partes* :—

HELD : the Archbishop was under no duty to hold any inquiry, but was merely under a duty to consider the interests of the benefice in approving or disapproving the patron's choice.

[EDITORIAL NOTE. It was here contended that the duty of the Archbishop was to hear both sides as though there were some charge made against the applicant. No charge is made against the presentee and there is no investigation of that nature to be made and the Archbishop is merely called upon to investigate the matter and satisfy himself that a proper decision has been reached on the matter.

AS TO PRESENTATION TO LIVING, see HALSBURY, Hailsham Edn., Vol. 11, pp. 701-707, paras. 1265-1272 ; and FOR CASES, see DIGEST, Vol. 19, pp. 400-405, Nos. 2300-2367.]

Cases referred to :—

- (1) *Local Government Board v. Arlidge*, [1915] A.C. 120 ; 22 Digest 300, 2880 ; 84 L.J.K.B. 72 ; 111 L.T. 905.
- (2) *Fisher v. Jackson*, [1891] 2 Ch. 84 ; 19 Digest 609, 351 ; 60 L.J.Ch. 482 ; 64 L.T. 782.
- (3) *Labouchere v. Wharnccliffe (Earl)* (1879), 13 Ch.D. 346 ; 8 Digest 509, 24 ; 41 L.T. 638.
- (4) *Burn v. National Amalgamated Labourers' Union*, [1920] 2 Ch. 364 ; 43 Digest 102, 1063 ; 89 L.J.Ch. 370 ; 123 L.T. 411.
- (5) *R. v. Archbishop of Canterbury and Bishop of London* (1812), 15 East 117 ; 19 Digest 366, 1846.
- (6) *R. v. London County Council*, [1931] 2 K.B. 215 ; Digest Supp. ; 100 L.J.K.B. 760 ; 144 L.T. 464.
- (7) *Abergavenny (Marquis) v. Llandaff (Bishop)* (1888), 20 Q.B.D. 460 ; 19 Digest 404, 2345 ; 57 L.J.Q.B. 233 ; 58 L.T. 812.
- (8) *R. v. Canterbury (Archbishop)*, [1902] 2 K.B. 557 ; 19 Digest 234, 135 ; 71 L.J.K.B. 894 ; 86 L.T. 79.
- (9) *R. v. Liverpool (Bishop)* (1904), 20 T.L.R. 485 ; 19 Digest 367, 1849.
- (10) *R. v. Church Assembly (Legislative Committee)*, [1928] 1 K.B. 411 ; Digest Supp. ; 97 L.J.K.B. 222 ; 138 L.T. 399.

APPLICATION for orders of *certiorari* and *mandamus* directed to the respondent, the Archbishop of Canterbury. The facts are fully set out in the judgments. *J. D. Casswell, K.C.*, and *L. MacLaren* for the applicant. *A. T. Denning, K.C.*, and *W. S. Wigglesworth* for the respondent.

VISCOUNT CALDECOTE, L.C.J. : The applicant is a clerk in Holy Orders and is the owner of the advowson of Batcombe cum Upton Noble, in the diocese of Bath and Wells. In 1911 the applicant became rector of Batcombe, and held that position until his resignation in 1926. After the resignation of his successor in September, 1942, the applicant, who had meantime worked in India as a missionary for five years and subsequently taken various charges in this country, presented himself to the Bishop of Bath and Wells for institution. Although the fact seems to be of little or no importance in connection with the questions raised by this application, the applicant places some reliance on the fact that his father from whom he inherited the advowson of Batcombe directed

by his will that, in order to produce equity between his other children and the applicant, the applicant should be debited in the final distribution of the estate with the sum of £2,500 being the amount he paid to acquire the advowson. The applicant on presenting himself for institution was met with the provisions of the Benefices (Exercise of Rights of Presentation) Measure, 1931, s. 3. The main question arising for our decision is whether the respondent has discharged the duties imposed upon him by s. 3 (2) (ii) (b).

The long title of the Measure is: "To regulate the exercise of rights of presentation to benefices." It seems to me plain that the Measure was intended to give greater power both to the parishioners and to the bishop in connection with appointments to vacant benefices. Sect. 3 provides as follows:

A patron shall be entitled to exercise his right of presenting . . . to a vacant benefice in the same manner as if this measure had not been passed unless the parochial church council, within 30 days after the vacancy or impending vacancy has been notified under this measure shall pass a resolution . . . that the provisions hereinafter in this section contained shall have effect.

A resolution under that provision was in this case passed by the parochial church council. Thereupon the provisions contained in subsect. (2) came into operation. By para. (i) it is provided as follows:

The patron shall be entitled to exercise his right of presentation after conferring either personally or through a representative with and obtaining the consent of the churchwardens acting as the representatives of the parochial church council.

The consent of the churchwardens was not obtained by the applicant. Para. (ii) next provides that in the circumstances of this case,

. . . the patron shall be entitled to exercise his right of presentation after obtaining the bishop's approval of the clerk presented as being suitable for the duties attached to the cure of souls in the particular benefice concerned.

The applicant accordingly sought the approval of the Bishop of Bath and Wells. The bishop, in pursuance of the powers given by proviso (a) consulted the body of advisers established by the Measure. This body which is constituted by sect. 4 of the Measure consists of three clerks in Holy Orders, four laymen and the archdeacon. Having received the advice of the body of advisers the Bishop declined to give his approval. By letter dated May 12, 1942, the Bishop had already informed the applicant that he did not think it would be wise for him to return to Batcombe as rector, and he reminded the applicant that the "parochial church council had certain rights which they were, of course, entitled to put into force." His refusal to approve the applicant as the clerk presented was intimated to the applicant by letter dated Nov. 7, 1942. In reply to that letter the applicant wrote on Nov. 16, claiming to be entitled both legally and morally to be enlightened as to the facts and sources of adverse criticisms on which the Bishop's decision was based. By letter dated Nov. 21, the bishop declined to tell the applicant on what grounds his body of advisers under the Measure recommended him not to assent to his petition for institution to the living of Batcombe. Thereafter the applicant through his solicitors by letter dated Mar. 10, 1943, gave "formal notice of appeal" to the respondent against the decision of the Bishop. The notice of appeal contained a statement that "this appeal is brought under the provisions of the Benefices (Exercise of Rights of Presentation) Measure, 1931." The applicant's solicitors further intimated that "the appellants [that is the applicant] would appear by Mr. Vaisey, K.C." The applicant based his assertion of a right to appeal upon sect. 3 (2) (ii), proviso (b) which is in the following terms:

If the bishop finally withholds his approval the patron may bring his decision before the archbishop for review and may lawfully present the clerk concerned if the archbishop shall authorise such presentation.

According to the affidavit of the applicant he instructed his solicitors to conduct the appeal before the Archbishop, to appear by counsel and to lay before the Archbishop all the facts which the applicant deemed material, asserting that the majority of the parishioners would welcome his return and that he was fit and able to carry out his duties as a minister of the church which he had faithfully served for nearly fifty years. After some correspondence between the applicant's solicitors and the respondent's legal secretary an interview took place between the respondent and the applicant as patron. Certain documents, including a

memorandum which set forth the applicant's complaint against the decision of the bishop, and a petition signed by parishioners were furnished to the respondent. Subsequently the respondent again saw Mr. Vaisey, appearing for the applicant. On this occasion the applicant was not present and the respondent showed Mr. Vaisey, in confidence, a letter which he had received. On June 24, 1943, the respondent wrote to the applicant as follows :

- A I have been giving the most careful attention I can to the application that you have made to me for a review of the decision of the late Bishop of Bath and Wells not to accept you for institution to the benefice of Batcombe. As I pointed out to you when you were kind enough to come and see me, I am advised that what is required of me by the Measure is to consider whether a case had been made out for varying the decision reached in the diocese. It is not my duty to hear the whole case afresh or to consider it on its merits as though no decision had already been reached. I must assume that the late bishop exercised the utmost care himself and reached his decision only after
- B very full and careful consideration. Indeed the volume of correspondence which has passed on this subject is evidence of this. I have then to consider whether sufficient argument has been adduced to lead to the reversal of a decision so reached, and I feel obliged to let you know that in my judgment no such sufficient argument has been put before me. The decision reached by the late bishop must, therefore, be regarded as standing.
- C The order of *certiorari* which is now sought is to quash this decision. The order of *mandamus* is to direct the respondent to hear and determine all issues of fact and law which may be necessary to enable the respondent to decide whether or not the decision of the bishop was just and proper and to hear and determine the issues according to law. An order of *mandamus* is also asked for directing the respondent to receive all relevant evidence which may be tendered by the applicant and to permit the applicant to appear before him by counsel.
- D The applicant's main submissions were these. First, that the word "review" has the same meaning and effect as "appeal," and secondly, that the respondent is under a duty to follow the procedure of a judicial inquiry as if there were a *lis inter partes*. As to the meaning of the word "review," counsel for the applicant relied on citations of certain statutes in which the word was used, he said, very much as "appeal." The three statutes cited to us all dealt with Scottish procedure, but apart from that reason for thinking they are not very useful in throwing light upon the sense in which "review" is used in this Measure, I cannot but think that the context in which the word is used in the Measure is a safer guide to its meaning than other enactments. It would not be difficult to find instances of the use of the word in a sense contrary to the applicant's contention, as for example bills of review in the Court of Chancery, which were heard by the same persons who had given the decision to be reviewed (see HOLDSWORTH, HISTORY OF ENGLISH LAW, Vol. 1, p. 436). As to the applicant's second submission, it was said he is in any case entitled to know the allegations against him and there must be a hearing at which the applicant, either with or without counsel, can appear to make his answer to the allegations. The respondent, on the other hand, took the view that his part is a much more limited one than that of a judge trying an issue of fact. The respondent has stated in the letter of June 24, which I have already read, the view which he takes of his
- G duty.
- H The applicant has, I think, misconceived both his position and the question which the Bishop and the respondent each have to consider under the Measure. The applicant happens to be the presentee, but this application is made by him, not as presentee, but in his capacity as patron to prevent what his counsel called an invasion of his rights. The fact that the applicant presented himself is a mere accident of which the only importance is, as it seems to me, that the Bishop, and the Archbishop might well think it undesirable that in that particular parish a man who had formerly been rector and had resigned should present himself against the wishes of at least a majority of the parochial church council. As patron the applicant undoubtedly has a right of presentation but since the passage of the Measure of 1931 his right is subject to the right of the Bishop, or upon a "review," whatever that may mean, of the Archbishop, to withhold their approval. Who, it may be asked, are the parties in the supposed suit and what is the issue? My answer must be that there are no parties, and there is no issue except as to the suitability of the person presented for the duties

attached to the cure of souls in this particular benefice as to which the Bishop or the Archbishop is given the final decision. The refusal of the Bishop or the Archbishop to approve the patron's choice is no more than the exercise of a power or even duty under the Measure to consider the interests of the benefice. It requires no charge to be made against the patron, nor for that matter against his presentee. It seems to me for these reasons wholly fallacious to treat the applicant as if he were in the position of a defendant entitled to resist some charge or aspersion made upon him. If I am right in this opinion the analogy of legal proceedings breaks down *in limine*.

The applicant, however, presented another argument, though I regard it as really the same contention in a different form. Whatever may be the nature of the "review" which the Measure permits, it was said it must be the duty of the respondent as it was of the Bishop to act in a judicial manner in what was at any rate a quasi-judicial inquiry. In support of that submission *Local Government Board v. Arlidge* (1) was relied on. The decision itself is not one from which the applicant can draw much help, but reference was made to passages in some of the opinions which support the contention that even when acting in an administrative capacity and *a fortiori* when acting in a quasi-judicial capacity a body or person entrusted with the task of giving decisions affecting other persons' rights or property must act judicially. The question in that case was whether the Local Government Board had properly heard and determined the appeal of the owner of a dwellinghouse against a closing order which had been made by the Hampstead Borough Council. By the Housing and Town Planning Act, 1909, s. 17 (6) a right of appeal in certain circumstances to the Local Government Board was given to the owner of a dwellinghouse in respect of which a closing order had been made. The House of Lords held that the procedure upon the appeal being made was under the Act a matter for the determination of the Local Government Board. LORD HALDANE, at pp. 132, 133, said :

... when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made ... giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view.

In his opinion, LORD MOULTON said that on such an appeal the Local Government Board must act judicially but that only meant that it must preserve a judicial temper and perform its duties conscientiously.

It is to be observed that in that case a right of appeal, *eo nomine*, to the Local Government Board, was given to the house owner against the decision of a the borough council, that the house in question was not fit for human habitation. There was of necessity a definite charge or allegation made as to the state of the house. *Fisher v. Jackson* (2), *Labouchere v. Wharmcliffe* (3), *Burn v. National Amalgamated Labourers' Union* (4), which were relied on by the applicant are all cases in which there was a charge against one of the parties. It was held in those cases that particulars of the charges must be given to the party against whom the charge was made. Similarly it was said here that natural justice required that the Archbishop should give notice to the applicant of the allegations against him. A more apposite decision was relied on by counsel for the applicant, *R. v. The Archbishop of Canterbury and the Bishop of London* (5). LORD ELLENBOROUGH, C.J., there dealt exhaustively with the position of the Archbishop and the Bishop where their approval and licence were required before a particular person could be received as a lecturer. He said, at p. 139:

... there never yet has been an instance of a *mandamus* to compel a bishop to approve and license a lecturer, where the question turned on the approbation or disapprobation of the bishop as to the fitness of the applicant.

Later in his judgment LORD ELLENBOROUGH said, at p. 146 :

May he not disapprove for matters within his own personal observation and knowledge for the habits of life and conversation of the person, which might be known to him from residing in the same university or society with him ; from his conduct in life down perhaps to the very time when the bishop is called upon to signify his approbation ?

Is he to exclude his own knowledge, the most material of any? Does the law say upon what proof he is to act, or that he is to have witnesses upon oath to the facts by which his judgment is to be guided? What authority has he to compel the attendance of witnesses before him? The word of the statute is "approve"; and he must exercise that approbation according to his conscience, upon such means of information as he can obtain; and every thing that can properly minister to his conscientious approbation or disapprobation, and fairly and reasonably induce his conclusion on such a subject, though it might not be evidence that would be formally admitted in a court of law, may, I am of opinion, be fitly taken into his consideration.

In my opinion the judgment of LORD ELLENBOROUGH is decisive of the present case.

Upon the whole matter I cannot find any ground upon which the Archbishop's decision should be quashed or orders of *mandamus* be made. Nor can I see any act which it is within our power to compel him to perform. If an order of *mandamus* were to go to him the Archbishop could, in my opinion, properly reply that he was acting upon his own knowledge. What is he to hear? His refusal to approve the presentee might be based on the presentee's age, or even upon the fact of his previous connection with the parish and upon other matters incapable of dispute, and all of them matters upon which the Archbishop or indeed the Bishop might properly base a decision to withhold approval. A great deal of importance was attached by the applicant's counsel to his contention that the applicant had been deprived of his right to go to a court of record under the provisions of the Benefices Act, 1898, s. 3, and that to refuse this application for an order of *mandamus* was tantamount to a repeal of the provisions of the Benefices Act, 1898, ss. 2 and 3. There is no reason whatever for suggesting that the provisions of sects. 2 and 3 afford no protection to a presentee whom the Bishop has refused to institute to a benefice. Be it noted that these provisions are for the protection of a presentee in cases where a refusal by the Bishop to institute has been upon such grounds as evil life or misconduct or neglect of duty. Sects. 2 and 3 moreover deal with the rights of a presentee and not with those of the patron. As I have already observed, it is the patron who is seeking to enforce what he regards as his rights in this case.

In my opinion, there is no ground for an order of *certiorari* or *mandamus*, and the application must be refused.

CHARLES, J.: I agree. It appears to me that this motion is entirely misconceived. Let us see quite shortly what the position was which led up to this dispute. The applicant, Mr. Morant, was ordained something like 50 years ago, and is now somewhere about 73 years of age. His father was the patron of the living, or the two livings, of Batcombe cum Upton Noble in the diocese of Bath and Wells, and Mr. Morant was presented to that living as rector and remained and acted as rector from 1911 to 1926. Be it observed there are two parishes, and they are country parishes and widespread. He then became himself the patron; but, when he left in 1926, he resigned of his own motion and went to India, and in India he stopped for some 5 years. When he went away he, as patron, presented perfectly satisfactorily another person. When he came back from India in 1931 he found his own presentee in occupation of the living, and applied to the Bishop for a licence to act in various parishes for the assistance of other clergymen in order that he might continue an active life as a clergyman. He was so licensed. That in itself, if I may pause here for one moment, indicates that the Bishop had nothing against him at all as a clergyman—nothing. Then in May, 1942, the then rector of these parishes resigned, and it is quite clear that from that moment Mr. Morant indicated to the Bishop that it was his intention then to present himself to the living which he had held from 1911 to 1926. On May 12, 1942, the Bishop wrote to Mr. Morant the following letter:

I received your letter dated May 9, 1942. Mr. Haviland's resignation [the person who had been the rector of the living] is to date on Sept. 30 of this year. I do not think it would be wise for you to return to Batcombe as rector. In any case, as you know, the parochial church council has certain rights under the Benefices (Rights of Presentation) Measure which they are, of course, entitled to put into force.

In November, 1942, Mr. Morant wrote to the Bishop:

As I cannot come back to Batcombe, I am writing to ask your lordship whether

you would kindly give me some work to do or recommend me to some vicar who needs assistance, the charge of his parish. I do not mind whether it is town or country. He was so recommended and he undertook work of that nature, thus indicating that the Bishop had not against him either as to his mode of life or manner of living or character any sort of objection to him as a clergyman.

The next step is that the parochial church council, the duly appointed representatives of the parish, took a hand in the matter, as they were entitled to do. The Benefices (Exercise of Rights of Presentation) Measure of 1931 gave the parochial church council a power which it had not got before, power to make objection to a presentee, or to require the Bishop to take certain steps before he approved the appointment of that presentee to their living, not because (let this be marked) they were alleging anything against the character, mode of life or manner of living of the presentee, but because they did not consider him to be a suitable person for that particular living, however suitable he might be for another particular living. So, in accordance with sect. 2 of that Measure, they took steps. That section says :

(i) When a vacancy or impending vacancy has been notified to a parochial church council under this Measure, such parochial church council may make representations in writing to the patron as to the conditions, needs and traditions of the parish, but without mentioning the name of any particular clerk. (ii) A copy of any representations made under this section shall be sent to the bishop unless the bishop is himself the patron.

In accordance with that right they took steps. Before the Measure of 1931 came into existence a patron (I am only giving this as an example) might, if he desired to benefit, we will say, a relation who was very old, who was infirm, or who patently was not a suitable man for a country parish, still present him and the parochial church council were saddled with him ; they had no right to object to him. But under the 1931 Measure they have. They were deliberately given quite deliberately given—the power to intervene in the best interests of the particular parish, which they represented as a parochial church council.

A memorandum came into existence made by Mr. Morant which itself contained the resolution which was passed by the parochial church council and, although we are not certain as to why the Bishop or why the Archbishop found that this particular man was unsuitable, it is perhaps a little illuminating, particularly having regard to the affidavit of Mr. Morant himself. The parochial church council of the parish of Batcombe cum Upton Noble passed a resolution in accordance with the provisions of the Benefices (Exercise of Rights of Presentation) Measure, 1931, s. 2, and the resolution was in the following terms :

That this council exercise its right under the Benefices (Exercise of Rights of Presentation) Measure, 1931, s. 2. That the following representation shall be made to the patron in writing and that a copy of same be sent to the bishop as regards (i) conditions, (ii) needs and (iii) traditions. (i) Taking conditions to mean the kind of population and its work, it principally consists of dairy farming community (to which arable land has lately been added) with its attendant labourers, roadmen attached to the rural district of Shepton Mallet, a few others, men and women who do daily work, gardening, etc., also a few residents, some old standing and some comparatively newcomers. In addition we still have some evacuees remaining. The only condition that has changed in recent years is the sending of children out of the village to secondary schools and the consequent need of special attention to their spiritual well-being in their homes. (ii) Needs : A young man with a broad mind and a liberal spirit exercising no rigidity in making full use of all forms of worship included in our Prayer Book. (iii) Traditions : catholic. That the parochial church council of the parish of Batcombe, Somerset, having received notification from the bishop of the diocese of a vacancy in the benefice of Batcombe with Upton Noble hereby resolves that the provision of the Benefices (Exercise of Presentation) Measure, 1931, s. 3 (2) shall have effect . . .

They sent the following resolution to the Bishop of Bath and Wells :

At a meeting of the parochial church council of Batcombe duly convened and held on Monday July 6, 1942, that the council require your lordship to consult the body of advisers established by the Benefices (Exercise of Rights of Presentation) Measure, 1931, before giving or withholding your approval of any clerk presented as being suitable for the duties attaching to the cure of souls in the benefice of Batcombe with Upton Noble. That the members of Batcombe parochial church council having received official intimation that the patron the Rev. G. Morant has petitioned the bishop and

presented himself for institution to the living wish hereby to record their objection to such institution and confirm their previous resolution already forwarded.

That resolution was passed with only one single dissident—it was practically unanimous. They object to the institution of Mr. Morant, they indicate that it was a widespread agricultural parish that needed a young man.

A That being the position, what did the Bishop do? The Bishop acted exactly as he ought to have done, and that is not indeed disputed by counsel for the appellant. He consulted his body of advisers, and his body of advisers is not a judicial body in any sense of the word. It is a body of advisers for the purposes of this Measure, and it consists of:

(i) three clerks in Holy Orders elected triennially by the chamber of clergy of the diocesan conference; (ii) four laymen elected triennially by the chamber of laity of the diocesan conference; and (iii) the archdeacon, who shall be the chairman.

B To that body of advisers the Bishop put the matter which was under consideration; and he did more, he had an interview with Mr. Morant himself. He wanted obviously, quite naturally, not only to act on his own knowledge but to see what Mr. Morant himself had to say, and he interviewed Mr. Morant. Then the body of advisers began to function, and they in accordance with their duty asked Mr. Morant to present himself to them, and he did so, and Mr. Morant stated his case to the body of advisers. The body of advisers then
C examined the matter on any material, written or oral, that they could obtain in order to enable them to give useful advice to their Bishop. It is clear from the Bishop's own letter (although he was not bound to disclose what advice the body of advisers gave to him) that they did advise the Bishop, and their advice was not in favour of Mr. Morant as being a suitable person for that particular parish. The Bishop, using as he was entitled to do, his own know-
D ledge, the advice of the body of advisers, any communication that had been made to him in confidence or otherwise, acting with his episcopal authority with a view to doing the best that could be done for a parish within his diocese, came to the conclusion that however suitable Mr. Morant might be for another living, he was not suitable for this particular parish, and so he ruled, as he was by all conscience bound to rule if he was to do his duty as a Bishop towards the parish and the parochial church council concerned. So we are left now
E in this position, that Mr. Morant, who by accident only happens to be both patron and presentee (it does not affect the legal position in the least that by accident he happens to be the patron and also the presentee) finds that the parochial church council representing the parish does not want him, does not think he is suitable and object to him; he finds that the body of advisers apparently agrees with their view and the Bishop agrees with that view as well.
F That being the position under the Benefices Measures of 1931, the patron (not the presentee) if the Bishop finally withholds his approval, may bring his decision before the Archbishop for review and may lawfully present the clerk concerned if the Archbishop shall authorise such presentation. Now this extraordinary misconception appears in all clarity. It is admitted by counsel for the appellant that the bishop acted with perfect regularity, that he was not bound to disclose any of the material which was before the body
G of advisers, that he was not bound to disclose the decision of the body of advisers, and yet it is said, when it passes to the Archbishop so that he may put the decision of the Bishop under review, the Archbishop is in some strange way clothed with entirely different powers, saddled with entirely different requirements to the powers which rested with the Bishop or the requirements that were upon the Bishop. It is said that you must hold a full dress appeal with counsel, witnesses, full disclosure of all documents, including documents, that is, that
H the Bishop need not disclose—the position really becomes almost absurd—you must hold a full dress court as if there were parties and as if allegations had been made against the manner and mode of living of this gentleman and the matter was being dealt with under the Benefices Act, 1898. In this case we are asked to grant a writ of *mandamus* to compel the Archbishop to do that which he has no power whatever to do any more than any man in the street, and to require him to do that which the Bishop is not required to do, namely, to produce all documents, confidential or otherwise, all testimony given by witnesses before the body of advisers. He refused to do so, and I

think that he acted in accordance with the law, because to do so would defeat the very object of this Measure.

What did he do? He perused all the materials that were at his hand in order to arrive conscientiously as the metropolitan at the proper conclusion as to whether or no, after he had reviewed the Bishop's decision, he ought to say that the Bishop's decision was wrong. He had before him the representations, the resolutions and the requirements of the parochial church council of Batcombe cum Upton Noble, he had the report of the body of advisers appended to which were all the notes taken at their meetings and the documents submitted to them. He had the documents from the file kept at the palace of Wells by successive Bishops of Bath and Wells, he had the memorandum to which I have referred submitted by Mr. Morant's advisers with the documents annexed thereto, including the petition, the report upon that petition, and the correspondence which had passed. He had his own file and also a resolution by the legal board of the church assembly in response to a request by the Archbishop's predecessor Lord Lang, as to the position of the Archbishop under the Measure and the practice he should adopt in dealing with cases under it. With all those matters before him he passed the decision of the Bishop under review and he came to the conclusion that the Bishop's decision ought not to be disturbed.

Once again, what was that decision, for this is all-important? It is not that Mr. Morant is unfit (the word used in the 1898 Act) by reason of some evil living or because of his mode of living or manner of living or because of something discreditable in his life as a clergyman—not for any of those reasons at all, simply and solely that he is a man who is not suitable for that particular parish. As I have said before, he may be eminently suitable for another parish—eminently suitable. But his own affidavit and also a passage, I think, in the memorandum display what was uppermost in his mind. He reiterates that, although he is, I think, 73, he is much younger than a man of that sort of age would generally appear to be. He adds that he is healthy, that he does not mind and is ready to cope with the extended nature of the two parishes. All those matters seem to have been uppermost in his mind and they certainly seem to have presented themselves to the minds of the parochial church council. There may be many things which make a man unsuitable for a particular parish who is an excellent man, a man of the highest integrity, a man with whose character no fault could be found. The passage of years over one's head is no fault of ours. In this case no suggestion is made, save in the imagination of Mr. Morant himself, who speculates as to the reason why the parochial church council do not like him as a rector and cannot see in him a suitable man—there is no allegation against him, and when the Archbishop had to consider the matter there were no parties. The patron, and the patron alone, asked him to review the matter, and he had to the best of his ability with all the materials that he could command reviewed it. There is no ground whatever why this court should grant either an order of *mandamus* or *certiorari*.

HALLETT, J.: I agree and desire to add only a few words of my own.

In the first place, I cannot reconcile the terms of the Measure with any notion that its object or effect is to provide for the eliciting or investigation of anything which can properly be called charges or allegations against a proposed presentee. The first step when a vacancy, or impending vacancy, has been notified to a parochial church council is for the council to make, if it desires, representations in writing to the patron and to the Bishop as to the conditions, needs and traditions of the parish, but without mentioning the name of any particular clerk. (See the Measure, s. 2.) Clearly at that stage there cannot be any question of a charge or allegation being made against a particular clerk.

The next step, where, as here, the provisions of sect. 3 (2) (ii) are applicable, is for the Bishop to decide whether he approves of the clerk presented as being suitable for the duties attaching to the cure of souls in the particular benefice concerned. To say in these circumstances that if the Bishop withholds his approval he is upholding any charge or allegation against the proposed presentee seems to me to be a manifest misuse of language. Some of the most illustrious clerks in the history of the Church of England may well have been unsuitable

for the duties attaching to the cure of souls in a particular benefice, for instance, in the neighbourhood of the London or Liverpool docks.

A It is to be observed, moreover, that the right to require the Bishop to consult the body of advisers before arriving at his decision is conferred by the first proviso only on the patron and the parochial church council, and not on the proposed presentee; an omission of some significance when we are considering whether the procedure contemplates an investigation into charges or allegations against the presentee. The next step, if the Bishop withholds his approval and the patron so desires, is for the Archbishop to review the decision of the Bishop, and again it is to be observed that no right to require a review is conferred on the presentee. In considering what such a review involves, I derive no assistance from cases dealing with what is required in, or the distinction or supposed distinction between, quasi-judicial and administrative proceedings, nor from the use made of the word "review" in Acts of Parliament relating

B to quite different matters. On the other hand, I think that it is legitimate, helpful and indeed necessary, when deciding what principles ought to govern any particular form of review, to consider first what principles were applicable in the proceedings which are the subject of review. The Court of Appeal, I apprehend, when reviewing proceedings before a judge of the High Court or county courts will consider and, if necessary, formulate the principles which

C should have governed the proceedings before the judge. So also the High Court, when reviewing proceedings before an arbitrator or what is often called a domestic tribunal, will be guided, I suppose, by the principles which should, in its opinion, have governed the reviewed proceedings. Similarly here I think that, in deciding what were the obligations of the Archbishop, help can be derived from considering what were the obligations of the Bishop.

D Counsel for the applicant at one stage conceded that, apart altogether from any technical difficulty occasioned by the fact that the Bishop, now deceased, or his representative, is not a party to this application, he could not take exception to the procedure followed by the Bishop. In particular, he expressly conceded at one time that the Bishop was not wrong in refusing by his letter of Nov. 21, 1942, to disclose to the applicant the report in writing of the body of advisers, which formed part, and obviously an important part, of the material upon which the Bishop reached his decision. This concession

E was, in my view, inevitable, having regard to the nature and scope of the duty imposed upon the Bishop by the terms of the Measure, yet it put the applicant's counsel in a serious dilemma, since the same report, as appears from Mr. Dashwood's affidavit, also formed part of the material upon which the Archbishop relied. Accordingly, either the contention must be that the Archbishop was bound to disclose material which the Bishop was not bound to disclose or else

F the contention must be that the Archbishop was bound to disclose part of the material before him, namely, the letter mentioned in his affidavit, but not another part of that material, namely, the report of the body of advisers. Both contentions appear to me to be equally unsustainable. The truth is that the duty of the Archbishop must be considered in relation to the duty of the Bishop, and the duty of the Bishop must be considered in the light of all the terms of the Measure.

G For these reasons, and the reasons stated in the other judgments, I agree that this application should fail.

Orders refused with costs.

Solicitors: *Evill & Coleman* (for the appellant); *Lee, Bolton & Lee* (for the respondent).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

H

R. v. OLIVER.

[COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., Macnaghten and Hallett, JJ.), **November 22, 1943.**]

Criminal Law—Evidence—Facts peculiarly within knowledge of accused—Grant of licence—"Wholesaler"—Defence (General) Regulations, reg. 55 Sugar (Control) Order, 1940 (S.R. & O., 1940, No. 1068), art. 2.

Criminal Law—Penalty—Enactment increasing penalty after commission of offence. A

The appellant was charged with having sold sugar as a wholesaler without the necessary licence. After the commission of the offences the penalties were increased by an order in the following terms: "Any person guilty of an offence against this regulation being a breach of the control or an offence referred to in paras. 1b or 1c of this regulation shall be liable to" certain penalties being greater than those previously applicable to such offences:—

HELD: (i) whether the appellant had a licence was a fact peculiarly within his own knowledge and proof of the fact that he had a licence lay upon him.

(ii) a wholesaler is not necessarily one who sells to another who resells the purchased article. B

(iii) upon the proper construction of the regulation increasing the penalties, a person who had already committed the offences at the time the order was enacted could be made liable to the higher penalties. C

[**EDITORIAL NOTE.** Generally speaking, the burden of proof lies upon the prosecution, but there are some facts so peculiarly within the knowledge of the accused that the prosecution is not required to give even *prima facie* evidence on the point.]

AS TO FACTS WITHIN THE KNOWLEDGE OF ACCUSED, see HALSBURY, Halsham Edn., Vol. 13, pp. 545, 546, para. 615; and FOR CASES, see DIGEST, Vol. 22, pp. 40, 41, Nos. 171-177.] D

Cases referred to:

- * (1) *R. v. Scott* (1921), 86 J.P. 69; 14 Digest 431, 4555.
- (2) *Williams v. East India Company* (1802), 3 East 192; 14 Digest 430, 4551.
- * (3) *Elkin v. Janson* (1845), 13 M. & W. 655; 14 Digest 430, 4549; 14 L.J.Ex. 201.
- (4) *Abrath v. N.E. Ry. Co.* (1883), 11 Q.B.D. 440; 22 Digest 46, 227; 52 L.J.Q.B. 620; 49 L.T. 618.
- * (5) *Hire Purchase Furnishing Co. v. Richens* (1887), 20 Q.B.D. 387; 12 Digest 237, 1948; 58 L.T. 460.
- (6) *R. v. James*, [1902] 1 K.B. 540; 15 Digest 903, 9900; 71 L.J.K.B. 211; 86 L.T. 202.
- (7) *R. v. Turner* (1816), 5 M. & S. 206; 14 Digest 430, 4552.
- (8) *Williams v. Russell* (1933), 149 L.T. 190; Digest Supp.
- * (9) *Buckman v. Button*, [1943] 1 K.B. 405; [1943] 2 All E.R. 82; 196 L.T. 75.
- * (10) *Public Prosecutions (Director) v. Lamb*, [1941] 2 K.B. 89; [1941] 2 All E.R. 499; 110 L.J.K.B. 480; 165 L.T. 59.
- (11) *Re Athlunney (Lord)*, [1898] 2 Q.B. 547; 42 Digest 702, 1191; 67 L.J.Q.B. 935; 79 L.T. 303.
- (12) *Re Pulborough Parish School Board Election, Bourke v. Nutt*, [1894] 1 K.B. 737; 42 Digest 704, 1208; 63 L.J.Q.B. 497; 70 L.T. 639.
- (13) *Barber v. Pigden*, [1937] 1 K.B. 664; [1937] 1 All E.R. 115; Digest Supp.; 106 L.J.K.B. 858; 156 L.T. 245.

APPEAL against conviction and sentence in connection with offences with articles of food controlled under the Defence (General) Regulations, reg. 55. The facts are fully stated in the judgment. G

G. O. Slade, K.C., and E. M. Hoy for the appellant.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.), and Frederick Levy for the Crown. H

VISCOUNT CALDECOTE, L.C.J.: The appellant was charged at the Middlesex sessions on July 9 last with 18 offences in connection with articles of food controlled under the Defence (General) Regulations, reg. 55.

Counts 1-6 charged him under the present para. 1b of the regulation with stealing controlled articles and receiving controlled articles knowing them to have been stolen, but that paragraph was first introduced by S.R. & O., 1942, No. 501, which came into effect on Mar. 23, 1942, whereas the offences were alleged to have been committed before that date. Accordingly these counts were

quashed. Counts 7-10 charged the appellant with supplying controlled goods, namely, sugar, otherwise than under and in accordance with the terms of a licence, permit or other authority granted by or on behalf of the Minister of Food contrary to the Sugar (Control) Order, 1940, art. 2, made in pursuance of powers conferred by Defence (General) Regulations, reg. 55. Counts 11-15 charged the appellant with selling controlled food at a price exceeding the appropriate price contrary to Defence (General) Regulations, reg. 55, and certain Orders fixing maximum prices. Counts 16-18 charged the appellant with selling a specified article at a price exceeding the maximum price prescribed under certain orders.

The appellant was convicted on all counts 7-18 and was sentenced to three years penal servitude on each count to run concurrently. He was also fined £5,000 on count 17 and £500 on each of the other counts on which he was convicted. He was further ordered to pay £150 towards the costs of the prosecution.

He has appealed both against his conviction and sentence.

At the trial the only evidence given was that called by the prosecution. It is not necessary to set out at any length the detailed facts of this case, and I very briefly summarise them so far as material. The appellant is a director of Great West Bakeries, Ltd. A witness named Doctor, trading as Doctor's Products, manufactured coffee essence for which he needed burnt sugar. He received an allocation of sugar for this purpose from the Ministry of Food and obtained his supplies from Tate & Lyle, the well-known sugar refiners. In April, 1941, Doctor, who had found it difficult to get his sugar burnt for him, arranged with the appellant for some sugar to be delivered direct to the Great West Bakeries, and he paid the appellant for burning the sugar. After a time he found or suspected that he was not receiving enough burnt sugar to account for all the sugar which he had delivered to the Great West Bakeries for burning. Evidence was given by other witnesses that the appellant sold and delivered sugar to a number of other persons and received payments for the quantities so delivered. There was further evidence that the appellant was paid more than the maximum price for the sugar which he so supplied, and that, in the case of other articles, cocoa, butter and certain egg products, which he sold, he charged and was paid a price exceeding the maximum price.

The first point taken by counsel for the appellant before us was in relation to counts 7-10, and was that the prosecution had not discharged the onus of proof, which rested on the prosecution, to show that the appellant had no licence to supply sugar. The material provisions are contained in the Sugar (Control) Order, 1940, art. 2 of which is as follows :

Subject to any directions given or except under and in accordance with the terms of a licence permit or other authority granted by or on behalf of the Minister no . . . wholesaler shall by way of trade . . . supply . . . any sugar.

The point is wholly without merits inasmuch as no one knew better than the appellant whether he had a licence or not, but none the less the point requires consideration particularly in view of certain decisions to which our attention was called. The appellant did not give evidence, and, indeed, we were told by counsel for the appellant that the appellant was not called by him because of this very point of the licence. If the appellant was in a position to say that he had a licence, he had a complete answer to the charges made against him under counts 7-10. The learned deputy chairman of the Middlesex sessions in summing up told the jury that the onus of proving that the appellant had a licence was on the appellant and that they must accept his direction that the appellant had no licence in view of the appellant's silence. There is direct authority on this point. In *R. v. Harry Scott* (1) a similar question arose upon an order made under the Dangerous Drugs Act, 1920, which provided that no person should supply any of the specified drugs unless he was licensed by the Secretary of State to supply the drug. The point was taken at the close of the case for the prosecution that there was no evidence that the defendant was an unauthorised person. SWIFT, J., held that, if the defendant were licensed, it was a fact which was peculiarly within his own knowledge and there was no hardship on him in being put to the proof. At p. 70 he says this :

It might be very difficult or impossible for the prosecution satisfactorily to prove that he did not possess any one or other of the qualifications which might entitle him

to deal with the drug. But the defendant could prove without the least difficulty that he had authority to do it.

Unless we are satisfied that this decision is clearly wrong, we should think it our duty to follow the decision of SWIFT, J.

The contention of counsel for the appellant that the prosecution must at least give enough evidence to prove a *prima facie* case was said by him to be supported by the decisions in a number of cases, the first of which was *Williams v. The East India Company* (2). In that case the plaintiff by his declaration said that the defendants who had chartered his ship put on board a dangerous commodity without due notice to the captain, and it was held that it lay upon the plaintiff to prove the negative averment. LORD ELLENBOROUGH, C.J., said, at p. 199, the

... rule of law is, that where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burden of proving the contrary, that is, in such case of proving a negative, on the other side.

The Court of King's Bench held that the plaintiff had not given sufficient *prima facie* evidence of the want of a notice to have gone to a jury. They held that the best evidence should have been given of which the nature of the thing was capable, and that the best evidence was that which the persons immediately and officially employed in the delivery and the receiving of the goods on board could have given.

Elkin v. Janson (3) was an action on a marine policy of insurance in which the defendant pleaded that the plaintiff wrongfully concealed certain facts material to the risk. PARKE, B., said that, although the allegation of the defendant was negative in its terms still, as it was the duty of the assured to make that communication, some evidence ought to have been given by the defendant to show that the material communication was not made to him. In *Abrath v. North Eastern Ry. Co.* (4), BOWEN, L.J., dealing with an action for malicious prosecution, said, at p. 457, that in an action for malicious prosecution the plaintiff has the burden throughout of establishing the want of reasonable or probable cause for instituting the prosecution :

In one sense, that is the assertion of a negative, and we have been pressed with the proposition that when a negative is to be made out the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff's case the proof of the assertion still rests upon the plaintiff.

Another citation was made from a judgment of BOWEN, L.J., in *Hire Purchase Furnishing Co. v. Richens* (5), where he is reported to have said, at p. 389 :

There is a broad principle that where a defendant is attempting to set aside a transaction for illegality, and the facts connected with it are equally consistent with the transaction being legal or illegal, it lies on the defendant to prove the illegality.

Lastly, in the case of *R. v. James* (6), LORD ALVERSTONE, L.C.J., stated, at p. 545, the substance of the authorities as follows :

It is not necessary for the prosecution to negative a proviso even though the proviso be contained in the same section of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception.

We do not think that these various passages are authorities for the contention of counsel for the appellant in the circumstances of the present case. There seems to us, indeed, no reason why an indictment should not have been framed without the averment that the supply was otherwise than under and in accordance with the terms of a licence granted by the Ministry of Food. It would have been sufficient, in our judgment, merely to charge the appellant with having supplied controlled goods contrary to the provisions of the Order. The appellant's answer would then be in the nature of a confession and avoidance assuming the fact to be that he had a licence to supply. We are not impressed with the argument based upon the form of the Order. With the greatest respect to the judgment of LORD ALVERSTONE, L.C.J., in *R. v. James* (6), it seems to us to be very difficult to make the result depend on the question whether the negative is of a proviso or of an exception. We think it makes no difference at all that the Order was drafted as it now appears instead of being in a form

which absolutely prohibits the supply of sugar except as thereafter provided, with a later clause providing that, if a person is supplied under a licence, he should be excused. In *Williams v. The East India Co.* (2), the offence was putting on board a dangerous commodity without due notice. Although in form the words "without due notice" import a negative, the plaintiff's allegation was positive, namely, that the articles were put on board without due notice and the plaintiff was under the necessity of proving his case. In *Elkin v. Janson* (3), the action on the policy was bound to succeed if it had not been for the assertion by the defendant of non-disclosure upon proof of which he would be entitled to succeed. There the case made by the defendant was that there was no disclosure of material facts. What he asserted he must prove, and if he gave no evidence his case failed. As to the test suggested by BOWEN, L.J., namely, that, when the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff, it seems to us, in this case, that it was not a necessary part of the case for the prosecution to assert or prove a negative. The prosecution had a complete case when proof had been given that there had been a supply by the appellant unless and until the appellant could escape the prohibition contained in the Order by proving the facts which were necessary to his case. Support for this proposition is to be found in the judgment of the Court of King's Bench in *R. v. Turner* (7). BAYLEY, J., said, at p. 211:

C I have always understood it to be a general rule, that, if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the negative.

In HAWKIN'S PLEAS OF THE CROWN (Vol. 2, p. 460, Chapt. 89, sect. 17), the following passage under the heading "On embezzling naval stores" occurs:

D It seems also agreed, that although the indictment state that the prisoner "then or at any time before, not being a contractor with or authorised by the principal officers or commissioners of our said lord the king, of the navy, ordnance or victuallers or victualling office, for the use of our said lord the king, to make any stores of war, etc.", yet that it is not incumbent on the prosecutors to prove this negative averment, but that it is incumbent on the defendant to show, if the truth be so, that he is within the exception in the statute.

E The latest case to which our attention was called in this connection was *Williams v. Russell* (8), where TALBOT, J., said, at p. 191:

On the principle laid down in *R. v. Turner* (7), and numerous other cases, where it is an offence to do an act without lawful authority, the person who sets up lawful authority must prove it, and the prosecution need not prove the absence of lawful authority. I think the onus of the negative averment in this case was on the accused to prove the possession of the policy required by the statute.

F In *Buckman v. Button* (9) the court did not have to consider what would have been the position as regards onus apart from the provisions of the Summary Jurisdiction Acts, 1848 and 1879.

In the circumstances of the present case, we are of opinion that the prosecution was under no necessity of giving *prima facie* evidence of the non-existence of a licence.

G A second submission was then made by counsel for the appellant to the effect that the appellant was not a wholesaler within the meaning of para. 1 of the Sugar (Control) Order, 1940. We think that the definition of "wholesaler" is clear. It provides in effect that a person who sells sugar by wholesale is a "wholesaler," but not if he be a retailer or manufacturer who sells sugar also on some occasions by wholesale. The appellant clearly was one who sold sugar by wholesale having regard to the large quantities which he supplied, running up to 4 tons at a time, and it was not suggested to us that he was either a retailer or a manufacturer. It was somewhat strenuously argued that the proper test of a "wholesaler" is whether he sells to someone something which the buyer is going to sell again. No doubt purchasers from the wholesaler are often, and, indeed, generally, persons who intend to sell again by way of trade the goods purchased, but it is not difficult to imagine many cases in which a wholesaler enters into transactions with persons who have no intention of selling the articles thus purchased. We think, therefore, these contentions fail. Counsel for the appellant conceded that the supplying, if any, was "by way of trade."

We do not think it necessary to deal at length with some other contentions raised but not very much pressed on behalf of the appellant. One such point taken by counsel for the appellant in relation to counts charging the appellant with selling controlled food at more than the maximum prices was that the appellant did not sell the goods but merely played the part of an agent and worked for a commission. Another contention was that, as it was part of the case for the prosecution that the sugar was stolen by the appellant, he could not pass the property in the sugar and so could not sell it. It was admitted before us that the appellant paid for the goods in question and received them and in his turn took payment for the goods. On these facts we think that both these points fail.

A further contention on behalf of the appellant was that the deputy chairman of the Middlesex Sessions had misdirected the jury by telling them that, even if they considered the appellant to have been an agent, they could convict him under the Accessories and Abettors Act, 1861, s. 8.

It was formerly the law that in cases of felony nobody could be convicted as an accessory unless the principal felon had been convicted, and this explains the provision to the contrary effect in the Accessories and Abettors Act, 1861, ss. 2 and 3. No similar provision occurs, or was needed, in sect. 8, for the simple reason that no similar principle ever applied in cases of misdemeanour.

Accordingly, counsel for the appellant did not rely upon the point that the principals of the appellant, if any, had not been convicted, but he fell back upon the contention that their guilt had not been established, and relied very strongly upon Doctor's evidence that he had never authorised the appellant to supply the sugar to the London Yeast Co., Ltd. In other words, for the purpose of negating the guilt of Doctor as a principal he invited the court to accept Doctor's evidence, although for the purpose of establishing that the appellant in those, as in other transactions, was merely an agent, he invited the court to reject Doctor's evidence. The appellant cannot have it both ways. If the appellant was a principal, the prosecution did not have to rely on sect. 8 of the Act of 1861, whereas if he was an agent, there was adequate evidence on each count to prove the commission of the principal offence. We think that there is no sound foundation for this ground of appeal.

For all these reasons, we think that the appeal against conviction must be dismissed.

The appellant also appeals against his sentence. The deputy chairman of the Middlesex Sessions, in passing sentence, availed himself of the provisions of para. 1D of the Defence (General) Regulations, reg. 55, which prescribe penalties far exceeding those originally prescribed by reg. 92, and later by S.R. & O., 1941, No. 1981. That paragraph was first inserted in the regulation by S.R. & O., 1942, No. 501, which came into operation on Mar. 23, 1942, that is to say, after the offences in question in this case had been committed, but before the appellant's guilt of them had been established. The contention on behalf of the appellant was the same as that advanced by counsel for the appellant on behalf of the appellant in *Buckman v. Button* (9), where the same para. 1D was under consideration. It was there, as here, contended that the offence having been committed before the date of the coming into operation of the Order, the increased penalties could not be imposed. We do not doubt in any way the correctness of his argument that where an enactment alters the rights of persons or creates fresh liabilities, the enactment ought not to be held to be retroactive unless the language is quite unambiguous and clear. We therefore look at the relevant terms of the paragraph which has been inserted by the Order in the Regulation. It provides as follows:

Any person guilty of an offence against this regulation being a breach of the control or an offence referred to in para. (1B) or (1C) of this regulation, shall be liable . . . (b) on conviction on indictment to . . .

certain penalties. The contention on behalf of the appellant was that, although the words "any person guilty of an offence" are capable of including a person who has committed an offence before the making of the Order, yet the words are not so clear as to require this construction necessarily to be placed upon them and that, therefore, they ought not to be held to operate retroactively. The judgments of the Divisional Court in *Buckman v. Button* (9) deal with

precisely this same point, but we were invited by counsel for the appellant to say that those judgments were wrong. It was there held that the paragraph was clear and unambiguous and that the justices in that case acted correctly in imposing penalties consistent with it, notwithstanding the fact that this gave the paragraph a retroactive effect. CHARLES, J., referred to the decision of the Divisional Court in *Director of Public Prosecutions v. Lamb* (10). In that case also the law as to the penalties in the circumstances of the case had been altered after the commission of the offence, but at a date considerably before the laying of the informations and to a greater extent before the hearing of them. HUMPHREYS, J., thought that the language of the Order in Council in question in that case was "perfectly plain." The words of the Order were as follows: "Where any person is convicted of an offence against these Regulations." Similarly, we think that the words of the paragraph which we have to construe satisfy the rule of construction contended for by counsel for the appellant and are wide enough and clear enough to require us to hold that they have the effect contended for by the prosecution. In other words, we agree with the decision of the Divisional Court in *Buckman v. Button* (9).

We were pressed with statements contained in MAXWELL'S INTERPRETATION OF STATUTES (8th Edn., p. 190), following a quotation from the judgment of WRIGHT, J., in *Re Athlumney* (11):

It is chiefly where the enactment would prejudicially affect vested rights, or the legality of past transactions or impair contracts, that the rule in question prevails. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the legislature, to be intended not to have a retrospective operation.

We accept this statement for which authority is to be found in many cases, some of which were cited to us (see *Re Pulborough*, *Bourke v. Nutt* (12) and *Barber v. Pigden* (13)). Our decision is based on the language of the paragraph we have to construe. For that reason, it is unnecessary to rely on any distinction or principle between words which create new offences and words which increase the penalties for offences already committed.

We dismiss the appeal both against conviction and against sentence.

Appeal dismissed.

Solicitors: *Franklins* (for the appellant); *Treasury Solicitor* (for the Crown).
[Reported by R. BOSWELL, ESQ., Barrister-at-Law.]

Re POTTER'S WILL TRUSTS, ECKFORD v. THOMSON.

[COURT OF APPEAL (Lord Greene, M.R., Luxmoore and Goddard, L.JJ.),
November 16, 17, 18, December 13, 1943.]

Wills—Construction—Direction for settlement on daughter's marriage—"For my said daughter's benefit and that of any children she may have"—Settlement including trust for children of first marriage—Children of second marriage excluded—Whether settlement in conformity with direction in will.

By his will the testator directed his trustees to divide the residue of his estate into 2 equal parts and to hold one part in trust for his infant daughter which, on her attaining the age of 25 years or on the day of her marriage with the consent of her guardians, whichever should occur first, was to be secured by settlement for the daughter's benefit and that of any children she might have. At the age of 16 the daughter married with the consent of her guardians and a settlement of the daughter's share was made whereby the income of the trust moneys was to be paid to the daughter during the joint lives of herself and her husband and after her death in trust for any of the children of the intended marriage. The will also provided that, in the event of the daughter leaving issue whether married with the guardians' consent or otherwise her share should be held for such issue as she should appoint, or, in default of appointment, for such issue *per stirpes*.

There were 3 children by that marriage and 2 by a second marriage. The property comprised in the settlement included property brought in by the husband. The appellants, the issue of the second marriage, contended that the settlement was not in conformity with the direction in the testator's will which required that under any such settlement all the children of the daughter should benefit equally, and not only those of the first marriage, and that the settlement was inoperative :

HELD : on the true construction of the testator's will the settlement should have provided for the issue of subsequent marriages, and, therefore, in the events which had happened, the fund was distributable equally among the children of both marriages who survived their mother.

Decision of BENNETT, J. ([1943] 2 All E.R. 284) reversed.

[**EDITORIAL NOTE.** In considering this case BENNETT, J., placed some reliance on the fact that the first husband of the daughter brought additional property into the settlement. Where the husband brings property into settlement, it is usual to restrict the beneficial interests, at least as far as that property is concerned, to children of the marriage. The Court of Appeal have, however, pointed out that the question is purely one of the construction of the will and have based their construction largely upon the fact that in a separate clause the testator had given the share to the issue of the daughter.

AS TO MEANING OF "CHILDREN," see HALSBURY, Hailsham Edn., Vol. 34, pp. 303-305, paras. 353, 354 ; and FOR CASES, see DIGEST, Vol. 44, pp. 840-846, Nos. 6937-6994.]

APPEAL by the plaintiffs from an order of BENNETT, J., dated May 27, 1943, reported [1943] 2 All E.R. 284. The facts are fully set out in the judgment of the court delivered by LORD GREENE, M.R.

Harold Christie, K.C., and *Raymond Jennings* for the appellants.

H. B. Vaisey, K.C., and *Wilfrid M. Hunt* for the respondents.

LORD GREENE, M.R. [delivering the judgment of the court] : In the year 1854 the testator, who was a master mariner, made his will in Bombay. He died nine days later, leaving a widow and a daughter, Florence Julia Alice Potter, then an infant aged about one year. The present question arises under the dispositions in favour of the daughter which are contained in the will. The relevant provisions are as follows. The testator bequeathed one-half share of his residuary estate to his trustees in trust for the daughter :

... to be paid to her on her attaining the age of 25 years or day of marriage whichever may first happen such marriage to be with the consent of her guardians as hereinafter mentioned.

In the meantime the widow was to apply the income for the support and maintenance of the daughter. The trustees were then directed to pay over both capital and income to the daughter :

... when she shall attain the age of 25 years or day of marriage, whichever shall first happen Provided such marriage is with the consent of the guardian or guardians for the time being of this my will who I direct shall cause such share to be properly secured by settlement for my said daughter's benefit and that of any children she may have.

The testator then made provision for the case of his daughter marrying under the age of 25 years without the consent of the guardians. In that event the income was to be paid to the daughter for her separate use without power of anticipation during the joint lives of herself and her husband.

Down to this point the testator has made provision for three possible events, namely (1) attainment of the age of 25 without having married, in which case the daughter takes the share absolutely ; (2) marriage under 25 with consent, in which case there is to be a settlement of the capital of the share ; (3) marriage under 25 without consent, in which case the daughter takes a life interest only. He now proceeds to deal with the capital in the case where the daughter dies under 25 without having married with the consent of the guardians. In that event the share is given to the testator's widow. But at this stage the testator realised that his daughter might leave issue surviving her ; and he accordingly provided that, in that event, the capital should not go to the widow, but to the daughter's issue. One would have expected that this provision would have been limited to the case where the daughter had married under 25 without the consent of the guardians, since he had already directed that, where she married

under 25 with the consent, the settlement to be made was to provide for her children. But he did not so limit it. His actual words are as follows :

... but in the event of my said daughter leaving any child, children or issue of any child or children, whether married with her guardians' consent or otherwise, then the said share to vest absolutely in such child or children or issue in such manner as she my said daughter shall by will appoint or in default of appointment then to such child, children or issue equally *per stirpes* and not *per capita*.

A

The question now falling for decision turns upon the true meaning and effect of the earlier clause providing for a settlement and the clause last quoted. For convenience we will refer to these two clauses as " the settlement clause " and " the issue clause " respectively. Before we come to consider the interpretation of these clauses, we will complete our recital of the facts.

B

The daughter was married twice. The first marriage took place in the year 1869, when she was sixteen. There were three children of this marriage, namely, the two defendants to the action and a third child who died in early infancy. The husband died in the year 1875. In the year 1884 the daughter married a second time. The plaintiffs in the action are the only two children of that marriage. The daughter died on June 8, 1940. The daughter entered into the first marriage with the consent of the guardians appointed by the will of the testator. On the occasion of the marriage an antenuptial settlement was

C

executed on Aug. 3, 1869. It recited parts of the will of the testator, including in particular the settlement clause but not the issue clause. By the operative part the trustees of the testator's will, who were also the guardians, assigned the daughter's half share to the trustees of the settlement upon trust to pay the income to the daughter " during the joint lives " of herself and her husband and (according to the copy supplied to us) " after the death " of the daughter

D

upon trust as to both capital and income for the children of the marriage as she should appoint and in default of appointment for the children attaining 21 or marrying. Power was given to the trustees to raise a sum not exceeding £1,000 and pay it over to the daughter, and there were powers of advancement and maintenance of the children. In default of any child of the marriage attaining 21 or marrying there were ultimate trusts as follows : if the daughter survived her husband, the trust was for her and her children by any future marriage,

E

the trust property to be re-settled on such marriage upon trusts similar to those contained in the settlement now in statement : the trusts declared for the event of her not re-marrying are not material to the present question. The husband brought into settlement an insurance policy for £2,000.

F

It is asserted by the present respondents, the children of the first marriage and defendants to the action, that this settlement complied with the directions contained in the will of the testator : that its provisions are binding and effective ; and that, the daughter not having, as it appears, exercised her power of appointment under the settlement, the trust funds representing her share of the testator's estate belong to the respondents in equal shares.

G

The appellants, the children of the second marriage and plaintiffs in the action, contend on the other hand, that the settlement directed by the testator to be made was one under which all children of the daughter, whether by the first or any subsequent marriage, should be treated on an equal footing ; that the settlement failed to comply with this direction in that, in the events which have happened, the children of the second marriage are excluded ; and that the settlement is, accordingly to that extent inoperative. They claim, therefore, that, in the events which have happened, the fund is divisible among themselves and the respondents in equal shares. BENNETT, J., decided in favour of the respondents. His judgment is based entirely on his view as to the true

H

interpretation of the settlement clause and its legal consequences. He quotes the issue clause in his statement of the facts, but he does not refer to it in his reasoning. He does not explain why he considers it irrelevant for the purpose of the question before him. In our opinion it is the issue clause that is decisive of the controversy.

It is a fundamental rule in the interpretation of wills that effect must be given, so far as possible, to the words which the testator has used. It is equally fundamental that apparent inconsistencies must, so far as possible, be reconciled ; and that it is only when reconciliation is impossible that a recalcitrant

provision must be rejected. Even in the case of two irreconcilable provisions, it is the later that prevails ; but in the present case there is no need to have recourse to this rule of despair.

The settlement clause and the issue clause are separated by a number of other provisions. But such a separation is of frequent occurrence, and it affords no bar to their reconciliation. The settlement clause, taken by itself, is self-contained, and effect could unquestionably be given to it, although the result would in that case be different from that contemplated by the issue clause. As we have already pointed out, the issue clause provides, in clear and unequivocal language, what is to happen to the capital of the fund on the death of the daughter leaving issue ; and it applies both to the case where she marries with the consent of the guardians and to that where she marries without such consent. It is impossible to ignore that part of the issue clause which deals with the case of marriage with consent. It must, if possible, be reconciled with the settlement clause ; and such reconciliation presents no real difficulty. The issue clause, in our opinion, must be construed as defining the nature of the benefit for the children of the daughter which is to be provided by the settlement which the testator directs to be made upon her marriage with the consent of the guardians. The fact that the issue of deceased children are to share under the issue clause, whereas in the settlement clause only children are referred to, does not present to our minds any insuperable difficulty. A benefit to the issue of a deceased child can fairly be regarded as a benefit to that child.

We come to the conclusion, therefore, that the settlement ought to have been made in conformity with the issue clause. The only alternative is to reject the reference in the issue clause to marriage with consent ; and this, in our opinion, is wholly illegitimate.

There remains the question whether the children referred to in the issue clause are only those of the marriage with consent, to which the clause refers, or include children of a subsequent marriage. In construing the settlement clause, BENNETT, J., held that the class of children referred to in it is confined to children of the particular marriage. We need express no opinion as to the correctness of this view, since, upon our own view as to the construction of the will, the two clauses must be read together. The language of the issue clause in this connection does not, in our opinion, admit of any doubt. The phrase used is "in the event of my said daughter leaving any child, children or issue of any child or children" ; and we can see no reason for cutting down the force of the word "any" which, *prima facie*, means what it says.

In the result, therefore, on this short ground, we are of opinion that the appeal succeeds ; and in the events which have happened the fund is distributable equally among the children of both marriages who survived their mother. Having regard to the view which we take, it is not necessary for us to consider what the result would have been if the settlement clause had stood alone. But it must not be taken from this that we would have accepted the reasoning of BENNETT, J., as correct. As it is, we need express no opinion upon it.

Appeal allowed.

Solicitors : *Burton, Yeates & Hart*, agents for *Nye & Donne*, Brighton (for the appellants) ; *Arthur Pyke & Co.* (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

